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9 **UNITED STATES BANKRUPTCY COURT**  
 10 **FOR THE DISTRICT OF NEVADA**

11 In re:  
 12 HORIZON VILLAGE SQUARE LLC,  
 13 Debtor.

Case No.: 11-21034-MKN  
 Chapter 11  
Confirmation Hearing:  
 Date: April 28, 2015  
 Time: 9:30 a.m.

14  
 15 **DECLARATION OF TODD NIGRO IN SUPPORT OF CONFIRMATION OF**  
 16 **DEBTOR'S AMENDED PLAN OF REORGANIZATION**

17 I, Todd Nigro, hereby declare as follows:

18 1. I am over the age of 18 and am mentally competent and I make this declaration in  
 19 support of confirmation of *Debtor's Amended Plan of Reorganization* [ECF No. 403] (the  
 20 "Plan").<sup>1</sup>

21 2. My role with Horizon Village Square LLC ("Debtor") is set forth with  
 22 particularity below; however, in summary, I have been involved with Debtor since its inception  
 23 as the co-manager of Nigro Development LLC ("Nigro Development"), which manages Debtor.  
 24 As such, except as otherwise indicated, all of the facts set forth in this declaration are based upon  
 25 my personal knowledge of Debtor's operations and finances, information gained from my review  
 26 of relevant documents, and information supplied to me by other members of Debtor's

27  
 28 <sup>1</sup> Capitalized terms not otherwise defined herein shall have the same meaning as set forth in the Plan.

1 management and Debtor's business and legal advisors. If called upon to testify as to the content  
2 of this declaration, I could and would do so.

3 **A. Horizon Village Square Shopping Center.**

4 3. Debtor owns and operates the Horizon Village Square Shopping Center located  
5 near the intersection of the I-95 and Horizon Ridge Parkway, and having local street addresses of  
6 25, 35, 55, 65, and 75 East Horizon Ridge Parkway, Henderson, Nevada, 89012, APNs 179-30-  
7 214-002 and 179-30-114-008 (the "Real Property").

8 4. Constructed in 2006, the Horizon Village Square Shopping Center is comprised of  
9 five multi-tenant retail buildings and is anchored by a Vons, which is under separate ownership.  
10 The Horizon Village Square Shopping Center, which is situated on 6.43 net acres and consists of  
11 approximately 42,845 sq. ft. of net rentable building area, is located in a largely residential  
12 neighborhood and provides the only grocery store within a several mile radius, thereby resulting  
13 in the Horizon Village Square Shopping Center being heavily utilized by the surrounding  
14 residents.

15 5. Due to its superior quality and location, the fact that it is anchored by Vons, the  
16 quality of the other tenants, the Horizon Village Square Shopping Center is 88.5% leased, with  
17 twenty tenants. The tenants are GNC, Weight Watchers, Sloppy Kisses, Wells Fargo Bank,  
18 Liberty Tax, PostNet, Kailey Smokes & Gifts, Al Phillips the Cleaner, Valerie's Paw Spa, Dr.  
19 Robert Pham DDS, Great Clips, Meehan, Inc. (dba Koko Fit Club), Avenue Nails, Blazing  
20 Wings, Inc., Simple Computer Repair, Café Rio, Family ATA Martial Arts, Grand China, Cold  
21 Stone Creamery, and Subway.

22 6. Pre- and post-petition, the rental income from these tenants generated sufficient  
23 monthly revenue to permit Debtor to satisfy not only its operating expenses, but also its monthly  
24 debt service to Secured Lender.

25 7. On the Petition Date, Debtor had \$1.04 Million in available cash.

26 8. As of the filing of this declaration, Debtor has increased its available cash to over  
27 \$1.8 Million (a +\$700,000 increase) after paying all of its post-petition operating expenses and  
28 tendering Adequate Protection Payments to Secured Lender.

1 9. Since the Petition Date, Debtor has tendered more than \$800,000 in Adequate  
2 Protection Payments to Secured Lender, which payments exceed the accrued post-petition  
3 interest at the contract rate.

4 **B. Debtor's Ownership and Management Bring a Wealth of Knowledge and**  
5 **Experience to Debtor.**

6 10. Debtor is a Nevada limited liability company owned by: (i) the 1990 Nigro Trust;  
7 (ii) Nigro Development, (iii) Omega Industries, Inc., (iv) Hi-Gear Development LLC; (v)  
8 Christopher J. Hukill Revocable Living Trust; (vi) Robert & Jennifer Munakash; and (vii) Aleco  
9 Enterprises, Inc.

10 11. Hi-Gear Development LLC, Christopher J. Hukill Revocable Living Trust, Robert  
11 and Jennifer Munakash and Aleco Enterprises, Inc. are all third-party investors unrelated to me  
12 or my family.

13 12. Prior to the Petition Date and throughout the Chapter 11 Case, Debtor has been  
14 managed by Nigro Development. My brother, Michael Nigro, and I are co-owners of Nigro  
15 Development, Nigro Construction, Inc. ("Nigro Construction"), and Nigro Management LLC  
16 dba Nigro Properties ("Nigro Management"), which we founded in 2000. For our entire adult  
17 lives, Michael and I have developed, constructed, and managed a wide-array of real estate  
18 projects in Nevada. We handle all aspects of development, including financing, design,  
19 construction, and management, with integrity and professionalism.

20 13. In 1990, I graduated from the University of Southern California with a degree in  
21 business administration. Following graduation, I worked for two years as a financial analyst in  
22 corporate finance for Salomon Brothers, an investment banking firm located in Los Angeles,  
23 California. I subsequently returned to Las Vegas to work with my father and my brother.

