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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 BRIEF IN SUPPORT OF CONFIRMATION OF DEBTOR'S AMENDED PLAN OF REORGANIZATION

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Horizon Village Square LLC, debtor and debtor-in-possession ("Debtor"), by and through its counsel, the law firm of Gordon Silver, hereby submits this brief in support of confirmation (the "Brief") of *Debtor's Amended Plan of Reorganization*, [ECF No. 403] (the "Plan"),[1] and requests that the Court overrule Wells Fargo Bank, N.A.'s ("Secured Lender") objections set forth in *Wells Fargo Bank, N.A.'s Objection to Confirmation of Debtor's Amended Plan of Reorganization* [ECF No. 409] (the "Objection") and confirm the Plan. No other party has submitted an objection to the Plan.

This Brief is made and based on the *Declaration of Todd Nigro in Support of Debtor's Brief in Support of Confirmation of Debtor's Amended Plan of Reorganization* [ECF No. 414] (the "Confirmation Decl."), the memorandum of points and authorities provided herein, and shall be further supported by the testimony and exhibits submitted in conjunction with the Confirmation Hearing, as well as the papers and pleadings contained in this Court's file, judicial notice of which is respectfully requested, and the oral argument presented at the time of the Confirmation Hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF PERTINENT FACTS[2]

A. The Commencement of the Chapter 11 Case and the Statement of Jurisdiction.

1. On July 13, 2011 (the "Petition Date"), Debtor filed its voluntary petition for relief under Chapter[3] 11, thereby commencing the Chapter 11 Case. Since the Petition Date, Debtor has continued operating its business and managing its property as debtor and debtor-in-possession pursuant to Sections 1107(a) and 1108. No committee has been appointed in the Chapter 11 Case and no request has been made for the appointment of a trustee or an examiner.

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

[2] In the interest of brevity, Debtor incorporates herein the factual recitation provided in its *Opposition to Wells Fargo Bank, N.A.'s (i) Renewed Motion for Relief from Stay with Respect to Debtor's Property Located in Henderson, Nevada, or, in the Alternative, (ii) Motion to Dismiss* [ECF No. 405].

[3] All references to "Chapter" and "Section" herein are to Title 11 of the U.S. Code (the "Bankruptcy Code"), all references to a "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure, and all references to "LR" or "Local Rule" are to the Local Rules of Bankruptcy Practice of the United States District Court for the District of Nevada.

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2. The Court has jurisdiction over the confirmation of the Plan as a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L). Venue for the Chapter 11 Case in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The bases for the relief sought herein include, but are not limited to, Section 1129 of the Bankruptcy Code and Bankruptcy Rule 3020.

3. Pursuant to Local Rule 9014.2, Debtor consents to entry of final order(s) or judgment(s) by the bankruptcy judge if it is determined that the judge, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

B. Debtor's Plan and the Remaining Disputed Issues.

4. This Court previously considered confirmation of *Debtor's Plan of Reorganization* [ECF No. 138] (the "Initial Plan"). On November 13, 2014, the Court entered its Memorandum Decision 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 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.

5. On December 24, 2015, Debtor filed *Debtor's Amended Plan of Reorganization* [ECF No. 316] 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

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deficiency claims. The remaining provisions of the Initial Plan were not altered. See Redline, ECF No. 311.

6. Thereafter, Debtor and Secured Lender entered into the *Stipulation Regarding Final Hearing on Plan Confirmation and Stay Relief and/or Dismissal of Chapter 11 Case* [ECF No. 390] (the "Stipulation"), wherein Debtor and Secured Lender agreed for the purpose of these Plan proceedings that: (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.

7. On April 15, 2015, in accordance with the Stipulation, Debtor filed the Plan, 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. See Redline, ECF No. 404.

8. 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.

9. Notwithstanding the foregoing, Secured Lender seeks to take another bite at the apple by objecting to Plan provisions that are identical to provisions in the Initial Plan irrespective of the fact that this Court did not previously find such provisions to provide a basis for denial of confirmation of the Initial Plan and where the Court confirmed identical provisions in the plan filed by Beltway One Development Group, LLC (Case No. 11-21026-MKN) (the "Beltway Case," and the confirmed plan in the Beltway Case, the "Beltway Plan"). See ECF Nos. 201 and 321, in Case No. 11-21026-MNK. Specifically, Secured Lender now objects that:

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(i) the Plan, in violation of Section 1129(a)(1), fails to comply with Section 524(e) as a result of the alleged "cure" provision in Section 4.1.3 of the Plan; however, not only was Section 4.1.3 included in the Initial Plan, identical language was included in the confirmed Beltway Plan;

(ii) the Plan, in violation of Sections 1129(a)(5) and 1123(a)(7) fails to meet the disclosure requirements relating to Debtor's proposed post-Effective Date management, and further, the proposed post-Effective Date management is inconsistent with the creditors' interests and public policy; however, Debtor's management has not changed since the Initial Plan and the same principals provide the management under the confirmed Beltway Plan; and

(iii) the Plan's treatment of the Secured Lender Claim is not "fair and equitable" because it does not place restrictions on Reorganized Debtor's use of cash, and it removes certain of the loan covenants from the original Loan Documents; however, again, the exact same language was included in the Initial Plan and identical language was included in the confirmed Beltway Plan.

