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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

In re: HORIZON VILLAGE SQUARE, LLC, Debtor.	Case No.: 11-21034-MKN Chapter 11 Confirmation Hearing: Date: April 28, 2015 Time: 9:30 a.m.

DEBTOR'S POST-TRIAL BRIEF IN SUPPORT OF CONFIRMATION OF DEBTOR'S AMENDED PLAN OF REORGANIZATION AND DENIAL OF WELLS FARGO'S STAY RELIEF MOTION

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Horizon Village Square, LLC ("Debtor"), by and through its proposed counsel, the law firm of Garman Turner Gordon, hereby submits its post-trial brief in support of confirmation (the "Brief") of *Debtor's Amended Plan of Reorganization* [Ex. 4] (the "Plan").[1]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTORY STATEMENT

Secured Lender is the only party-in-interest seeking denial of confirmation of Debtor's Plan. And all other creditors have voted to accept Debtor's Plan, which provides for the ***full payment with interest*** of all Allowed Claims within five years of the Effective Date, and preserves the interests of the Equity Security Holders. See Ex. 4 § 4 and Ex. 5. The Plan satisfies Section 1129 and should be confirmed.

Prior to the Confirmation Hearing, Debtor and Secured Lender entered into the Stipulation, whereby Secured Lender and Debtor stipulated that:

- Secured Lender is oversecured and thus does not have a deficiency claim for purposes of confirmation.
- Secured Lender does not challenge the Plan's feasibility.
- Secured Lender does not challenge the Plan's satisfaction of the "good faith" requirement of Section 1129(a)(3).
- The Plan's Secured Interest Rate of 4.25% satisfies the "market rate of interest" requirement of Section 1129(b)(2)(A)(i).

See Ex. 1 §§ 2.4, 2.5, 2.8, and 2.9.

Beyond the consensual resolution of the foregoing material points, Secured Lender's Objection [ECF No. 409] was limited to the following: (i) the Plan fails to comply with Sections 1129(a)(1) and (a)(5); and (ii) the Plan fails to meet the requirements for cramdown under Section 1129(b). In light of the limited objections asserted by Secured Lender and in the interest of brevity, Debtor incorporates herein by this reference its Confirmation Brief [ECF No. 419] and the supporting declaration of Todd Nigro [Ex. 2], which together establish that Debtor has

[1] Capitalized terms not otherwise defined herein shall have the same meanings set forth in the Plan.

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satisfied each of the subsections of Section 1129(a) for which an objection has not been lodged by Secured Lender (i.e., Sections 1129(a)(2)-(a)(4), (a)(6), and (a)(9)-(a)(16). This Brief shall address Secured Lender's three fatally flawed objections and establish that the Plan in fact satisfies Section 1129(a)(1), (a)(5), and (b) and should be confirmed.

II. LEGAL ARGUMENT

A. Section 4.1.3 of the Plan Does Not Contravene Section 524(e) of the Code.

Section 1129(a)(1) requires that a plan must "[c]omply with the applicable provisions of [the Code]." 11 U.S.C. § 1129(a)(1). Despite having not objected to identical language contained in Debtor's Initial Plan [Ex. 20], in a desperate attempt to find some basis to object to the Plan, Secured Lender now takes the untenable position that Section 4.1.3 of Debtor's Plan violates Section 524(e) of the Code and therefore the Plan does not satisfy Section 1129(a)(1). See ECF No. 409, at p. 13. Section 4.1.3 of the Plan provides that "[o]n the Effective Date, all pre-Effective Date defaults under the Loan Documents shall be deemed to have been cured and on the Effective Date, ***Debtor and/or Reorganized Debtor*** shall be current and in good standing under the Loan Documents." Section 524(e) serves to preclude third-party post-Effective Date releases, providing that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for such debt." As Section 4.1.3 does not grant a third-party release or injunction, Secured Lender's argument fails and must be overruled.

Foremost, the plain language of Section 4.1.3 of the Plan addresses only Debtor and/or Reorganized Debtor and does not create a release of the Guarantors' liability nor does it enjoin Secured Lender from pursuing the Guarantors if Secured Lender is entitled to do so under the guarantees. Rather, Section 4.1.3 serves to ensure that upon the Effective Date, Reorganized Debtor is in good standing with Secured Lender such that immediately upon the Effective Date of the Plan, Secured Lender does not have basis to declare a default against Debtor or Reorganized Debtor and proceed to foreclosure as a result of a pre-petition default.

Beyond the fact that the plain language of Section 4.1.3 does not grant a third-party injunction or release, at the Confirmation Hearing, Mr. Nigro testified that he did not believe that Section 4.1.3 of the Plan operated as a third-party injunction.

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Q. And is it your position that 4.1.3 under the Horizon Plan would return the debtor into good standing such that enforcement of the guarantees would no longer be viable for Wells Fargo?

A. Speaking on behalf of the debtor, it places the debtor in good standing under the loan documents. That's what this says to me.

Q. And what I'm asking for is your understanding of what that does to the guarantees.

A. ***As the debtor, I don't think it addresses the guarantees at all.***

Q. I understand, but I'm asking whether the provision itself talks about the guarantees. I'm asking for your understanding of what this provision would do with respect to the enforcement of the guarantees, if anything.

A. ***Again, as the debtor, I don't think it impacts the guarantees, and the guarantees remain in place as part of the loan documents.***

Q. It doesn't impact the guarantees one way or another?

A. ***The guarantees remain in place as they did in the original loan documents.***

Q. Yesterday I think there was some testimony to the effect that you believe once the debtor in Nigro HQ is in good standing, the loan is in good standing. There's no way to enforce the guarantees at that point unless there is a default after the effective date. Do you recall that?

A. I don't recall saying that there's no way to enforce the guarantees. I'm not sure what my exact answer was but –

Q. Well, whatever your answer was yesterday for Nigro HQ, it would be a similar position with respect to this provision in this case?

A. Generally, yes.

Transcript, pp. 15:8-17.2 (emphasis added).

At the Nigro HQ hearing, Mr. Nigro similarly affirmed that the identical provision in the Nigro HQ plan did not provide a release of the Guarantees.