24 14. Prior to founding Nigro Development, Nigro Construction, and Nigro  
25 Management, I served as the Chief Financial Officer and Michael served as the Director of  
26 Construction for Nigro Associates, a commercial and residential development company founded  
27 by our father, Edward Nigro, in 1979. As Chief Financial Officer, I oversaw the financing and  
28 development of Nigro Associates' projects.

1 15. Nigro Development, together with its affiliates, specializes in developing,  
2 constructing, and managing commercial real estate primarily in the Las Vegas market, including  
3 residential developments, high rise, “flex” and industrial projects, retail buildings, hospitality  
4 projects, master planned business parks, professional office complexes, and medical centers.  
5 Detailed below are summaries of the recent developments completed by Nigro Development.

6 16. Nigro Development’s recent developments, in addition to Debtor, include:

7 a. Desert Canyon Business Park: The Desert Canyon Business Park is a 15  
8 acre master-planned business park located on the corner of Russell Road and the I-215  
9 beltway. Nigro Development has completed 180,000 square feet with an estimated value  
10 in excess of \$35 Million. Nigro Development has been able to create an efficient,  
11 architecturally diverse, investment grade environment that has a broad appeal. The  
12 Desert Canyon Business Park includes the corporate headquarters for the following  
13 companies: Bank of George, Anthem Blue Cross/Blue Shield, Beazer Homes, Cannery  
14 Resorts, JW Advisors, and Nigro Development.

15 b. Rhodes Ranch Town Center: Rhodes Ranch Town Center is a 250,000  
16 square foot Von’s anchored shopping center situated on 25 acres of property located on  
17 Durango Drive and Warm Springs Road at the entrance to the Rhodes Ranch Master  
18 Planned Community. The shopping center was opened in 2004 at a cost in excess of \$35  
19 Million. The shopping center includes many national brands such as Bank of America,  
20 Buffalo Wild Wings, Great Clips, AAA, and American Family Insurance.

21 c. Siena Town Center: Siena Town Center is a 120,000 square foot Smith’s  
22 anchored shopping center situated on 15 acres of property located on Tropicana Avenue  
23 and Hualapai Way at the entrance to the Siena Master Planned Community. The  
24 shopping center opened in 2002 at a cost in excess of \$20 Million. In addition to Smith’s  
25 Food and Drug, the center includes Wells Fargo, Great Harvest Bread Co., and State  
26 Farm, among others.

27 d. Park Central Plaza Shopping Center: Park Central Plaza Shopping Center  
28 is a 200,000 square foot Wal-Mart anchored shopping center situated on 30 acres located

1 on Ann and Losee Roads. The shopping center opened in 2008 at a cost in excess of \$25  
2 Million. In addition to Wal-Mart, the center includes, among others, Wells Fargo,  
3 McDonald's, Kentucky Fried Chicken, and Checker Auto Parts.

4 e. Desert Canyon Rehabilitation Hospital: The Desert Canyon Rehabilitation  
5 Hospital is a state of the art medical facility featuring technically advanced equipment  
6 and customized physical therapy techniques. The facility is over 50,000 square feet and  
7 is situated on 4 acres of property located on Oquendo Road, one-half mile west of Russell  
8 Road and the I-215 beltway. The facility was completed in 2007 at a cost in excess of  
9 \$20 Million.

10 f. The Place @ Seven Hills: The Place @ Seven Hills is a mixed use retail  
11 and hospitality development situated on 9 acres at the corner of St. Rose Parkway and  
12 Seven Hills Drive in Henderson. The development includes two hotels, a Hampton Inn &  
13 Suites by Hilton and a Fairfield Inn & Suites by Marriott, with 250 total rooms, two  
14 multi-tenant retail buildings totaling approximately 20,000 square feet, the Bank of  
15 George Henderson headquarters, and Remedy's, an upscale restaurant/tavern. The  
16 development was completed in 2009 with a value in excess of \$50 Million.

17 g. Siena Suites: Siena Suites is a 600 room upscale extended stay hotel  
18 located on the corner of Russell Road and Boulder Highway. The property includes one  
19 and two bedroom suites, two pools, and exercise facility and a conference room. The  
20 success of Siena Suites is its appeal to business, leisure, and military travelers.

21 17. In all of the foregoing developments, Nigro Development was responsible for the  
22 following:

23 a. Creation of the concept for each of the properties. The focus is always on  
24 the highest and best use, which has resulted in architecturally diverse projects with a high  
25 probability of success.

26 b. All developments activities. This includes site selection, coordination of  
27 architecture and engineering, estimating/budgeting, entitlements, and securing the  
28 necessary equity and debt financing.

1 c. Design/Build Construction Services. Nigro Construction is responsible  
2 for constructing the developments. This includes administering the architecture and  
3 engineering contracts, providing construction management services, and contracting with  
4 all sub-contractors

5 d. Operations. Nigro Development, through its wholly owned affiliates,  
6 including Nigro Management, and through contracts with third party management  
7 companies, oversees all management activities for the properties it develops. Nigro  
8 Development, through Nigro Management and its other affiliates, only provides  
9 operational and management services to properties it owns thus always maintaining its  
10 focus on developing and maintaining the value of the projects it creates.

11 e. Nigro Management currently provides property management services for  
12 all of Nigro Development's existing projects, except the two hotels, which engage third-  
13 party property management companies that specialize in hotel operations.

14 18. Michael and I, thus, bring to Debtor knowledge regarding: (i) all facets of  
15 construction and development of real estate in the Las Vegas area; (ii) the Las Vegas residential  
16 and commercial real estate industries; (iii) property valuations in the Las Vegas area real estate  
17 market; (iii) the financing obtained for our prior and existing projects; (iv) property management  
18 and leasing; and (v) successful management strategies within the unique Las Vegas area market.  
19 In addition, as natives and lifelong businessmen in Las Vegas, I believe that we have developed  
20 strong relationships with local government, the Las Vegas business community, other real estate  
21 developers, brokers, investors, and lending institutions that provide incomparable value to  
22 Debtor.