10. Thus, Debtor has resolved the Court's concerns raised in the Memorandum Decision with regard to the Initial Plan and Secured Lender is simply seeking to re-argue positions that the Court did not find persuasive during the confirmation hearing on the Initial Plan or during the confirmation hearing on the Beltway Plan. As the Plan satisfies all of the requirements of Section 1129, Debtor requests that the Plan be confirmed.

II. LEGAL ANALYSIS

A. The Burden of Proof for Plan Confirmation is a Preponderance of the Evidence.

To obtain confirmation of the Plan on contested issues, Debtor must demonstrate that the Plan satisfies the various provisions of Section 1129 by a *preponderance* of the evidence. See Liberty Nat'l Enters. v. Am banc Lames Ltd. Pushup (In re Am banc Lames Ltd. Pushup), 115 F.3d 650, 653 (9th Cir. 1997). As shall be demonstrated herein and through the evidence

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submitted in conjunction with the Confirmation Hearing, the Plan amply satisfies this standard as it satisfies each provision of Section 1129 by a preponderance of the evidence.

B. Section 1129(a)(1): Plan Compliance With the Bankruptcy Code.

Section 1129(a)(1) requires that a plan must "[c]comply with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1). This provision encompasses, among others, the requirements of Sections 1122 and 1123 governing classification of claims and contents of plans, respectively. See H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992).

1. Section 1122: Classification of Claims.

a. Separate classification of claims generally.

Section 1122(a) provides in pertinent part that "a plan may place a claim or an interest in a particular class only if such claim or interest is *substantially similar* to the other claims or interests of such class." 11 U.S.C. § 1122(a)(emphasis added). "In other words, what § 1122(a) requires is that dissimilar claims must be placed in different classes." In re Loop 76, LLC, 442 B.R. 713, 715 (Bankr. D. Ariz. 2010) aff'd, 465 B.R. 525 (B.A.P. 9th Cir. 2012) aff'd on other grounds, 578 F. App'x 644 (9th Cir. 2014); see also In re Red Mountain Machinery Co., 448 B.R. 1, 7-8 (Bankr. D. Ariz. 2011); Steelcase Inc. v. Johnston (In re Johnston), 21 F.3d 323, 327-328 (9th Cir. 1994).

In determining whether two claims are substantially similar, the court must evaluate the nature of each claim, including the kind, species, and character of each claim. See In re Johnston, 21 F.3d at 327. As Section 1122(a) solely precludes the classification of substantially similar claims in the same class, the plan proponent is granted broad discretion in classifying its claims within its plan of reorganization. See State St. Bank & Trust Co. v. Elmwood, Inc. (In re Elmwood, Inc.), 182 B.R. 845, 849 (D. Nev. 1995); In re Johnston, 21 F.3d at 327.

b. All five classes of Claims are properly classified in the Plan.

The Plan properly classifies all Claims and Equity Interests into five separate classes based on the kind, species, and character of each category of claims. Only substantially similar claims have been placed in each class. The Secured Lender Claim is properly separately

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classified as Secured Lender holds a first priority lien on the Real Property, each additional secured claim, if any, is separately classified in a subclass within Class 2, all Claims entitled to priority treatment are separately classified in Class 3, the General Unsecured Claims are separately classified in Class 4 as they are not secured or entitled to any priority treatment under the Bankruptcy Code, and the Equity Securities are separately classified in Class 5. See Plan § 4. Thus, the Plan's classification scheme complies with Section 1122(a).

2. Section 1123(a): Mandatory Plan Requirements.

Debtor's Plan also satisfies the seven requirements in Section 1123(a). First, the Plan classifies all Claims and Equity Interests as required by Section 1123(a)(1). See Plan §§ 3.1 and 3.2. Second and third, the Plan specifies which Classes of Claims are Impaired, and the treatment of each Impaired Class as required by Sections 1123(a)(2) and (3). See Plan §§ 3 and 4. Fourth, the treatment of each Claim and Equity Interest in each particular Class of the Plan is the same as the treatment for each other Claim or Equity Interest in such Class as required by Section 1123(a)(4). See id. Fifth, as more fully set forth in Section 5 of the Plan, the Plan provides adequate means for its implementation as required by Section 1123(a)(5) through: (i) the creation and continued existence of Reorganized Debtor and the vesting of Debtor's Assets in Reorganized Debtor; (ii) the execution and delivery to Secured Lender of the Amended and Restated Note and the amendment and continued effectiveness of the Loan Documents; and (iii) the continuation of post-Effective Date management and operations. See Plan § 5. Sixth, Section 1123(a)(6), which requires a prohibition in the charter of a debtor against issuance of non-voting equity securities, is satisfied because as of the Effective Date, the articles of organization, by-laws, or other organizational documents of Debtor shall be amended as necessary to satisfy the provisions of the Plan and the Bankruptcy Code, and shall include, among other things, a provision prohibiting the issuance of non-voting equity securities. See Plan § 5.4. Seventh, Section 1123(a)(7), which requires that provisions concerning the manner of selection of officers, directors, or trustees under the Plan to be consistent with the interests of Creditors, Equity Interest Holders, and with public policy, is met because on and after the