Q. So your contention is that the plan does not enjoin an action on those guarantees, right.

A. Right.

Q. Is it your contention that the plan somehow precludes, that that issue is decided as part of the plan?

A. On the bank's ability to pursue the guarantees?

Q. Correct.

A. No, I don't believe that this decides that.

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> Q. Let me make sure I understand the answer. I may have turned myself around with my questioning, so let me make sure I understand. We talked about the fact that third-party injunctions – okay – third-party injunction [sic] not intended under the plan. Does the plan otherwise – in your view, does it otherwise preclude enforcement of the guarantees in any way?
>
> A. I don't believe so. I don't believe it deals with the guarantees.

See Nigro HQ Transcript, p. 48, ll. 4-20.

Upon further questioning, Mr. Nigro also testified as follows:

> Q. And I believe you also testified that it's your understanding that the plan does not enjoin any lawsuit against the guarantors. Is that correct?
>
> A. Yes.

Id., p. 79, ll. 6-9.

Finally, in addition to the fact that Secured Lender's argument is contradicted by both the plain language of Section 4.1.3 and the testimony of Mr. Nigro, this Court has previously confirmed a plan containing nearly identical language. Specifically, Section 4.1.3 of the *Amended Plan of Reorganization* filed by Beltway One Development Group, LLC is nearly ***identical*** to Section 4.1.3 of Debtor's Plan with the sole exception that the term "Loan Documents" in Debtor's Plan is defined as the "Wells Fargo Loan Documents" in the Beltway plan in order to differentiate between BB&T and Wells Fargo's loan documents in the Beltway case.[2] As this Court is well-aware, Secured Lender was also one of the secured lenders in the Beltway Case and was represented by the same counsel, the law firm of Bryan Cave LLP. The Beltway plan, containing nearly the exact same language as Section 4.1.3 of the Plan, was confirmed over Wells Fargo's objection. See Beltway Case, Case No. 11-21026-mkn, at ECF Nos. 98 and 321. Thus, Secured Lender's objection that the Plan violates Section 1129(a)(1) fails and should be overruled.

. . .

[2] Section 4.1.3 in Debtor's Plan provides: "[o]n the Effective Date, all pre-Effective Date defaults under the Loan Documents shall be deemed to have been cured and on the Effective Date, Debtor and/or Reorganized Debtor shall be current and in good standing under the Loan Documents." Section 4.1.3 in the Beltway plan provides "[o]n the Effective Date, all pre-Effective Date defaults under the Wells Fargo Loan Documents shall be deemed to have been cured and on the Effective Date, Debtor and/or Reorganized Debtor shall be current and in good standing under the Wells Fargo Loan Documents." Ex. 4 § 4.1.3 and ECF No. 98 in the Beltway Case, Case No. 11-21026-mkn, § 4.1.3.

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B. The Plan Satisfies Sections 1129(a)(5) and 1123(a)(7): Management and Insiders.

Secured Lender asserts that the "Plan fails to satisfy the adequate disclosure of the 'identities and affiliations' of post confirmation management and such management is not in the best interest of creditors or consistent with public policy" and therefore does not satisfy the requirements of Sections 1123(a)(7) and 1129(a)(5). See Objection, ECF No. 409, at pp. 10-12.

Section 1129(a)(5)[3] and Section 1123(a)(7)[4] set forth the plan requirements relating to the management of a reorganized debtor that, when taken together, require this Court to find that: (i) Debtor, as proponent of the Plan, has disclosed (a) the identity and affiliations of the proposed post-Effective Date management of Reorganized Debtor; and (b) the nature of the compensation of the proposed post-Effective Date management; and (ii) the appointment of the proposed post-Effective Date management of Reorganized Debtor is consistent with (a) Debtor's creditors and equity security holders' interests; and (b) public policy.

As a preliminary matter, it should be noted that such arguments are raised for the first time by Secured Lender with respect to the current Plan notwithstanding the fact that Nigro Development was the proposed post-Effective Date manager under the Initial Plan [Exs. 11 and 20] and Secured Lender raised no issue at that time. See Ex. 20 § 5.5; ECF Nos. 105 and 195. Additionally, in confirming the Beltway Plan, this Court found substantially similar disclosures and management (as Nigro Development is also the manager of Beltway One Management Group, LLC) to satisfy the requirements of Section 1129(a)(5) and 1123(a)(7). See ECF No. 320 in the Beltway case, at p. 18 and ECF No. 321 in the Beltway case.

Irrespective of the fact that Secured Lender has conjured up these new objections, such arguments are without merit as the Plan not only meets the management disclosure requirements,

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[3] Section 1129(a)(5) provides that a plan of reorganization may be confirmed only if "the proponent of the plan has disclosed the identify and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer or voting trustee of the debtor[,] . . . the appointment to, or continuance in, such office of such individual, is consistent with the interest of creditors and equity security holders and with public policy[, and] the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider." See 11 U.S.C. § 1129(a)(5).

[4] Section 1123(a)(7) provides that a plan must "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee[.]" 11 U.S.C. 1123(a)(7).

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but also proposes management that is both absolutely in the best interest of Debtor's Creditors and Equity Security Holders alike (as required under the Code) and consistent with public policy.

1. Debtor's Disclosures Relating to the Post-Effective Date Management Fulfill the Requirements of Section 1129(a)(5).

Throughout the course of this Chapter 11 Case, and specifically in connection with confirmation of the Plan, Debtor has made repeated detailed disclosures that fulfill the requirements of Section 1129(a)(5) as follows:

- Section 5.5 of the Plan provides that "[f]rom and after the Effective Date, Reorganized Debtor will continue to be managed by Debtor's pre-petition managers, which management may subsequently be modified to the extent provided by Reorganized Debtor's articles of organization, by-laws, and operating agreement (as amended, supplemented, or modified)." See Ex. 4 § 5.5.

- In its Disclosure Statement, Debtor identified Nigro Development, LLC ("Nigro Development"), which is managed by Todd Nigro and Michael Nigro, as Debtor's pre-petition manager. See Ex. 8, at p. 19, ll. 19.

- The Nigro Declaration provides exhaustive detail as to the identity of Nigro Development and its affiliation with Debtor, among other entities. See Ex. 2 ¶¶ 2, 10-14.

- The Nigro Declaration also discloses the fact that Nigro Development receives no compensation for its services rendered as manager of Debtor, but that its affiliate, Nigro Management LLC dba Nigro Properties ("Nigro Management") to whom the property management services have been delegated by Nigro Development, receives monthly compensation in the sum of $500. See id. ¶¶ 20-24. Such amount is consistent with the Property Management expense set forth in the Debtor's Budget approved by this Court in connection with the *Stipulation Authorizing Use of Cash Collateral and Granting Adequate Protection* [Ex. 21] and furthermore the Property Management expense set forth in the Projections [Ex. 13].