23 19. Testament to the knowledge, skill, experience, and relationships that my brother  
24 and I, through Nigro Development, and the other individuals comprising Debtor's management  
25 team, have brought specifically to Debtor, are the facts that:

26 a. As set forth herein in more detail, Debtor generated sufficient revenue to  
27 make each and every monthly payment due under the Secured Note prior to its maturity  
28

1 date despite the global economic recession that, by 2009, had severely affected the Las  
2 Vegas economy and decimated the local real estate market.

3 b. As also set forth herein in more detail, since the commencement of the  
4 Chapter 11 Case, Debtor has not only generated sufficient revenue to tender monthly  
5 adequate protection payments to Secured Lender in accordance with its monthly payment  
6 obligations under the Secured Note, but, as of the Confirmation Hearing, Debtor will  
7 have in excess of \$1.8 Million after tendering all of its post-petition operating expenses  
8 and Adequate Protection Payments.

9 c. All seven tenants whose leases terminated in 2011 renewed their leases for  
10 an additional five-year term. Additionally, despite Debtor's pending Chapter 11 Case, I  
11 have successfully increased the occupancy of the Real Property with excellent tenants.

12 20. For the corporate management services that Nigro Development provides Debtor,  
13 other than the development fee, which was paid years prior to the Petition Date, Nigro  
14 Development does not receive any compensation for its services beyond expense  
15 reimbursements. Nigro Development's compensation as manager of Debtor was initially set  
16 forth in the terms of the *Operating Agreement of Horizon Village Square, LLC*, as amended (the  
17 "Operating Agreement"), which provides as follows:

18 The Managers<sup>[2]</sup> shall not be entitled to any compensation for their services to the  
19 Company except as set forth in this Section 3.3 hereinbelow and except that the  
20 Managers shall be reimbursed or have paid directly by the Company all direct  
21 out-of-pocket expenses incurred by either of them respectively for the benefit of  
22 the Company; provided, however, that except to the extent provided for under the  
23 agreement referred to in clause (ii) of this Section 3.3 hereinbelow, the Operations  
24 Manager<sup>[3]</sup> and its Affiliates shall not be reimbursed by the Company for its  
25 overhead expenses or for salaries paid to their respective personnel. Notwithstanding anything to the contrary, the Operations Manager shall receive the Development Fee of 2.5% of the Development Costs and may: (i) from time to time designate an Affiliate of its to serve as the Property Manager in respect of which services in managing the Property such Affiliate shall receive fees equal to

26 <sup>2</sup> Under the terms of the Operating Agreement, Nigro Development initially shared the management responsibilities  
27 with Nigro Inc. Pursuant to the terms of the *First Amendment to Operating Agreement of Horizon Village Square, LLC*  
dated February 5, 2008, Nigro Development assumed the role as sole manager of Debtor.

28 <sup>3</sup> Under the terms of the Operating Agreement, the "Operations Manager" is Nigro Development.

1 15% of all Triple-Net Charges<sup>4</sup> incurred by the Company, whether or not  
2 reimbursement for such Triple-Net Charges is collected by the Company; (ii)  
3 designate an Affiliate to serve as the contractor in developing the Property  
4 pursuant to an agreement substantially in the form of Exhibit “C” attached hereto;  
5 (iii) from time to time designate a duly licensed Affiliate to serve as the leasing  
6 and sales broker for the Property, in respect of which activities such Affiliate shall  
7 receive brokerage commissions equal to \$4.00 per square foot of leased space in  
8 respect of the Company’s leases if no co-broker is utilized or \$2.00 per square  
9 foot of leased space if a co-broker is utilized and 5% of the gross amounts of the  
10 Company’s sales (as the case may be) if no co-broker is utilized in a sale  
11 transaction or 2.5% of the gross amounts of the Company’s sales (as the case may  
12 be) if a co-broker is utilized in a sale transaction; provided, however, that the  
13 payment schedule for any such brokerage commissions to Affiliates of the  
14 Operations Manager shall be consistent with customary practice, except that  
15 commissions to such Affiliates in connection with sales shall only be paid upon  
16 consummation of such sales; and (iv) directly itself or from time to time through  
17 an Affiliate maintain the Company’s books and records, in respect of which  
18 services the Company shall monthly pay a fee of \$250.

12 21. Following the execution of the Operating Agreement, Debtor adjusted the  
13 compensation that would be paid to a Property Manager to make the rates consistent with market  
14 conditions, which changed dramatically since Debtor’s inception. Instead of 15% of the Triple  
15 Net Charges contemplated under the Operating Agreement, Debtor is authorized to compensate a  
16 Property Manager the equivalent of 4% of Debtor’s gross revenues, which amount is  
17 commensurate with the commercially standard management fee for similar properties.

18 22. In accordance with the Operating Agreement, Nigro Development has engaged its  
19 affiliate, Nigro Management, to provide the property management services for Debtor for which  
20 Nigro Management receives 4% of Debtor’s gross revenues. Additionally, Nigro Management  
21 provides leasing services to Debtor, among other of Nigro Development’s projects, and receives  
22 the leasing commissions authorized in the Operating Agreement.

23 23. As disclosed in the Disclosure Statement, after the Effective Date, Debtor will  
24 continue to be managed by Nigro Development, which is authorized to engage and will continue  
25 to engage Nigro Management to provide the property management services, with all

26 \_\_\_\_\_  
27 <sup>4</sup> Under the terms of the Operating Agreement, the “Triple Net Charges” means all real property taxes, insurance  
28 premiums, common area maintenance costs, and like costs or expenses related to the Property (and/or any other real  
property of the Company) incurred by the Company.