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Effective Date, Debtor, as shall be addressed below in more detail,[4] will continue to be managed by Debtor's pre-petition manager, 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 § 5.5. Finally, Section 1123(a)(8) is inapplicable as it applies only to cases in which the debtor is an individual. Based on the foregoing, the Plan satisfies the mandatory requirements of Section 1123(a) applicable to limited liability companies.

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

Secured Lender contends that "the Second Amended Plan's 'cure' attempt is legally impermissible to the extent it shields non-debtor third parties from creditor claims[,]" and further that Debtor's alleged "attempt to collaterally shield the guarantors from the defaults that now exist under their guaranties violates section 524 of the Bankruptcy Code." See Objection, at p. 12. Such argument is a red herring and should be disregarded as the alleged "cure" provision in the Plan does not relate to anyone other than Debtor. Moreover, such argument seemingly serves as a back door entry to a "good faith" argument under Section 1129(a)(3), which Secured Lender represented that it would not challenge. See ECF No. 390, § 2.9. Such objection to confirmation must be overruled.

Specifically, Section 4.1.3 of the Plan provides that: "On 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." The foregoing plainly addresses only Debtor and/or Reorganized Debtor, and does not by implication create a prohibited release of the Guarantors' liability nor does it enjoin Secured Lender from pursuing the Guarantors if entitled to do so under the guarantee. Section 4.1.3 serves to ensure that upon the Effective Date, Reorganized Debtor is in

[4] Secured Lender has raised objection to confirmation of the Plan on the basis of Debtor's alleged failure to satisfy the requirements of Section 1123(a)(7) and 1129(a)(5). As these provisions are related conceptually, Debtor shall address Secured Lender's objection to each in a combined section below.

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good standing with Secured Lender such that immediately upon the Effective Date of the Plan, Secured Lender does not have basis to declare default and proceed to foreclosure.

Further, Secured Lender represented to both Debtor and this Court that it would not challenge "good faith" under Section 1129(a)(3), which requires that a plan be proposed "in good faith and not be any means forbidden by law." See 11 U.S.C. § 1129(a)(3). To suggest that the proposed default cure would lead to a prohibited release of guarantor liability, though guised as a Section 1129(a)(1) violation, implicates the principles of good faith. Secured Lender's stipulation not to challenge good faith must be enforced.

Finally, Section 4.1.3 as it is presented in the current Plan is the identical provision not only of the Initial Plan, but also of the plan of reorganization confirmed by this Court in the Beltway Case. See Initial Plan § 4.1.3; see also Beltway Case, ECF Nos. 99 & 321. Secured Lender raised absolutely no objection to Section 4.1.3 in either of the confirmation proceedings. See ECF Nos. 105 & 195; Beltway Case, ECF Nos. 125 & 223. Such non-opposition in the prior litigation and the Court's confirmation of Beltway's plan further establishes the meritlessness of Secured Lender's argument.

Thus, not only does Section 4.1.3 not violate Section 524(e), but the Plan does not violate any other provisions of the Bankruptcy Code and therefore meets the requirements of Section 1129(a)(1) and should be confirmed.

C. Section 1129(a)(2): Proponent Compliance With the Bankruptcy Code.

Section 1129(a)(2) requires a plan proponent to "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). Section 1129(a)(2) is intended to encompass the disclosure and solicitation requirements under Section 1125. See H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); In re Trans World Airlines, Inc., 185 B.R. 302, 313 (Bankr. E.D. Mo. 1995). The determination of adequate information for disclosure statement purposes is made on a case-by-case basis and is largely within the discretion of the bankruptcy court. See Computer Task Group, Inc. v. Brotby (In re Brotby), 303 B.R. 177, 193 (B.A.P. 9th Cir. 2003). As this Court previously approved the adequacy of the information in the Disclosure Statement and as Secured Lender has not ever suggested that the Disclosure

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Statement fails to contain adequate information to allow Secured Lender to determine how to vote on the Plan, Debtor submits that the Plan and Disclosure Statement amply satisfy Section 1129(a)(2).