Based on the foregoing, Debtor has amply satisfied Section 1129(a)(5)'s requirement to disclose the identity, affiliations, and compensation of the proposed post-Effective Date management of Reorganized Debtor.

2. Debtor's Proposed Post-Effective Date Management Is in the Interests of Creditors and Equity Security Holders, as well as Public Policy.

Maintaining Nigro Development as its post-Effective Date manager, without a doubt, meets the requirements of Sections 1129(a)(5) and 1123(a)(7).

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a. The appointment of Nigro Development is consistent with the interests of Creditors and Equity Security Holders.

Secured Lender creates a substantial amount of noise relating to the retention of Nigro Development as Debtor's post-Effective Date manager despite being unable to point to any credible evidence of mismanagement prior to or during the Chapter 11 Case. The continuance of Nigro Development as manager of Reorganized Debtor is consistent with the interests of Debtor's Creditors and Equity Security Holders alike, as Nigro Development, and its principals, possess extensive knowledge and experience developing, constructing, and managing a wide-array of real estate projects in Nevada, as well as the unique experience in the conception, development, and management of Debtor and its property specifically. See Ex. 2 ¶¶ 10-24. Specifically, Nigro Development is co-owned and managed by Todd Nigro and Michael Nigro. See id. ¶ 12. For their entire adult lives, the Nigro brothers have developed, constructed, and managed a wide-array of real estate projects in Nevada, in which they handle all aspects of development, including financial, design, construction, and management, with integrity and professionalism. See id. Prior to founding Nigro Development, and its affiliates, Todd Nigro served as the Chief Financial Officer and Michael Nigro served as the Director of Construction for Nigro Associates, a commercial and residential development company founded by their father, Edward Nigro, in 1979. See id. ¶ 14. Nigro Development, together with its affiliates, specialized in developing, constructing, and managing commercial real estate primarily in the Las Vegas market, including residential developments, high rise, "flex" and industrial projects, retail building, hospital projects, master planned business parks, professional office complexes, and medical centers. See id. ¶ 15.

Thus, Nigro Development brings to Debtor knowledge regarding: (i) all facets of construction and development of real estate in the Las Vegas area; (ii) the Las Vegas residential and commercial real estate industries; (iii) property valuations in the Las Vegas area real estate market; (iii) the financing obtained for Nigro Development's prior and existing projects; (iv) property management and leasing; and (v) successful management strategies within the unique Las Vegas area market. See id. ¶ 18. In addition, as natives and lifelong businessmen in Las

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Vegas, the Nigro brothers' strong relationships with local government, the Las Vegas business community, other real estate developers, brokers, investors, and lending institutions provide incomparable value to Debtor. See id.

Additionally, Nigro Development, as one of Debtor's founding members, has acted in the capacity as Debtor's manager since its inception. See Ex. 2 ¶ 12. As testament to the benefit Debtor has received under Nigro Development's management, Debtor generated sufficient revenue to make each and every monthly payment due under the Secured Note prior to its maturity date despite the global economic recession that, by 2009, had severely affected the Las Vegas economy and decimated the local real estate market. See id. ¶ 19. Furthermore, since the commencement of the Chapter 11 Case, Debtor has generated sufficient revenue to tender monthly adequate protection payments to Secured Lender in-excess-of its monthly payment obligations under the Secured Note, which exceeded $800,000, as well as accumulated a substantial sum of cash (exceeding $1.8 Million), thereby putting Debtor in an even better cash position (after payment of Plan obligations) than it was pre-petition. See id. Such cash will ensure that Debtor has the needed flexibility to complete tenant improvements and property maintenance and repairs to protect the value of the Real Property. See id. ¶¶ 19 and 61.

Thus, contrary to Secured Lender's unfounded and unsubstantiated assertions, the continuance of Nigro Development as Debtor's post-Effective Date manager satisfies the standards of Sections 1129(a)(5) and 1123(a)(7).

b. The appointment of Nigro Development is consistent with public policy.

Secured Lender further argues that proposed management is not consistent with public policy. See Objection, at p. 12. However, such argument is entirely inconsistent with applicable law. As cited by Secured Lender, *Digerati Technologies, Inc.* clearly articulates an instructive distillation of the scant authority that relates to the issue at hand. See 2014 WL 2203895, *6 (Bankr. S.D. Tex. May 27, 2014) (citing In re Beyond.com Corp., 289 B.R. 138 (Bankr. N.D.Cal. 2003); In re Machne Menachem, Inc., 304 B.R. 140 (Bankr. M.D. Pa. 2003); In re WRN 1301, Inc., 2007 WL 1555812 (Bankr. E.D.Tex. May 24, 2007)). The *Digerati* court established that in assessing whether the appointment of an individual to serve as a director or

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officer of a reorganized debtor is "consistent with public policy," the following non-exhaustive list of factors, giving appropriate weight to each of them based on the particular circumstances of the case, should be considered: (i) Does the proposed plan, if confirmed, keep the debtor in existence as an ongoing company or is the debtor extinguished?; (ii) Is the debtor a publicly-held or a privately-held company?; (iii) Does continued service of the individual perpetuate incompetence, lack of direction, inexperience, or affiliations with groups inimical to the best interests of debtor?; (iv) Does the continued service of the individual provide adequate protection of all creditors and equity security owners?; (v) Does the retention of the individual violate state law in any respect?; (vi) Is the individual a "disinterested person"?; (vii) Is the individual capable and competent to serve in the proposed capacity assigned to him?; (viii) Are the salaries and benefits that the individual will receive reasonable based upon the size of the debtor's operations, the complexity of these operations, and the revenues to be generated?; and (ix) Are new independent outside directors being appointed under the proposed plan? See In re Digerati Technologies, Inc., 2014 WL 2203895 at *6.

As applied to this Chapter 11 Case, the current Plan, if confirmed, provides for the continued operation of the Horizon Village Square Shopping Center. See Ex. 2 ¶ 4. Debtor is a privately-held company who's Equity Security Holders determined at the time of its inception that Nigro Development should be vested with the management authority of Debtor, and further have determined that Nigro Development should remain with such authority as Debtor emerges from bankruptcy. Secured Lender has never objected to Nigro Development and Nigro Management's corporate and property management services nor sought the appointment of a trustee. In fact, Secured Lender even stipulated to the cash collateral budget that provided for the 4% property management fee to be paid to Nigro Management throughout the Chapter 11 Case. See Ex. 21, at Ex. 1.