1 compensation to be paid in accordance with the terms of the Operating Agreement as set forth  
2 above.

3 24. Thus, Debtor's pre-petition, post-petition, and post-Effective Date management,  
4 and the compensation paid by Debtor for such corporate and property management, will remain  
5 the same.

6 **C. Pre-Petition and Post-Petition, Debtor Has Been, and Remains, Able to Service Its**  
7 **Monthly Debt Obligations.**

8 25. Debtor's Chapter 11 Case is solely predicated upon a maturity default. Despite  
9 Debtor's ability to service its monthly payment obligations to Secured Lender, as well as to all of  
10 Debtor's other creditors, upon the February 13, 2011 maturity of the Secured Note, Secured  
11 Lender refused to extend the maturity date to provide Debtor with additional time to obtain  
12 refinancing or to sell the Real Property. Instead of negotiating in good faith to reach a workable  
13 solution for both Debtor and Secured Lender, Secured Lender commenced foreclosure  
14 proceedings, thereby necessitating the commencement of this Chapter 11 Case in order to  
15 preserve the value of Debtor's assets for the benefit of all of its creditors and equity, not just  
16 Secured Lender.

17 **1. The Secured Loan.**

18 26. A Term Loan Agreement was entered into between Debtor and Wachovia Bank,  
19 N.A. ("Wachovia") effective as of February 13, 2008, pursuant to which Wachovia agreed to  
20 lend Debtor the principal amount of \$11.35 Million (the "Secured Loan").

21 27. Consistent therewith, Debtor executed the Secured Note in favor of Wachovia, in  
22 the principal sum of \$11.35 Million.

23 28. The Secured Note provides that "[i]nterest shall accrue on the unpaid principal  
24 balance of this Note during each Interest Period from the date hereof at a rate per annum equal to  
25 the Wachovia 1-month LIBOR plus 1.50%." To the best of my knowledge and belief, since the  
26 Petition Date, the interest rate under the Secured Note has not exceeded 1.8% per annum.

27 29. As security for the repayment of the Promissory Note: (i) Debtor and Wachovia  
28 entered into the Deed of Trust; (ii) Wachovia filed a UCC-1 Financing Statement with the

1 Nevada Secretary of State; and (iii) Debtor granted Wachovia an Assignment of Permits,  
2 Licenses and Approvals.

3 30. As further security for the Loan, I, along with Ryanne Nigro, Michael Nigro, and  
4 Margaret Nigro guaranteed the repayment of the Secured Loan.

5 31. On August 19, 2008, Debtor and Wachovia entered into a swap agreement, which  
6 was terminated automatically on the February 13, 2011 maturity date.

7 32. I have been advised, but I have no personal knowledge and thus cannot testify to  
8 the fact that effective December 31, 2008, Secured Lender acquired Wachovia.

9 **2. The Events Necessitating the Bankruptcy Filing.**

10 33. Despite having received all monthly payment obligations, on May 18, 2010,  
11 Secured Lender issued to Debtor and the guarantors notices of default premised solely on an  
12 alleged loan-to-value ratio covenant default. Specifically, based on appraisal prepared by Eva  
13 Zupkova and Steven Gragg of Cushman & Wakefield dated January 10, 2010, Secured Lender  
14 alleged that the value of the Real Property was \$11.7 Million as stabilized on August 1, 2011,  
15 which valuation exceeded the then-outstanding balance of the Secured Loan. Therefore,  
16 purportedly in order to comply with the covenant requiring a loan-to-value ratio of less than  
17 80%, Secured Lender demanded that Debtor immediately tender a payment of \$1.64 Million in  
18 order to reduce the Secured Loan balance to \$9.36 Million. Debtor was not able to satisfy the  
19 demand.

20 34. Able to fully service its monthly payment obligations under the Secured Note,  
21 Debtor contacted Secured Lender and sought to reach a consensual resolution with Secured  
22 Lender to extend the term of the Loan. Despite many months of negotiations and Debtor's  
23 ability to service its monthly debt obligations, Secured Lender refused to reach a consensual  
24 resolution with Debtor unless a consensual resolution was also reached with regard to a separate  
25 loan obligation between Ten Saints LLC and Secured Lender, to which Debtor was not a party.

26 35. As a global resolution as required by Secured Lender could not be reached, on or  
27 about July 7, 2011, Secured Lender recorded its Notice of Trustee's Sale and advised Debtor that  
28 it would be filing a complaint and seeking the appointment of a receiver the following week,

1 thereby leaving Debtor with no other option but to seek Chapter 11 relief in order to protect  
2 Debtor's unsecured creditors and equity.

3 **D. The Plan.**

4 36. I believe that the Plan provides adequate means for its implementation through: (i)  
5 the creation and continued existence of Reorganized Debtor and the vesting of Debtor's Assets in  
6 Reorganized Debtor; (ii) the execution and delivery to Secured Lender of the Amended and  
7 Restated Note and the amendment and continued effectiveness of the Loan Documents; and (iii)  
8 the continuation of pre-Effective Date management and operations after the Effective Date.

9 37. All U.S. Trustee fees due as of the filing of this declaration have been paid.

10 38. Debtor is not required by a judicial or administrative order or by statute to pay  
11 domestic support obligations.

12 39. There are no retirement benefits in controversy in the Chapter 11 Case as that  
13 term is defined in Section 1114 of the Bankruptcy Code. As such, the Plan does not provide for  
14 the continuation after the Effective Date of payment of any retiree benefits.

15 40. The Plan has been proposed in good faith in order to restructure Debtor's  
16 obligations for the benefit of all Debtor's creditors and equities. I believe that the Plan provides  
17 fundamental fairness to all of Debtor's creditors as it contemplates the full repayment of all pre-  
18 petition Allowed Claims within a reasonable amount of time.