D. Section 1129(a)(3): Good Faith.

Section 1129(a)(3) requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Although Section 1129(a)(3) does not define "good faith," the Ninth Circuit has clarified that "[a] plan is proposed in good faith where it achieves a result consistent with the objectives and purposes of the Code." Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.), 314 F.3d 1070, 1074 (9th Cir. 2002). As the Supreme Court has explained, the "policy of Chapter 11 is to permit successful rehabilitation of debtors," thereby enabling a troubled enterprise to operate successfully in the future. See National Labor Relations Board v. Bildisco and Bildisco, 465 U.S. 513, 527 (1984); see also United States v. Whiting Pools, Inc., 462 U.S. 198, 204 (1983). "By permitting reorganizations, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners," as well as to maximize the value of the bankruptcy estate for such creditors and owners. See Whiting Pools, Inc., 462 U.S. at 204; Toibb v. Radloff, 501 U.S. 157, 163 (1991).

The Section 1129(a)(3) good faith determination is based on the "totality of the circumstances" and "bankruptcy courts should determine a Debtor's good faith on a case-by-case basis, taking into account the particular features of each . . . plan." See Sylmar Plaza, L.P., 314 F.3d at 1074-1075. The second prong of Section 1129(a)(3) requires that the Plan "not be proposed by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The term "law" as used in this section, includes state law, and applies not to the substantive provision of a plan itself, but rather to the means employed in proposing a plan. See In re Food City, Inc., 110 B.R. 808, 810 (Bankr. W.D. Tex. 1990).

Debtor commenced its Chapter 11 Case in order to maintain its operations and to preserve and enhance the value of its Real Property for all of Debtor's creditors through a Court-ordered restructuring. Consistent therewith, the Plan provides for the continued operation of the

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Real Property and the restructuring of Debtor's debts, with Debtor's creditors receiving full repayment of the Allowed Claims. Therefore, not only does the Plan provide fundamental fairness to all creditors, it has been proposed in good faith and consistent with the policy and goals of Chapter 11 as enunciated by the Supreme Court. See National Labor Relations Board, 465 U.S. at 527 ("policy of Chapter 11 is to permit successful rehabilitation of debtors"); see also Whiting Pools, Inc., 462 U.S. at 204 ("By permitting reorganizations, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners….").

Moreover, pursuant to the Stipulation, Secured Lender agreed that "whether the Debtor has satisfied section 1129(a)(3) of the Bankruptcy Code (good faith) will not be challenged by Wells Fargo." See Stipulation, § 2.9. In addition, no other party has formally or informally expressed an objection to confirmation of the Plan based upon it being proposed in a manner contrary to the good faith requirement or by means forbidden by law.

To the extent that a formal objection is not raised prior to confirmation, the Court determines this issue pursuant to Bankruptcy Rule 3020. See Fed. R. Bankr. P. 3020(b)(2) ("If no objection is timely made, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues."). Accordingly, the Plan satisfies Section 1129(a)(3).

E. Section 1129(a)(4): Payments for Services.

Section 1129(a)(4) requires that all payments of professional fees made from estate assets be subject to review and approval by the court. Consistent therewith, the Plan provides that all pre-Effective Date fees and expenses of professionals retained by Debtor, as well as all other accrued fees and expenses of professionals through the Effective Date, remain subject to final review by the Court for reasonableness pursuant to Section 330. See Plan §§ 2.2 and 2.2.1. As such, the foregoing procedures for the Court's review and ultimate determination of the fees and expenses to be paid by Debtor satisfy the objectives of Section 1129(a)(4). See In re Elsinore Shore Assocs., 91 B.R. 238, 268 (Bankr. D.N.J. 1988) (holding that the requirements of Section

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1129(a)(4) were satisfied where the plan provided for payment of only "allowed" administrative expenses). As a result, the Plan satisfies Section 1129(a)(4).

F. Section 1129(a)(5) & Section 1123(a)(7): Management and Insiders.

Secured Lender objects to confirmation of the Plan on the basis that the Plan fails to meet the requirements of Section 1129(a)(5) and Section 1123(a)(7). See Objection, at pp. 10-12. Specifically, 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." See id. at pp. 10-11.

Section 1129(a)(5)[5] and Section 1123(a)(7)[6] set forth the plan requirements that concern management of the reorganized debtor that, when taken together,[7] 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 and Secured Lender raised no issue at that time. See Initial Plan, § 5.5; ECF Nos. 105 & 195. Additionally, in confirming the Beltway Plan, this Court found substantially similar disclosures and

[5] 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).

[6] 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).

[7] As stated previously, this section provides a joint analysis of Debtor's fulfillment of Sections 1129(a)(5) and 1123(a)(7) as there is substantial conceptual overlay between the two provisions.

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management (as Nigro Development is also the manager of Beltway One Management Group, LLC) to satisfy the requirements of Section 1129(a)(5) and (a)(7).

In any event, such arguments are without merit as the Plan not only meets the management disclosure requirements, but also proposes management that is absolutely in the best interest of Debtor's Creditors and Equity Security Holders alike (as required under the Bankruptcy 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, 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 Plan § 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 Disclosure Statement, at p. 19, ll. 11.

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

- The Confirmation 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 equivalent to 4% of Debtor's gross revenues. 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* [ECF No. 51] and furthermore the Property Management expense set forth in the Projections attached as Exhibit 2 to the Disclosure Statement.