Nigro Development is both capable and competent and its continued service ***does not*** perpetuate incompetence, lack of direction, inexperience, or affiliations with groups inimical to Debtor's best interest. Nigro Development's continued service does not violate the law. Finally, Nigro Development has demonstrated a conservative management approach, one that prevented

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Debtor from ever missing a monthly payment to Secured Lender pre-petition, permitted Debtor to make all of its Adequate Protection Payments throughout the Chapter 11 Case (exceeding $800,000), effectuating an 88.9% occupancy as of the Confirmation Hearing, and Nigro Development's involvement has fostered Debtor's ongoing ability to meet its obligations under the Plan, which provides payment in full to all of Debtor's Creditors and permits the retention of the Equity Security Holders' interests. Thus, Debtor's proposed management more than adequately protects all of Debtor's Creditors and Equity Security Holders.

Unable to dispute any of the foregoing, Secured Lender, through the testimony of its representative, Kevin Haley, instead contends that Debtor is mismanaged because Nigro Development owns 42.97% of Debtor and, as the manager, is able to determine when distributions will be made. See Ex. 3 ¶¶ 24-26. Foremost, in nearly every single asset real estate entity, one or more of the equity holders also manages the entity and thus is able to determine if and when distributions are made. Under Mr. Haley's analysis, in every single asset case, the debtor would have to transfer management to a third-party instead of the owners in order to satisfy Section 1129(a) (5). This is an absurd and legally unsupportable proposition.

Additionally, the undisputed evidence establishes that Nigro Development has been an exceptional manager in a very difficult market obtaining an occupancy of 88.9%, never missing a pre-petition monthly payment to Secured Lender, and making all of its Adequate Protection Payments during the Chapter 11 Case. See Ex. 2 ¶ 61. Beyond the lack of any evidence of mismanagement, Secured Lender's unfounded conspiratorial theory that after the Confirmation Hearing, Nigro Development is going to cause Debtor to distribute all of Debtor's cash to the members to the detriment of Secured Lender is belied by the fact that on the Petition Date, Debtor held more than $1 Million. See id. ¶ 77 ("As evident by the fact that Debtor was holding over $1 Million on the Petition Date and that Beltway One Development Group, LLC was holding approximately $1.3 Million on the Petition Date and is holding approximately $1.6 Million today, we are very conservative in our analysis and only make distributions.") and ¶ 78 ("Our conservative approach to distributions is further evidenced by the fact that after the Secured Loan was originated, other than distributions to reimburse Debtor's members for the

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taxes incurred as a result of Debtor's positive revenue, Debtor has not tendered distribution to Debtor's members.").

Secured Lender also tries to contend that Debtor has failed to pursue viable Avoidance Actions and therefore, has mismanaged Debtor. See Objection, p. 11. However, despite undertaking significant written discovery and deposing Mr. Nigro twice, Secured Lender cannot articulate any potentially viable Avoidance Actions. While Mr. Suzuki did inquire at the Confirmation Hearing about a disclosed $30,000 retainer that was paid to Morris Peterson prepetition in anticipation that Secured Lender might sue the Guarantors, no testimony was elicited that would even suggest that the payment of the retainer was avoidable. See Transcript, pp. 19:11-20:18. Further, Debtor's Operating Agreement requires Debtor to indemnify the Guarantors in the event of even a threatened litigation. See Ex. 35 § 3.6. Specifically, Section 3.6 of the Operating Agreement provides in pertinent part that "[t]he Company ***shall indemnify and hold harmless*** the Managers, and each director, officer, shareholder, manager, member, employee, or agent thereof, from and against any loss, expense, damage or injury suffered or sustained by it or any of them by reason of any acts, omissions, or alleged acts or omissions…arising out of its or any of their activities on behalf of the Company or in furtherance if the interest of the Company, including but not limited to, any judgment, award, settlement, ***reasonable attorney's fees***, and other costs or expenses incurred in connection with the defense of any action ***or threatened*** action, proceeding, or claim…." Id. (emphasis added). Based on the foregoing, Mr. Nigro testified that he believes the provision of the retainer to Morris Peterson in anticipation that Secured Lender may sue the Guarantors was in the ordinary course for Debtor. See Transcript, p. 20, ll. 2-10. Mr. Nigro also testified that Secured Lender has, in fact, threatened to sue the Guarantors as recently as the last thirty days preceding the Confirmation Hearing. See id., p. 45, ll. 6-12.

Beyond Secured Lender's inability to point to any viable Avoidance Actions that Debtor is not pursuing that could result in a material benefit to Debtor and therefore reaches the level of mismanagement, the undisputed evidence establishes that Debtor "reviewed with Debtor's counsel the payments tendered during the applicable preference periods and, based on the advice

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of Debtor's counsel, have determined that the payments were in the ordinary course of business and were not on account of an antecedent debt." Ex. 2 ¶ 49. Further, Mr. Nigro testified that "all pre-Petition Date creditors will be paid in full; as such, as explained by Debtor's counsel, no legal basis exists to pursue certain of the pre-petition Avoidance Actions." Id. Even were there to exist viable Avoidance Actions, the Plan expressly retains all Avoidance Actions for pursuit by the Reorganized Debtor and therefore preserves such causes of action to the extent that they exist. See Ex. 4 § 5.1 and Sch. 1.1.45.

Weighing the *Digerati* factors as applied to the circumstances here, it is apparent that the continued service of Nigro Development is consistent with the best interest of Debtor's Creditors and Equity Security Holders, as well as public policy. Thus, the Plan amply satisfies Section 1129(a)(5) and Section 1123(a)(7) and should be confirmed.

C. The Plan Is Fair and Equitable and "Cramdown" Pursuant to Section 1129(b) Is Appropriate.

Section 1129(b) provides that if a proposed plan meets all the requirements in Section 1129(a), except for class acceptance pursuant to Section 1129(a)(8), then the plan may still be confirmed "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). Class 1 is the only Impaired Class that did not vote to accept the Plan. As Class 4 is impaired and voted to accept the Plan, Class 1 may be "crammed down" pursuant to Section 1129(b).