19 41. Specifically, Debtor estimates that on the Effective Date, it will have:

20 (i) One Class 1 Secured Lender Claim, which claim will receive a principal  
21 repayment of \$585,000 within one month after the Effective Date, followed by  
22 monthly principal and interest payments in accordance with Section 4.1 of the  
23 Plan, and a final balloon payment within five years of the Effective Date;

24 (ii) No Class 2 Other Secured Claims;

25 (iii) No Class 3 Other Priority Unsecured Claims; and

26 (iv) Class 4 General Unsecured Claims of approximately \$16,500, which will  
27 receive repayment in full, together with interest at the rate of 5.5% per annum on  
28 or about the sixtieth (60<sup>th</sup>) Business Day after the Effective Date.

...

...

1 42. Moreover, to my knowledge, to date, no party has formally or informally  
2 expressed an objection to confirmation of the Plan based upon it being proposed in a manner  
3 contrary to the Bankruptcy Code’s good faith requirement or by a means forbidden by law.

4 43. In fact, Section 2.9 of the Stipulation [ECF No. 390] provides that “[f]or purposes  
5 of the Final [Confirmation] Hearing only, whether Debtor has satisfied Section 1129(a)(3) of the  
6 Bankruptcy Code (good faith) will not be challenged by Wells Fargo.”

7 44. All payments to professionals during the administration of the Chapter 11 Case or  
8 other administrative costs that require Court approval have been made only with prior approval  
9 of the Court. Debtor will continue to obtain Court approval prior to the payment of any pre-  
10 confirmation charges of professionals or other such administrative expenses that require prior  
11 Court approval.

12 45. There is sufficient cash on hand to pay all anticipated Allowed Administrative  
13 Claims, as well as all other Effective Date payments. Specifically, as of the submission of this  
14 declaration, Debtor’s unpaid professionals’ fees total less than \$30,000. Debtor has the ability to  
15 satisfy its Allowed Administrative Claims, as well as the anticipated cure payments of less than  
16 \$10,000. Debtor’s post-Effective Date performance is sufficient to assure payment to the  
17 Allowed General Unsecured Claims.

18 46. Under the Plan, all Allowed Claims will be paid in full and the Allowed Claims  
19 that are not paid on the Effective Date will receive interest of 5.5% for the General Unsecured  
20 Claims and 4.25% for the Secured Lender Claim. As such, each Holder of an Allowed Claim or  
21 Equity Security in an impaired Class will receive or retain under the Plan property of a value, as  
22 of the Effective Date of the Plan, that is equal to or greater than the amount that such Holder  
23 would receive or retain if Debtor were liquidated under Chapter 7 of the Bankruptcy Code.

24 ...

25 ...

26 ...

27 ...

28

1 47. Notably, in Section 2.4 of the Stipulation [ECF No. 390], Secured Lender  
2 stipulated as follows:

3 For purposes of applying section 1129(b) (2) (A)(i), the Court ruled in the  
4 Memorandum Decision that the appropriate rate of interest applicable to  
5 Wells Fargo's secured claim was 4.25%. For purposes of the Final  
6 [Confirmation] Hearing only, the Parties agree that this same rate (4.25%)  
7 satisfies the 'market rate of interest' requirement of  
8 section 1129(b)(2)(A)(i).

9 48. The Plan does not impose, and does not intend to impose, a post-Effective Date  
10 third-party injunction.

11 49. The Plan preserves all of Debtor's Litigation Claims, including Avoidance  
12 Actions, for the benefit of the estate. While I have not undertaken an exhaustive analysis, I have  
13 reviewed with Debtor's counsel the payments tendered during the applicable preference periods  
14 and have discussed additional payments during the applicable fraudulent transfer periods and,  
15 based on the advice of Debtor's counsel, have determined that the payments were in the ordinary  
16 course of business and were not on account of an antecedent debt. In addition, all pre-Petition  
17 Date creditors will be paid in full; as such, as explained by Debtor's counsel, no legal basis exists  
18 to pursue certain of the pre-petition Avoidance Actions. As such, I do not anticipate that Debtor  
19 will be pursuing any pre-petition Avoidance Actions or Litigation Claims. However, for the  
20 avoidance of doubt, if, upon further post-Effective Date analysis and review with Debtor's  
21 counsel, it is determined that there are viable and collectable Litigation Claims, Debtor will  
22 pursue them.

23 **1. The Plan is feasible.**

24 50. In my capacity as Debtor's manager, I prepared the financial projections (the  
25 "Projection Summary") for the period of the Effective Date through December 31, 2019, as well  
26 as the supporting analysis and assumptions (the "Projection Analysis and Assumptions," and  
27 together with the Projection Summary, the "Plan Projections").

28 51. I believe that the Plan Projections are feasible and that Debtor has more than a  
reasonable probability of success such that confirmation of the Plan is not likely to be followed  
by Debtor's liquidation or the need for further financial reorganization.

52. As more fully set forth in the Plan Projections and as summarized in the following chart, Debtor will generate sufficient funds to meet its monthly debt service to Secured Lender and the balance of its operating and debt obligations.