Based on the foregoing, Debtor indisputably meets the requirement under Section 1129(a)(5) to disclose the identity and affiliations of the proposed post-Effective Date management of Reorganized Debtor, and the nature of the compensation of the proposed post-

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Effective Date management. Thus, Secured Lender's accusation that "[t]he Debtor has failed to disclose *with any precision* the identity and affiliations of the insiders who will run the Debtor and their compensation structure, which appears to depend on equity distributions[,]" see Objection, at p. 11 (emphasis added), completely disregards the abundant information that Debtor has provided regarding the management, not only in connection with the Plan, but throughout the Chapter 11 Case.

Accordingly, Debtor has fulfilled the disclosure requirements of Section 1129(a)(5), and thus, the Plan should be confirmed.

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

Moving next to evaluate whether the proposed management is consistent with interests of *both* creditors and equity security holders alike, as well as public policy, Debtor submits that maintaining Nigro Development as its post-Effective Date manager, without a doubt, meets the requirements of Sections 1129(a)(5) and 1123(a)(7).

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 appointment of Nigro Development as Debtor's post-Effective Date manager. Secured Lender specifically laments that "Debtor's proposed management is the single largest equity security holder, refuses to provide any reasonable safeguards for Wells Fargo's cash collateral, and would have unfettered discretion to make distributions to itself" under the terms of the Plan. See id. In other words, Secured Lender would have this Court conclude that Nigro Development would intentionally threaten Secured Lender's collateral position even to its own detriment. Such unsubstantiated contention, which defies both logic and precedent, must be disregarded. Secured Lender's argument is – at bottom – nothing more than a shrouded attempt by Secured Lender to get what it wants – stay relief and unfettered access to the Real Property and Debtor's cash.

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,

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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 specifically. See Confirmation Decl. ¶¶ 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.[8] 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 our 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 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 Confirmation Decl. ¶ 12, n. 2. As testament to the benefit that Debtor has received under Nigro Development's management,

[8] For a list of example properties, see paragraph 16 of the Nigro Declaration.

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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 accordance with its monthly payment obligations under the Secured Note, as well as accumulated a substantial sum of cash, thereby putting Debtor in nearly the same cash position (after payment of Plan obligations) as it was in 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.

Thus, contrary to Secured Lender's unfounded and unsubstantiated assertions, the continuance of Nigro Development, as Debtor's post-Effective Date manager, meets 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. 11. However, such argument is entirely inconsistent with applicable law.

As cited by Secured Lender, *In re 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 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:

(1) Does the proposed plan, if confirmed, keep the debtor in existence as an ongoing company or is the debtor extinguished?

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(2) Is the debtor a publicly-held or a privately-held company?

(3) Does continued service of the individual perpetuate incompetence, lack of direction, inexperience, or affiliations with groups inimical to the best interests of debtor?

(4) Does the continued service of the individual provide adequate protection of all creditors and equity security owners?

(5) Does the retention of the individual violate state law in any respect?

(6) Is the individual a "disinterested person"?

(7) Is the individual capable and competent to serve in the proposed capacity assigned to him?

(8) 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?

(9) Are they 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 Confirmation Decl. ¶ 4. Debtor is a privately-held company whose Equity Security Holders determined at the time of its inception that Nigro Development should be vested with 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 ECF No. 51, at Ex. 1. Nigro Development is 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, due to the fact that Nigro Development has demonstrated a conservative

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management approach, one that prevented Debtor from ever missing a monthly payment pre-petition, and that permitted Debtor to make all of its Adequate Protection Payments throughout the Chapter 11 Case, and further has demonstrated 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 Equity Security Holders' interest, Debtor's proposed management adequately protects all of Debtor's Creditors and Equity Security Holders.

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

G. Section § 1129(a)(6): Regulatory Approvals.

Section 1129(a)(6) is inapplicable in the instant case because Debtor does not charge rates that are regulated by a governmental agency. Moreover, no party has objected to confirmation of the Plan on these grounds.

H. Section § 1129(a)(7): Best Interests Test.

Section 1129(a)(7) requires that a plan be in the best interests of creditors and interest holders, and specifically, that each holder of an impaired claim has either accepted the plan, or "will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date." 11 U.S.C. § 1129(a)(7)(A)(i) and (ii). In order to satisfy the "best interest test," the court must find that each dissenting creditor will receive or retain value, as of the effective date of the plan, that is not less than the amount it would receive if the debtor were liquidated. See Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 761 (Bankr. S.D.N.Y. 1992).

Each Holder of an Allowed Claim or Equity Security in an impaired Class will receive or retain under the Plan property of a value, as of the Effective Date of the Plan, that is equal to or greater than the amount that such Holder would receive or retain if Debtor were liquidated under Chapter 7 of the Bankruptcy Code. Specifically, under the Plan, *all* Allowed Claims are repaid in full and Classes 1 and 4 will be repaid in full with interest. See Plan § 4. As Secured Lender,

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the only creditor voting to reject the Plan, does not dispute that the Plan satisfies Section 1129(a)(7)'s best interest test and as the undisputed evidence demonstrates that Secured Lender will receive value as of the Effective Date that is not less than the amount it would receive if Debtor were liquidated, Debtor submits that the Plan satisfies Section 1129(a)(7).