1. There Is No Dispute that the Plan Satisfies Section 1129(b)(2)(A)(i).

The Code specifies that with respect to a class of secured claims, a plan is "fair and equitable" if the plan provides, among other relief:

> (i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allow amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property.

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11 U.S.C. § 1129(b)(2)(B).

Secured Lender concedes that the Plan satisfies Section 1129(b)(2)(A)(i). However, again desperately seeking to find some basis to object to the Plan, Secured Lender contends that irrespective of the Plan's satisfaction of Section 1129(b)(2)(A)(i), the Plan is nonetheless unfair and inequitable because it removes certain loan covenants and does not rewrite the Secured Note to add Secured Lender's wish-list of restrictions that did not exist in the original Secured Note. See Objection, pp. 8-10. Such argument lacks any merit and must be overruled.

2. The Undisputed Evidence Establishes that the Plan Is Fair and Equitable.

Among other factors, the following undisputed facts support a determination that the Plan's treatment of the Secured Lender Claim is fair and equitable: (i) Debtor timely tendered every monthly payment due under the Secured Note prior to the February 13, 2011 maturity date; (ii) the Chapter 11 Case was solely filed because Secured Lender refused to extend the maturity date of the Secured Loan despite being oversecured and despite Debtor's history of timely payments; (iii) Debtor began making monthly Adequate Protection Payments of $18,500 immediately after the Petition Date; (iv) Debtor continued making the $18,500 Adequate Protection Payments throughout the Chapter 11 Case, which payments exceed $800,000 as of the filing of this declaration; (v) the Secured Lender Claim will be fully repaid within five years; (vi) the 4.25% Secured Interest Rate is over 2.45% greater than the floating interest rate set forth in the Secured Note, which has not exceeded 1.8% since the Petition Date; (vii) Secured Lender will receive a principal reduction payment of $585,000 within one month of the Effective Date; and (viii) Debtor will have over $1.8M as of the Effective Date, as well as revenues that exceed its expenses, and thus, Secured Lender has a very low risk of non-payment. See Ex. 2 ¶ 61. Notably, similar terms and circumstances were found to satisfy the fair and equitable test in the Beltway Case.

Furthermore, the undeniable feasibility of Debtor's Plan further counters against Secured Lender's alleged shifting of the risk. When in 2014 Debtor received an LOI for a potential sale of the Real Property that could produce sufficient funds to repay the Secured Lender Claim

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(minus default interest)[5] and produce a return for equity, Debtor promptly approached Secured Lender and inquired about a payoff excluding default interest. See Ex. 2, p. 15, n. 6. Secured Lender refused to engage in any discussion that would not pay Secured Lender its principal, interest, and ***post-petition*** default interest (which Debtor understands Secured Lender calculates at over $1 Million). See id. Thus, once the Plan is confirmed and the Secured Lender Claim is liquidated, Debtor will be poised to proceed expeditiously with a sale in order to repay the Secured Lender Claim. Irrespective of the timing of such sale, Secured Lender is clearly adequately protected by the value of the Real Property and therefore, its "shifting of risk" argument is not meritorious.

Beyond the foregoing undisputed facts, the applicable case law supports a determination that Debtor's Plan is fair and equitable. First, most of the cases that find an impermissible shifting of the risk, involve negative amortization plans or similar treatment. Here, the Plan provides for an initial payment to Secured Lender of $585,000, fully amortized monthly payments to Secured Lender, and full repayment of the Secured Lender Claim within five years. Thus, the Plan does not violate the "fair and equitable" test of Section 1129(b) as it does not impermissibly shift the risk to Secured Lender. To determine whether the proposed arrangement imposes impermissible risk shifting upon a secured creditor, "a court will consider: (i) the debtors' demonstration of feasibility; (ii) the protections and risks to the secured creditor, and (iii) the general reasonableness of the proposals in light of the circumstances." In re TCI 2 Holdings, LLC, 428 B.R. 117, 168 (Bankr. D.N.J. 2010) (citing In re Kennedy, 158 B.R. 589, 599 (Bankr. D.N.J. 1993); In re EFH Grove Tower Associates, 105 B.R. 310, 313 (Bankr. E.D.N.C. 1989)). Similarly, the court in *Montgomery* held that the following factors should be considered when determining whether a plan unduly shifts the risk of reorganization upon a secured creditor: "(1) whether the statutory mandates of § 1129(b)(2)(A) or (B) have been met; (2) whether for a secured class, the valuation process has been fair; (3) whether the primary risk of reorganization remains with the equity interests of the reorganized debtor; (4) whether any

[5] For the avoidance of doubt, Debtor disputes any contention that Secured Lender is entitled to any post-petition default interest.

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secured loan restructure, including default provisions and other covenants, is reasonable when compared to the parties' previous understandings and practices; (5) whether the length of time until proposed repayment is reasonable; (6) whether, for an unsecured class, the percentage or formula for proposed payment demonstrates a good faith effort to repay those obligations; and (7) whether other particular inequities exist, including special prejudice to a dissenting class arising from its particular circumstances." See In re Montgomery Court Apartments of Ingham Cnty., Ltd., 141 B.R. 324, 346 (Bankr. S.D. Ohio 1992).

Here, the Plan does not violate the "fair and equitable" test as: (i) the Plan meets the technically requirements of Section 1129(b)(2)(A) and (B); (ii) Secured Lender is fully secured; (iii) as discussed more fully below, the Plan's elimination of four of twenty-four loan covenants is reasonable compared to previous understandings and practice of Debtor and Secured Lender; (iv) the length of time until repayment (5 years) is reasonable; (v) there is no dispute as to the feasibility of the Plan; (vi) Secured Lender retains its fully secured liens under the Plan; and (vii) based upon the foregoing, the Plan is reasonable in light of the circumstances.

Further, the authority cited by Secured Lender is either so distinguishable that it is rendered wholly-inapplicable or does not actually support Secured Lender's position. See Objection, at p. 7. First, *In re D & F Const., Inc.*, upon which Secured Lender relies, involved a fifteen year negative amortization plan. See In re D & F Const., Inc., 865 F.2d 673, 675 (5th Cir. 1989).[6] Notably, the court stated that "[w]e do not hold there can never be an occasion when negative amortization would be fair and equitable. We do say this plan is not fair and equitable." Id. However, here, Debtor's Plan is not a negative amortization plan. As such, *D & F Const.* is not helpful to the Court in analyzing the Plan.