	FYE 2015	FYE 2016	FYE 2017	FYE 2018	FYE 2019
<b>Revenue</b>	\$1,185,744.43	\$1,287,729.36	\$1,338,965.71	\$1,381,162.00	\$1,418,599.61
<b>Total Operating Expenses</b>	\$278,298.55	\$289,616.33	\$298,809.00	\$307,854.37	\$316,930.11
<b>Total Non-Operating Expenses</b>	\$182,632.00	\$106,252.56	\$63,813.06	\$68,377.05	\$73,289.92
<b>Principal and Interest Payments to Secured Lender</b>	\$640,210.57	\$640,210.57	\$640,210.57	\$640,210.57	\$640,210.57
<b>Net Cash Flow</b>	\$84,603.31	\$251,649.90	\$336,133.07	\$364,720.01	\$388,169.00
<b>Estimated Ending Cash Balance</b>	\$1,384,896.55	\$1,636,546.45	\$1,972,679.51	\$2,337,399.52	\$2,725,568.53

53. Debtor's revenue projections are modest and obtainable and derived from its current leases, which include annual rent escalators as set forth on the rent roll. As previously discussed, as of the submission of this declaration, Debtor is 88.5% leased. For the last five years, Debtor has consistently maintained an occupancy rate of at least 82%. Additionally, eleven of Debtor's twenty tenants have been tenants since the Real Property was built in 2006, further establishing the stability of its tenancy.

54. Based on my extensive experience in obtaining financing and purchasing and selling real estate, I am confident that on or before the Maturity Date, Debtor will be able to obtain replacement financing or sell the Real Property for a sum sufficient to repay the balance of the Amended and Restated Note.

55. Not only has Secured Lender stipulated that it is oversecured as of the Confirmation Hearing,<sup>5</sup> but Debtor will have repaid in excess of \$1.3 Million in principal under the Amended and Restated Note.

<sup>5</sup> See Stipulation § 2.6, ECF No. 390.

1 56. Furthermore, within the last year, Debtor was approached by an interested  
2 purchaser who provided a letter of intent to purchase the Real Property for \$14.9 Million,<sup>6</sup>  
3 further establishing that Debtor will be able to sell the Real Property for in excess of the then-  
4 outstanding principal balance under the Amended and Restated Note, which is expected to be  
5 less than \$10 Million as of the Maturity Date.

6 57. Thus, Debtor's Plan has more than a reasonable probability of success such that  
7 confirmation of the Plan is not likely to be followed by Debtor's liquidation or need for further  
8 financial restructuring.

9 58. Moreover, in Section 2.8 of the Stipulation, Secured Lender stipulated that for  
10 purposes of Plan Confirmation, "whether the Debtor has satisfied section 1129(a)(11) of the  
11 Bankruptcy Code (feasibility) will not be challenged by Wells Fargo."

12 **2. The Plan fairly and equitably treats the Secured Lender Claim.**

13 59. Foremost, in accordance with Section 1129(b)(2)(A)(i), Section 4.1.1(b) of the  
14 Plan provides for Secured Lender's retention of its Lien in its Collateral until the Amended and  
15 Restated Note is repaid.

16 60. Secured Lender has further stipulated that the Secured Interest Rate of 4.25%  
17 satisfies the "market rate of interest" requirement of Section 1129(b)(2)(A)(i). See Stipulation  
18 § 2.4, ECF No. 390.

19 61. Additionally, among other reasons, the Plan fairly and equitably treats the  
20 Secured Lender Claim as: (i) Debtor timely tendered every monthly payment due under the  
21 Secured Note prior to the February 13, 2011 maturity date; (ii) the Chapter 11 Case was solely  
22 filed because Secured Lender refused to extend the maturity date of the Secured Loan despite  
23 being oversecured and despite Debtor's history of timely payments; (iii) Debtor began making  
24 monthly Adequate Protection Payments of \$18,500 immediately after the Petition Date; (iv)

25 \_\_\_\_\_  
26 <sup>6</sup> Upon receipt, I contacted Secured Lender to see if it would accept the full repayment of the outstanding principal,  
27 accrued interest at the contract rate, and attorney's fees in satisfaction of the Secured Lender Claim if the sale was  
28 consummated and the Secured Lender Claim was repaid by December 2014 (i.e., only excluding the default interest  
asserted by Secured Lender); Secured Lender indicated its unwillingness to support the sale unless the disputed  
default interest was also paid and so the transaction was not pursued.

1 Debtor continued making the \$18,500 Adequate Protection Payments throughout the Chapter 11  
2 Case, which payments exceed \$800,000 as of the filing of this declaration; (v) the Secured  
3 Lender Claim will be fully repaid within five years; (vi) the 4.25% Secured Interest Rate is over  
4 2.45% greater than the floating interest rate set forth in the Secured Note, which has not  
5 exceeded 1.8% since the Petition Date; (vii) Secured Lender will receive a principal reduction  
6 payment of \$585,000 within one month of the Effective Date; and (viii) Debtor will have over  
7 \$1.8M as of the Effective Date, as well as revenues that exceed its expenses, and thus, Secured  
8 Lender has a very low risk of non-payment.

9 62. In accordance with Section 4.1.1(h) of the Plan, the Amended and Restated Note  
10 will include all of the covenants that were included in the original Loan Documents, except the  
11 following, which covenants are being removed because they will jeopardize Debtor's ability to  
12 successfully reorganize:

13 (i) Section 7.4 of the Loan Agreement, which requires Secured Lender's approval  
14 of leases or terms that are not reflective of the current commercial leasing market (the  
15 "Lease Covenant");<sup>7</sup>

16 (ii) Section 7.7 of the Loan Agreement, which provides as follows: "**Cross**  
17 **Default.** Default in payment or performance of any obligation under any other loans,  
18 contracts or agreements of Borrower, or any general partner of or the holder(s) of the  
19 majority ownership interests of Borrower with Bank or its affiliates" (the "Cross Default  
20 Covenant");

21  
22  
23 <sup>7</sup> Section 7.4 provides as follows: "**Leases.** Borrower will comply with the terms and conditions of, and deliver  
24 leased premises at the time and in the condition required by any Bank-approved or other tenant lease. Bank  
25 approval of leases under 5,000 square feet will not be required provided: (i) the lease confirms to a Lender-approved  
26 standard lease form (with Bank hereby acknowledging that it has approved the form lease that Borrower has used  
27 for the current tenants of the Project); (ii) provided that the lease is on then current commercially reasonable terms to  
28 a third-party unrelated to Borrower or Guarantor, and (iii) after giving effect to such lease, the average rental rate for  
the leased space in the Project after executing the lease in question must be equal to or greater than \$2.33/SF NNN  
and the lease in question must have a lease term of 3 years or greater. Bank shall not unreasonably withhold,  
condition or delay its consent of any other lease. Bank's consent may be conditioned upon receipt of such  
documents and agreements, including without limitation subordination and attornment agreements and tenant  
estoppel certificates, as Bank may require."