I. 11 U.S.C. § 1129(a)(8): Class Acceptance.

Section 1129(a)(8) requires that each class of claims and interests either has accepted a plan or is not impaired under a plan. See 11 U.S.C. § 1129(a)(8). Whether a class of claims is impaired is governed by Section 1124 and whether a class of claims has accepted a plan is determined by reference to Section 1126. See 11 U.S.C. §§ 1124 and 1126.

Classes 2, 3, and 5 are all Unimpaired and thus deemed to have accepted the Plan pursuant to Section 1126(f). See 11 U.S.C. § 1126(f). The only Impaired Classes entitled to vote on the Plan are Classes 1 and 4. As stated in the Ballot Summary [ECF No. 410], Class 1, which Class is solely comprised of the Secured Lender Claim, voted to reject the Plan. Class 4 voted to accept the Plan. As such, cramdown of the Plan pursuant to Section 1129(b) is requested as to Class 1, which is discussed below.

J. 11 U.S.C. § 1129(a)(9): Priority Claims.

Section 1129(a)(9) encompasses several requirements concerning the payment of unsecured claims entitled to priority distribution pursuant to Section 507(a). See 11 U.S.C. § 1129(a)(9). No party has objected to confirmation on the basis that the Plan fails to satisfy Section 1129(a)(9).

In accordance with Sections 1129(a)(9)(A), (B), and (C), Section 2.2 of the Plan provides for the full payment of all Allowed Administrative Claims and Section 4.3 of the Plan provides for full payment of all Allowed Priority Claims. Additionally, pursuant to Section 2.2.1 of the Plan, all requests for payment of Administrative Claims against Debtor and all final applications for allowance and disbursement of Professional Fees must be filed by the Administrative Claims Bar Date (e.g., sixty (60) days after the Effective Date of the Plan). As such, the Plan satisfies the requirements of Section 1129(a)(9).

. . .

K. 11 U.S.C. § 1129(a)(10): One Consenting Impaired Class.

Section 1129(a)(10) requires that "[i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by an insider." 11 U.S.C. § 1129(a)(10). As Class 4, which does not include "insiders" as that term is defined in Section 101(31), voted to accept the Initial Plan and is deemed to have accepted the Plan, the Plan satisfies Section 1129(a)(10).

L. 11 U.S.C. § 1129(a)(11): Feasibility.

1. Section 1129(a)(11)'s Feasibility Requirement Serves to Prevent Visionary Schemes.

Section 1129(a)(11) requires that a proposed plan be feasible. Specifically, Debtor must establish that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11).

"The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.), 761 F.2d 1374, 1382 (9th Cir. 1985).

This Court has explained the feasibility test as follows:

> The feasibility test set forth in § 1129(a)(11) requires the court to scrutinize the plan to determine whether it offers a reasonable prospect of success and is workable. The debtor must present ample evidence to demonstrate that the plan has a reasonable probability of success. Success need not be guaranteed. The mere potential for failure of the plan or the prospect of financial uncertainty is insufficient to disprove feasibility.
>
> While a reviewing court must examine the totality of the circumstances in order to determine whether the plan fulfills the requirements of § 1129(a)(11), only a relatively low threshold of proof is necessary to satisfy the feasibility requirement. The key element of feasibility is whether there exists a reasonable probability that the provisions of the plan of reorganization can be performed. However, where the financial realities do not accord with the proponent's projections or where the projections are unreasonable, the plan should not be confirmed.
>
> . . .

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> The traditional factors which have evolved to aid the bankruptcy court in a feasibility analysis include: (1) the adequacy of the capital structure; (2) the earning power of the business; (3) economic conditions; (4) the ability of management; (5) the probability of the continuation of the same management; and (6) any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan. . . . This list of factors is neither exhaustive nor exclusive.

In re Sagewood Manor Assocs. Ltd. P'ship, 223 B.R. 756, 761-62 (Bankr. D. Nev. 1998); see also Computer Task Group, Inc. v. Brotby (In re Brotby), 303 B.R. 177, 191 (B.A.P. 9th Cir. 2003) ("The Code does not require the debtor to prove that success is inevitable [citation omitted], and a relatively low threshold of proof will satisfy § 1129(a)(11)…."); Acequia, Inc. v. Clinton (In re Acequia, Inc.), 787 F.2d 1352, 1364 (9th Cir. 1986) (affirming plan confirmation over feasibility objection and stating that the debtor presented evidence to demonstrate that the proposed plan "has a reasonable probability of success," thereby satisfying the feasibility test); *Memorandum on Confirmation*, In re Rainbow 215, LLC, US Bankruptcy Court for the District of Nevada, Case No. 09-23414, ECF No. 323 (filed March 25, 2011) ("Generally speaking, the debtor's threshold to demonstrate the feasibility of a plan is relatively low.").