Second, in *In re Tri Growth Center City, Ltd.*, the court stated "[a]lthough not per se objectionable, careful scrutiny must be given to a debtor's plan which proposes to convert a fully matured short term loan into permanent financing" where the debtor proposed extending a three

[6] Secured Lender notably fails to cite to *Great W. Bank v. Sierra Woods Grp.*, 953 F.2d 1174, 1178 (9th Cir. 1992), which determined that negative amortization is not *per se* impermissible, and fairness of a plan that includes negative amortization must be considered on a case-by-case basis.

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year loan over seven years, more than double the original loan term. See In re Tri Growth Center City, Ltd., 136 B.R. 848, 852 (Bankr. S.D. Cal. 1992). The court then explained that the debtor had failed to submit expert testimony as to whether such seven-year term was reasonable based on market conditions. See id.

Third, *In re Monarch Beach Venture, Ltd.*, 166 B.R. 428, 436 (C.D. Cal. 1993), which was decided in 1993 and is cited by Secured Lender, has been openly criticized by the courts in *In re Bashas' Inc.*, 437 B.R. 874, 928 (Bankr. D. Ariz. 2010) and *In re Linda Vista Cinemas, L.L.C.*, 442 B.R. 724 (Bankr. D. Ariz. 2010) because *Monarch* interpreted the "implicit" fairness test to graft the absolute priority requirement onto repayment of secured creditors, which everyone knows only applies to *unsecured* creditors. Thus, the authority cited by Secured Lender fails in any way to actually support the propositions asserted by Secured Lender or aid this Court with its decision.

3. Secured Lender's Contention that the Plan is Not Fair and Equitable Because It Does Not Include New "Wish-List" Provisions Is Untenable.

Secured Lender complains that the Plan is not fair and equitable because it allows Debtor to continue to control and manage its cash as provided for under the existing Loan Documents. In essence, Secured Lender believes that Debtor should be penalized because it sought Chapter 11 protection and will be successfully reorganized. Such proposition is not only inconsistent with the principles of the Code relating to the effect of Plan confirmation, but results in the egregious levy of a penalty on Debtor simply because Debtor has been successful and meaningfully increased its cash position.

By way of his declaration, Mr. Haley stated "I believe that the Debtor should, at a minimum, be prohibited from making any distributions to equity, until Wells Fargo is paid in full, and should be required (i) to pay all excess cash on hand to Wells Fargo on the Effective Date, after making reasonable reserves or to deposit all excess cash on hand into a debt service escrow to be used only to pay Wells Fargo's secured claim, and (ii) to escrow reasonable amounts each month as further reserves for the payment of real property taxes, insurance, and maintenance expenses." Ex. 3 ¶ 23. However, there is absolutely nothing in Debtor's existing

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Loan Documents that would require all excess cash to be paid over to Secured Lender or the establishment of tax, insurance, and maintenance expense reserves. See Ex. 25 (Loan Agreement) and Ex. 26 (Secured Note). Similarly, no evidence was submitted to even suggest that Debtor has ever failed to timely pay its taxes, insurance, or to maintain the Real Property.

Secured Lender's contention that without a debt service escrow, cash sweep, or tax, insurance, and expense reserve escrows the Plan is unfair and inequitable fails. The existing Loan Documents do not impose any such restrictions, the Plan indisputably meets the requirements of Section 1129(b)(2)(A), and there is simply no factual or legal basis for Secured Lender's to impose penalizing provisions solely because Debtor sought Chapter 11 protection, particularly where Debtor is making a sizable down payment of $585,000 immediately after the Effective Date and has paid over $800,000 in Adequate Protections to Secured Lender.

Further, Secured Lender's exaggerated concern over Debtor's use of the cash must be tempered with reality. Secured Lender will receive a pay down of $585,000 within one month of the Effective Date. Further, Mr. Nigro has testified that he and his brother, in their capacities as managers of Nigro Development, will make determinations as to the use of the cash, including decisions relating to equity distributions, based on "ensuring the viability and success of Debtor." See Ex. 2 ¶ 77. "This includes ensuring that there are sufficient funds to pay any tenant improvements (which can exceed hundreds of thousands of dollars), as well as repairs and maintenance . . . [w]e additionally consider what cash reserves will place Debtor in the best position to facilitate a financing or a sale." See id. "[W]e are very conservative in our analysis and only make distributions where we are entirely confident that such distribution will not harm the viability of the project and/or the ability to refinance or sell the project." See id. ¶ 77. Absolutely no contrary evidence was presented.

Moreover, the Court cannot lose sight of the fact that the Guarantees provided by Mr. Nigro, his wife, his brother, and his brother's ex-wife in favor of Secured Lender all remain in place during the Plan term and in the event of a post-Effective Date default, Secured Lender would have the ability to sue the guarantors. See Transcript, p. 49, ll. 4-14. It is therefore, at best, illogical to suggest that the indirect managers, who are also two of the Guarantors, would

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cause Debtor to utilize its cash in a manner that would increase the likelihood of a default under the Plan that would result in not only foreclosure proceedings, but also litigation against the Guarantors in their individual capacities.

Thus, Secured Lender's desire to commandeer the plan process and to rewrite the Loan Documents to impose brand new restrictions on Debtor is factually and legal unsupportable and certainly does not render the Plan unfair and inequitable.

4. The Removal of Four of the Twenty-Four Loan Covenants Is Fair and Equitable, Particularly Given the Financial Reporting Requirements.

The Plan provides for the removal of four financial covenants that could render Reorganized Debtor in default under the Amended and Restated Note immediately after the Effective Date if they were to remain. See Ex. 4 § 4.1.1(h); Ex. 2 ¶¶ 74-85. Secured Lender contends that such removal violates Section 1129(b)'s fair and equitable test. Most significantly, this Court previously rejected this exact same argument made by Wells Fargo in the Beltway case. Section 4.1.1(h) of the Beltway plan provided nearly identical language to Section 4.1.1(h) of Debtor's Plan with the only difference being the specific reference to Section 5.13 in the Beltway plan verses the reference to Section 7.13 in Debtor's Plan. See ECF No. 201 in the Beltway Case; Ex. 4 § 4.1.1(h). In the Beltway case, Wells Fargo argued that the "Plan proposes to gut all financial covenants in the loan document, which are standard protections provided to all lenders in commercial transaction" and therefore, the Beltway plan is unfair and inequitable. See ECF No. 233 in the Beltway Case, at pp. 14-15. The Court rejected Wells Fargo's argument holding "[t]he elimination of financial covenants is not per se unfair or inequitable, and is not unfair or inequitable in these circumstances. See In re Bashas' Inc., 437 B.R. 874, 925 (Bankr. D. Ariz. 2010) ('Likewise of concern to the Banks is that the Plan strips them of their contractual 'covenants.' However, nothing in the Chapter 11 statutes proscribes this. Under § 1123, the modification of secured 'rights' is expressly allowed. § 1123(b)(5).')." See ECF No. 320 in the Beltway Case, at pp. 14:23-15:2.