1 (iii) Section 7.13 of the Loan Agreement, which provides as follows: “**Loan-To-**  
2 **Value.** At all times during the term of the Loan, the unpaid principal balance of the Loan  
3 shall not exceed 80% of the appraised stabilized market value of the Project, as  
4 determined by Bank in its sole discretion. If for any reason the loan-to-value ratio  
5 exceeds the applicable percentage, then Borrower shall, within 30 days of Bank’s  
6 demand, immediately reduce the unpaid balance of the Loan, or deposit sufficient sums  
7 with Bank to reduce the loan-to-value and/or the loan-to-cost ration to at or below said  
8 percentage, and Bank may, at its option, withhold or refuse to make any Loan balances  
9 until Borrower has fully complied with this requirement” (the “Loan-to-Value  
10 Covenant”); and

11 (iv) Section 15(f) of the Loan Agreement, which provides unless cured within the  
12 applicable cure period, the following is an event of default: “**Material Adverse Change.**  
13 Bank determines in good faith, in its sole discretion, that the prospects for payment or  
14 performance of the Obligations are materially impaired or there has occurred a material  
15 adverse change in the business or prospects of Borrower, financial or otherwise” (the  
16 “Material Adverse Change Covenant”).

17 63. With regard to the Lease Covenant, as a result of the post-recession economic  
18 commercial leasing market in Las Vegas, eleven of Debtor’s leases are less than the \$2.33 per  
19 square foot rate set forth in the Lease Covenant. As Debtor did not obtain Secured Lender’s  
20 approval of these leases, if this provision is not stricken from the Loan Agreement, upon the  
21 Effective Date, Debtor would be in default. As such, the Lease Covenant must be stricken from  
22 the Loan Agreement in order to ensure Debtor’s ability to consummate its Plan and to repay all  
23 of the Allowed Claims, including the Allowed Secured Lender Claim, in accordance with the  
24 terms of its Plan.

25 64. Additionally, since the Secured Loan was originated, Debtor has used its business  
26 judgment to obtain the best possible leases and has never sought, nor obtained, Secured Lender’s  
27 approval of such leases. Despite this, until now, Secured Lender has never formally objected to  
28 Debtor’s ability to lease the Real Property without its approval.

1           65.     Moreover, when the Secured Loan was originated in 2008, Secured Lender's  
2 motivation was to be repaid upon the maturity date. Today, Secured Lender has made clear that  
3 its desire is to foreclose on the Real Property, not to repaid pursuant to the Plan terms. As such, I  
4 believe that Debtor and Secured Lender's interests are in conflict. Debtor desires to achieve the  
5 best possible leases to ensure the value of the Real Property is maximized and that Debtor is able  
6 to refinance or sell the Real Property prior to the Maturity Date. Secured Lender desires to find a  
7 means of forcing a default so that it can foreclose on the Real Property. Given this conflict, it  
8 would unduly impair Debtor's operations to allow Secured Lender to have any approval rights  
9 over its current and future leases.

10           66.     Finally, with respect to the Lease Covenant, the language of the provision itself  
11 renders compliance with the covenant difficult to establish. Specifically, the leases must  
12 conform to the "then current commercially reasonable terms" in order to obtain Secured  
13 Lender's approval. Such language will be open to wide interpretation and thus, ripe for  
14 disagreement between Debtor and Secured Lender. Especially in light of Secured Lender's  
15 desire to find a default, as mentioned above, such highly subjective determinations of  
16 compliance with the covenant would likely require future, and perhaps multiple instances of,  
17 judicial intervention.

18           67.     The Cross Default Covenant unduly impairs Debtor's ability to reorganize as it  
19 places Debtor at risk of a default even if it is fully performing in accordance with the terms of its  
20 Plan.

21           68.     If the Loan-to-Value Covenant is not stricken, Debtor could arguably be placed in  
22 default immediately after the Effective Date and therefore such covenant unduly impairs  
23 Debtor's ability to reorganize. The Loan-to-Value Covenant allows Secured Lender, *in its sole*  
24 *discretion*, to obtain an appraisal and to call a default if the balance of the Allowed Secured  
25 Claim exceeds 80% of the appraiser's stabilized value. There is no mechanism for Debtor to  
26 challenge the validity of the valuation or to obtain its own valuation. It is certainly possible, if  
27 not likely, that if Secured Lender could find at least one appraiser to value the Real Property at a  
28 value that would place Debtor in default on the Effective Date. And, as discussed above,

1 Secured Lender has a history of calling a default under the Loan-to-Value Covenant even when  
2 Debtor is otherwise in full compliance with the terms of the Secured Loan.

3 69. The Material Adverse Change Covenant likewise allows Secured Lender to call a  
4 default “*in its sole discretion*” if it believes that the prospects for repayment are materially  
5 impaired. Secured Lender’s opposition to confirmation itself evidences that Secured Lender  
6 believes that Debtor is in violation of the Material Adverse Change Covenant. Debtor’s ability  
7 to reorganize will be unduly impaired if Secured Lender can call a default at any time because it  
8 believes, in its sole discretion, that there has been a material adverse change, which default could  
9 be called by Secured Lender even if Debtor were in compliance with all of its payment  
10 obligations under the Plan and in compliance with all of the remaining covenants.