2. The Plan is Feasible.

No party has raised any objection to confirmation of the Plan on the basis of feasibility. In fact, Secured Lender stipulated that for the purposes of Plan confirmation, "whether the Debtor has satisfied section 1129(a)(11) of the Bankruptcy Code (feasibility) will not be challenged by Wells Fargo." See Stipulation § 2.8. Acknowledging the independent duty of the Court to determine feasibility, the two issues which the Court should consider in this regard are, first, can Debtor meet the payment requirements under the Plan, and second, will Debtor be able to pay Secured Lender at the Maturity Date?

Debtor's property is 88.5% leased and Debtor presently possesses cash reserves of over $1.8 Million.[9] As evidenced by the Plan Projections, Debtor will not only be able to meet its monthly debt service, but anticipates that it can increase its excess cash balance to in-excess-of $2.7 Million by the Maturity Date. By the Maturity Date, Debtor will have also repaid in excess

[9] See ECF No. 398.

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of $1.3 Million in principal under the Amended and Restated Note. Thus, Debtor can meet its payment requirements under the Plan.

Furthermore, within the last year, Debtor was approached by an interested purchase that provided a letter of intent to purchase the Real Property for $14.9 Million, further establishing that by the Maturity Date, Reorganized Debtor will be able to refinance or sell the Real Property for in excess of the then-outstanding principal balance under the Amended and Restated Note, which is expected to be less than $10 Million as of the Maturity Date. See Confirmation Decl. ¶ 56.

M. 11 U.S.C. § 1129(a)(12): U.S. Trustee's Fees Paid.

Section 1129(a)(12) requires that all fees payable under 28 U.S.C. § 1930, as determined by the Court at the Confirmation Hearing, be paid or provided for in the Plan. In the instant case, all fees payable pursuant to 28 U.S.C. § 1930 will be paid as a condition to the Effective Date of the Plan as Administrative Claims pursuant to Sections 1.1.2 and 2.2 of the Plan. As such, the Plan satisfies Section 1129(a)(12).

N. 11 U.S.C. §§ 1129(a)(13) Through (a)(16): Miscellaneous Inapplicable Provisions.

There are no retiree benefits, as that term is defined in Section 1114, in controversy in this Chapter 11 Case, and thus Section 1129(a)(13) is inapplicable. Second, Debtor is not required or obligated on any domestic support obligation, and thus Section 1129(a)(14) is inapplicable. Third, Debtor is not an individual, and thus Section 1129(a)(15) is inapplicable. Fourth, Debtor is a moneyed, business and commercial entity, not an eleemosynary organization, and thus Section 1129(a)(16) is inapplicable.

O. "Cramdown" of the Plan Is Available Pursuant to Section 1129(b).

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 voted to accept the Plan, Class 1 may be "crammed down" pursuant to Section 1129(b).

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1. The Plan's Treatment of the Secured Lender Claim is "Fair and Equitable" Pursuant to Section 1129(b)(2)(A).

The Bankruptcy 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.

11 U.S.C. § 1129(b)(2)(B).

Thus, Section 1129(b)(2)(A)(i) essentially permits a plan proponent to unilaterally write a new loan. Pursuant to such authority, as long as the holder of the affected secured claim "retain[s] the lien securing [its] claims[,]" and also receives "deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan," a court may determine such cramdown to be "fair and equitable" as against the dissenting secured creditor. Accordingly, the statute requires that secured creditors receive a stream of payments over time equal to the "present value" of the allowed amounts of the secured creditors' claims.

As the Plan provides that Secured Lender retains its Lien in the Real Property consistent with the applicable Loan Documents until such Claim is repaid in full, the first prong of the "fair and equitable test" is satisfied. See Plan § 4.1.1(b).

The second prong of the "fair and equitable test" requires a determination of the "present value," a term which reflects the "time value of money," and requires the court to determine "the appropriate rate [of interest] which will serve as the measuring standard by which to determine whether deferred payments under the terms of [a] plan have a value as of the effective date of the plan equal to the allowed claim." See 7 COLLIERS ON BANKRUPTCY ¶ 1129.05[2].

In the Memorandum Decision relating to the Initial Plan, this Court determined that an interest rate of 4.25% accommodates the cramdown risk associated with the treatment of the Secured Lender Claim, which interest rate analysis took into consideration that the Initial Plan

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did not impose restrictions on Debtor's control and use of its cash (i.e. there was no lockbox, no cash sweep in favor of Secured Lender, and no prohibition on the Reorganized Debtor's ability to make distributions) and that the Initial Plan eliminated financial covenants. Thus, 4.25% is appropriate under Section 1129(b)(2)(A)(i) for the fair and equitable treatment of the Secured Lender Claim.