Further, in considering confirmation of Debtor's Initial Plan, which included identical

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language regarding the removal of certain financial covenants,[7] this Court took into consideration the removal of the financial covenants when it determined that 4.25% was the appropriate interest rate for the Secured Lender Claim, which rate Secured Lender has stipulated satisfies Section 1129(b)(2)(A). See Ex. 1 § 2.4; Ex. 11, p. 22. On this basis alone, Secured Lender's argument fails.

To support its broad assertion, Secured Lender again cites *P.K. Keating, Co.* See Opposition, at p. 10 (citing In re P.K. Keating, Co., 168 B.R. 464, 473 (Bankr. D. Mass 1994)). However, in *P.K. Keating, Co.*, pursuant to a loan agreement, the debtor was prohibited from redeeming capital stock without the secured creditor's prior permission. See id. Under the debtor's plan, the non-redemption clause was to be eliminated, which would have allowed the debtor to pay out $5.5 million to shareholders while more than $20 million remained due to the secured creditor. See id. The court ruled solely on the modification of the stock redemption provision, noting that it "express[ed] no opinion" regarding amendment of loan agreement covenants regarding "net worth, earnings and capital expenditures," explaining, "[t]he covenants to be included in the loan documents of a cramdown need not precisely track the covenants in the parties' existing loan agreement." In re P.K. Keating, Co., 168 B.R. 464, 473 (Bankr. D. Mass 1994) (citing In re Western Real Estate Fund, Inc., 75 B.R. 580 (Bankr. W.D. Okla. 1987); In re Coastal Equities, Inc., 33 B.R. 898 (Bankr. S.D. Cal. 1983)).

Additional authority again cited by Secured Lender, *In re Kellogg Square P'ship*, 160 B.R. 343, 368 (Bankr. D. Minn. 1993), has been distinguished by the court in *In re TCI 2 Holdings, LLC*, 428 B.R. 117, 167 (Bankr. D.N.J. 2010), stating that "[t]he pronouncements of the *Kellogg Square* court must be understood in the context of the circumstances of that case." See id. The court acknowledged that the original credit agreement in *Kellogg* governing the relationship between the debtor and the creditor that was being crammed down was entered into sixteen years prior to the debtor's reorganization during which time significant changes in

[7] See Initial Plan, Ex. 20, ECF No. 142 § 4.1.1(h) (providing "Financial Covenants. On and after the Effective Date, all financial covenants, expressly including debt coverage ratio requirements, set forth in the Loan Documents shall be of no force and effect, including but not limited to the financial covenants set forth in Section 7.13 of the Secured Loan Agreement.").

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industry standards for covenants had developed. See id. The *Kellogg* court noted that "'[s]ince 1977, changes in the economy, business practices, and law have created or materially increased risks that were not previously anticipated by the parties, were not covered under the parties' pre-petition contract or perhaps were not even in existence then.'" See id. (quoting Kellogg, 160 B.R. at 369.). It was only in that context that the *Kellogg* court determined that the proposed credit agreement must "shelter" the creditor from the risks of a debtor's proposal. See id.

More recent authority has established that the proper inquiry to determine whether modification of loans documents is appropriate requires consideration of: (i) whether the proposed terms and covenants unduly harm the secured creditor with respect to its collateral position; and (ii) whether the inclusion of terms and conditions from the pre-bankruptcy loan documents would unduly impair the debtor's ability to reorganize. See American Trailer and Storage, Inc., 419 B.R. 412, 441 (Bankr. W.D.Mo. 2009). Contrary to Secured Lender's portrayal of Debtor's "gutting" the loan covenants, as set forth in the Nigro Declaration [Ex. 2], Debtor has proposed the removal of only the following loan covenants: (i) the Lease Covenant; (ii) the Cross Default Covenant; (iii) the Loan-To-Value Covenant; and (iv) the Material Adverse Change Covenant. See Ex. 2 ¶¶ 62-73. In each instance, the retention of these covenants would place Reorganized Debtor at great risk of Secured Lender calling an immediate default upon the Effective Date, particularly where Secured Lender has repeatedly expressed its desire to obtain a default and foreclose on the Real Property irrespective of Debtor's timely compliance with its monthly payment obligations. See id.

By way of example, if the Loan-to-Value Covenant is not stricken, Debtor could arguably be placed in default immediately after the Effective Date. The Loan-to-Value Covenant allows Secured Lender, ***in its sole discretion***, to obtain an appraisal and to call a default if the balance of the Allowed Secured Claim exceeds 80% of the appraiser's stabilized value. See Ex. 25 § 7.13. There is no mechanism for Debtor to challenge the validity of the valuation or to obtain its own valuation. See id. It is certainly possible, if not likely, that if Secured Lender could find at least one appraiser to value the Real Property at a value that would place Debtor in default on the Effective Date. Therefore, the retention of the Loan-To-Value Covenant, which could

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conceivably be triggered immediately after the Effective Date, unduly impairs Debtor's ability to reorganize.

Similarly, as Mr. Nigro testified "[w]ith regard to the Lease Covenant, as a result of the post-recession economic leasing market in Las Vegas, eleven of Debtor's leases are less than the $2.33 per square foot rate set forth in the Lease Covenant. As Debtor did not obtain Secured Lender's approval of these leases, if this provision is not stricken from the Loan Agreement, upon the Effective Date, Debtor would be in default." Ex. 2 ¶ 63. No contrary evidence was presented. Moreover, the fact that Debtor has increased its cash position by over $800,000 after paying all Adequate Protection Payments during the Chapter 11 Case through its rental revenues demonstrates that the Lease Covenant is not necessary to protecting Secured Lender's interest in the Real Property.