11 70. Notably, the Plan does *not* remove the following affirmative covenants in the Loan  
12 Agreement: (i) Section 6.1 titled “Access to Books and Records”; (ii) Section 6.2 titled  
13 “Business Continuity”; (iii) Section 6.3 titled “Compliance with Other Agreements”; (iv) Section  
14 6.4 titled “Estoppel Certificate”; (v) Section 6.5 titled “Insurance”; (vi) Section 6.6 titled  
15 “Maintain Properties”; (vii) Section 6.7 titled “Non-Default Certificates From Borrower”; (viii)  
16 “Section 6.8 titled “Notice of Default and Other Notices”; (ix) Section 6.9 titled “Permanent  
17 Financing”; or (x) Section 6.10 titled “Bank’s Costs.”

18 71. Additionally, the Plan does *not* remove the following negative covenants in the  
19 Loan Agreement: (i) Section 7.1 titled “Change in Fiscal Year”; (ii) Section 7.2 titled “Change of  
20 Control”; (iii) Section 7.3 titled “Encumbrances”; (v) Section 7.5 titled “Guarantees”; (vi)  
21 Section 7.6 titled “Investments”; (vi) Section 7.8 titled “Default on Other Contracts or  
22 Obligations”; (vii) Section 7.9 titled “Government Invention; (vii) Section 7.10 titled “Judgment  
23 Entered”; (viii) Section 7.11 titled “Prepayment of Other Debt”; or (ix) Section 7.12 titled  
24 “Retire or Repurchase Capital Stock.”

25 72. Similarly, the Plan does *not* remove Sections 8.1 or 8.2, which set forth the  
26 financial reporting that must be provided by Debtor and the Guarantors to Secured Lender.

27 ...

28

1           73. Thus, the Plan solely removes the four financial covenants that would preclude  
2 Debtor from successfully reorganizing. The balance of the covenants set forth in the Loan  
3 Agreement will remain in place after the Effective Date.

4           74. The Plan's treatment places Secured Lender in a better position than it was in pre-  
5 petition. Specifically, Secured Lender will receive a pay down of nearly \$600,000 and an  
6 increased interest rate of over 2.45% above the contract rate.

7           75. Additionally, Debtor will retain nearly the same cash position it was in pre-  
8 petition (\$1.04 Million on the Petition Date and approximately \$1.3 Million after the Effective  
9 Date and pay down to Secured Lender), thereby giving Debtor the needed flexibility to complete  
10 tenant improvements and property maintenance and repairs to ensure the value of the Real  
11 Property is maintained and continues to increase and to ensure that Debtor can effectuate a sale  
12 or refinancing prior to the Maturity Date.

13           76. As the manager, I, together with my brother Michael Nigro, in our capacities as  
14 the managers of Nigro Development, the manager of Debtor, determine whether to make equity  
15 distributions. In making that determination, we are foremost focused on ensuring the viability  
16 and success of Debtor. This includes ensuring that there are sufficient funds to pay any tenant  
17 improvements (which can exceed hundreds of thousands of dollars), as well as repairs and  
18 maintenance that necessarily occur in a project approaching ten years old. We additionally  
19 consider what cash reserves will place Debtor in the best position to facilitate a refinancing or a  
20 sale. This is the same distribution analysis we undertake for all of the projects we manage  
21 through Nigro Development.

22           77. As evident by the fact that Debtor was holding over \$1 Million on the Petition  
23 Date and that Beltway One Development Group, LLC was holding approximately \$1.3 Million  
24 on the Petition Date and is holding approximately \$1.6 Million today, we are very conservative  
25 in our analysis and only make distributions where we are entirely confident that such distribution  
26 will not harm the viability of the project and/or the ability to refinance or sell the project.

27           78. Our conservative approach to distributions is further evidenced by the fact that  
28 after the Secured Loan was originated, other than distributions to reimburse Debtor's members

1 for the taxes incurred as a result of Debtor's positive revenue, Debtor has not tendered  
2 distributions to Debtor's members.

3 79. I have handled the financing for all of the Nigro Development projects, which  
4 includes over twenty commercial loans with numerous lending institutions. In my experience,  
5 the lenders do not place a restriction on the ability of the borrower to make distributions to equity  
6 if the loan is otherwise performing. In fact, none of Secured Lender's Loan Documents impose  
7 any such restriction. Stated otherwise, while Secured Lender now complains that there is no  
8 Plan restriction on Debtor's ability to make distributions to equity, Secured Lender's own Loan  
9 Documents never imposed any such restriction on Debtor's ability to make distributions to  
10 equity.

11 80. Moreover, as Debtor's manager, my responsibility is to ensure the viability of the  
12 project. I take this responsibility seriously and would never take any action that would  
13 jeopardize the ability to successfully refinance or sell the Real Property.

14 81. Beyond my responsibility as manager, my brother, my wife, and my brother's ex-  
15 wife, and I are all Guarantors of the Secured Loan. Thus, we are further incentivized to ensure  
16 that Secured Lender is repaid in accordance with the terms of the Plan as Secured Lender has  
17 repeatedly expressed its intent to sue the Guarantors should there be a breach.

18 82. My brother and I, as manager, have always acted, and will continue to act, in the  
19 best interest of Debtor to ensure the viability of the project and the consummation of the Plan,  
20 including the repayment of Secured Lender's claim prior to the Maturity Date.

21 83. I reserve my right to expound upon the testimony set forth herein as appropriate at  
22 the Confirmation Hearing.

23 I declare under penalty of perjury of the laws of the United States that these facts are true  
24 to the best of my knowledge and belief.

25 DATED this 22<sup>nd</sup> day of April, 2015.

26 /s/ Todd Nigro  
27 TODD NIGRO