Additionally, for the purposes of the Confirmation Hearing, Secured Lender and Debtor have stipulated that this same interest rate (4.25%) satisfies the "market rate of interest" requirement of Section 1129(b)(2)(A)(i). See Stipulation § 2.4. Thus, the Plan's treatment of the Secured Lender Claim meets the second prong of the "fair and equitable" test under the terms of the Plan.

The Plan also provides fair and equitable treatment of the Secured Lender Claim as, among other reasons: (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 Confirmation Decl. ¶ 61. Notably, similar terms and circumstances were found to satisfy the fair and equitable test in the Beltway Case.

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2. Secured Lender's Argument that the Plan Does Not Meet the "Implicit Fairness" Test Fails.

Secured Lender contends that regardless of the "specific requirements" of Section 1129(b)(2)(A), the Plan fails Section 1129(b)'s general "fair and equitable" test as a result of the lack of restrictions on Reorganized Debtor's post-Effective Date use of cash and the removal of certain financial covenants. See Objection, at pp. 7-9. In addition to the fact that such arguments lack merit for the reasons discussed herein, 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).[10] 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. Debtor's Plan is not a negative amortization 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 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, has been 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) to the extent that any "implicit" fairness test attempts to graft the absolute priority requirement onto repayment of secured creditors, which absolute priority requirement applies only to *unsecured* creditors.

[10] 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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Thus, the authority cited by Secured Lender fails to actually support the propositions asserted by Secured Lender.

a. The Plan properly excludes restrictions on Reorganized Debtor's use of cash.

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 the 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 Bankruptcy 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.

Further, Secured Lender's exaggerated concern over Debtor's use of the cash – which pervades the entirety of the Objection – 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 Confirmation Decl. ¶ 76. "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," which is evidenced by the fact that Debtor had over $1 Million in its accounts on the Petition Date. See id. ¶ 77.

b. Without the removal of certain loan covenants, Reorganized Debtor would be in default under the Loan Documents and/or unable to reorganize.

Secured Lender next argues that the Plan proposes to "gut all 'financial covenants' in loan documents, which are standard protections provided to all lenders in commercial transactions." See id. Secured Lender further concludes that "[t]he Debtor's attempt to strip

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these covenant protections further increases the risk shifted to Wells Fargo and is in contravention of well-reasoned case law to the contrary." See id. Once again, it must be noted that these very proposed deletions from the Loan Documents were provided for in the Initial Plan and were not an issue with which the Court had objection. In fact, 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. Further, the Beltway Plan contains identical language regarding the removal of financial covenants and this Court found the provision to be appropriate and confirmed the Beltway Plan over Secured Lender's objection. See ECF No. 320 in the Beltway Case, at p. 14:23-15:2 (citing In re Bashas' Inc., 437 B.R. 874, 925 (Bankr. D. Ariz. 2010)).

To support its broad assertion, Secured Lender cites *P.K. Keating, Co*. See Opposition, at p. 8 (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 only 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 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

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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 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). In contrast to Secured Lender's portrayal of Debtor's "gutting" of the loan covenants, as set forth in the Confirmation Declaration, Debtor has proposed the removal of only the following loan covenants:[11] (i) the Lease Covenant; (ii) the Cross Default Covenant; (iii) the Loan-To-Value Covenant; and (iv) the Material Adverse Change Covenant. See Confirmation Decl. ¶¶ 62-72. 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. There is no

[11] The Confirmation Declaration includes a detailed statement identifying which of the covenants Debtor proposes to eliminate and which will remain. See Confirmation Decl. ¶¶ 62 - 70.

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mechanism for Debtor to challenge the validity of the valuation or to obtain its own valuation. 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 conceivably be triggered immediately after the Effective Date, unduly impairs Debtor's ability to reorganize.

As set forth in detail in the Confirmation Declaration, each of the stricken financial convents materially impairs Debtor's ability to reorganize. 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.

Moreover, 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. As such, the Court should find that the Plan meets Section 1129(b)'s fair and equitable test.

P. If Necessary, Non-Material Plan Modifications Are Permitted.

Section 1127(a) allows for plan modifications, and Bankruptcy Rule 3019(a) establishes the procedural requirements for plan modifications pre-confirmation. See 11 U.S.C. § 1127(a); Fed. R. Bankr. P. 3019(a). Plan modifications do not require a new disclosure statement and court approval unless the modifications are material. See In re Simplot, No. 06-00002, 2007 WL 2479664, at *11 (Bankr. D. Idaho Aug. 28, 2007) (citing In re Downtown Inv. Club III, 89 B.R. 59, 65 (B.A.P. 9th Cir. 1988)). The word "material" in this context has been described as "so affect[ing] a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance." Id. (quoting In re Am. Solar King Corp., 90 B.R. 808, 824 (Bankr. W.D. Tex. 1988)). To the extent any plan modifications are

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needed, they will not be material, such that they would cause a creditor who voted to accept the plan to reconsider its acceptance.

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 24th day of April, 2015.

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