As set forth in detail in the Nigro Declaration, each of the stricken financial convents materially impairs Debtor's ability to reorganize. See Ex. 2 ¶¶ 62-73. Further, in many instances, the covenants involve highly subjective determinations of compliance. In light of Secured Lender's desire to find a default, highly subjective determinations of compliance with the four stricken covenants would likely require future, and perhaps multiple instances of, judicial intervention. Thus, consistent with *American Trailer and Storage* and *Bashas,* the removal of these four financial convents is fair, equitable, and appropriate.

Additionally, in its fair and equitable analysis with regard to the Initial Plan (and the Beltway Plan), this Court did not accept any of the arguments that Secured Lender seeks to re-litigate here. Instead, the only open "fair and equitable" issue with regard to the Initial Plan was the appropriate interest rate, which has been resolved by the Stipulation. See Exs. 4 and 11.

Finally, as Debtor is retaining the majority of the loan covenants set forth in the Loan Agreement, the Plan's removal of those loan covenants that would likely cause an immediate default post-Effective Date does not alter that fact that the Plan is fair and equitable. As set forth in the Nigro Declaration, the following "Affirmative Covenants" will remain and be enforceable post-Effective Date: (i) Section 6.1 titled Access to Books and Records; (ii) Section 6.2 titled Business Continuity; (iii) Section 6.3 titled Compliance with Other Agreements; (iv) Section 6.4

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titled Estoppel Certificates; (v) Section 6.5 titled Insurance; (vi) Section 6.6 titled Maintain Properties; (vii) Section 6.7 titled Non-Default Certificate From Borrower; (viii) Section 6.8 titled Notice of Default and Other Notices; (ix) Section 6.9 titled Permeant Financing; and (x) Section 6.10 titled Bank's Costs. See Ex. 2 ¶ 70; Ex. 25 § 6.

In addition to the Affirmative Convents, the following Negative Covenants are being retained and will be enforceable post-Effective Date: (i) Section 7.1 titled Change in Fiscal Year; (ii) Section 7.2 titled Change in Control; (iii) Section 7.3 titled Encumbrances; (iv) Section 7.5 titled Guarantees; (v) Section 7.6 titled Investments; (vi) Section 7.8 titled Defaults on Other Contacts or Obligations; (vii) Section 7.9 titled Government Intervention; (viii) Section 7.10 titled Judgment Entered; (ix) Section 7.11 titled Payment of Other Debt; (xii) Section 7.12 titled Retire or Repurchase of Capital Stock. See Ex. 2 ¶ 71; Ex. 25 § 7.

Beyond the foregoing affirmative and negative covenants that will be retained and effective post-Effective Date, Sections 8.1 through 8.5 of the Loan Agreement will remain enforceable. Sections 8.1 through 8.5 of the Loan Agreement require not only Debtor, but also the Guarantors to provide periodic financial reporting, including financial statements and tax returns to Secured Lender. See Ex. 2 ¶ 72; Ex. 25 § 8. Thus, the removal of the four loan covenants that could cause an immediate default after the Effective Date is fair and equitable, particularly where all of the foregoing covenants remain and will be enforceable post-Effective Date.

As such, Wells Fargo's Objection should be overruled and the Court should determine that the Plan meets Section 1129(b)'s fair and equitable test.

D. Stay Relief Is Not Appropriate.

This Court previously considered confirmation of the Initial Plan [Ex. 20] and on November 13, 2014, the Court entered its Memorandum Decision [Ex. 11] on the Initial Plan wherein it determined that: (i) the value of Debtor's Real Property is $10,845,000, which is less than Secured Lender's asserted claim, thereby resulting in Secured Lender having a secured and an unsecured claim; (ii) the appropriate interest rate under Section 1129(b)(2)(A)(i) for the secured portion of Secured Lender's claim is 4.25% per annum; (iii) the appropriate interest rate

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under Section 1129(b)(2)(B)(i) for the unsecured portion of Secured Lender's Claim is not less than 5.00%; and (iv) the Initial Plan's failure to provide the foregoing interest rates and to separately classify the Secured Lender's deficiency claim did not satisfy the requirements of Sections 1122 and 1129(b) and on that basis, denied confirmation of the Initial Plan. No other basis for denial of confirmation was articulated in the Memorandum Decision.

On December 24, 2015, Debtor filed *Debtor's Amended Plan of Reorganization* [Ex. 7] to correct the deficiencies cited in the Memorandum Decision by: (i) providing that the Secured Lender Claim is $10,845,000, which is the value determined by the Bankruptcy Court; (ii) providing interest on the Secured Lender Claim at the rate of 4.25% per annum; (iii) increasing the interest rate on the General Unsecured Claims and Secured Lender's deficiency claim to 5.5% per annum; (iv) and separately classifying Secured Lender's secured and deficiency claims. The remaining provisions of the Initial Plan were not altered. (i) the Secured Interest Rate of 4.25% satisfies the "market rate of interest" requirement of Section 1129(b)(2)(A)(i); (ii) the value of the Real Property, consistent with the Court's determination, is *at least* $10,845,000; (iii) Wells Fargo is an oversecured creditor without a deficiency claim; (iv) feasibility of the Plan, pursuant to Section 1129(a)(11), will not be challenged by Secured Lender; and (v) good faith of the Plan, pursuant to Section 1129(a)(3), will not be challenged by Secured Lender. The Stipulation also required Debtor to file a revised plan incorporating these stipulations.

On April 15, 2015, in accordance with the Stipulation, Debtor filed the Plan [Ex. 4], which made the following revisions: (i) treated the Secured Lender Claim as fully secured (i.e., removed the deficiency claim); and (ii) changed the previously contemplated deficiency claim payment to a principal reduction payment for the Secured Lender Claim. Thus, of the issues identified by the Court as the basis for denying confirmation of Debtor's Initial Plan, each has been resolved through either the Stipulation or the Plan amendments.

While Secured Lender has sought to take another bite at the apple by conjuring up additional basis to object to confirmation of the Plan, many of which have already been rejected by this Court in this case or the Beltway case, the reality is that Debtor cured all of the prior defects and the Plan should be confirmed. On the evidentiary record, there is no basis to grant

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stay relief as Debtor is certainly able to effectuate a plan that repays all of its creditors in full and preserves Debtor's equity interests.

III. CONCLUSION

WHEREFORE, Debtor respectfully requests that Secured Lender's objections to confirmation of Debtor's Plan be overruled and that the Plan be confirmed. Debtor also seeks such other and further relief as is just and proper.

DATED this 5th day of June, 2015.

GARMAN TURNER GORDON

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