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14 **UNITED STATES BANKRUPTCY COURT**

15 **DISTRICT OF NEVADA**

16 In re:
17 HORIZON VILLAGE SQUARE LLC,
18 Debtor.

In Proceedings Under Chapter 11
Case No. 11-21034-mkn

**WELLS FARGO BANK, N.A.'S
OBJECTION TO CONFIRMATION OF
DEBTOR'S AMENDED PLAN OF
REORGANIZATION**

Hearing Date: April 28, 2015
Hearing Time: 9:30 a.m.

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1 Wells Fargo Bank, N.A. (“Wells Fargo”) hereby files this objection to confirmation of
2 *Debtor’s Amended Plan of Reorganization* [Docket No. 403] (the “Second Amended Plan”) filed
3 by Horizon Village Square LLC (the “Debtor”) on April 15, 2015.

4 The Debtor has been in bankruptcy for nearly four years. After the Court’s denial of
5 confirmation of the Debtor’s initial plan, Wells Fargo engaged in discussions with the Debtor to
6 narrow certain issues that would allow the Debtor to propose a confirmable chapter 11 plan and
7 finally exit this bankruptcy case. For purposes of confirmation only, the parties stipulated to the
8 minimum value of the bank’s real property collateral, to the “market” interest rate to be applied
9 to Wells Fargo’s secured claim, that Wells Fargo holds an oversecured claim in this case, and
10 that Wells Fargo would not contest certain requirements for confirmation of the proposed plan,
11 although the Debtor still carries the burden of proving such requirements. The parties have also
12 agreed to defer until after the confirmation hearing issues regarding the extent of the bank’s lien
13 in the Debtor’s cash and the bank’s entitlement to default interest and fees.

14 Notwithstanding Wells Fargo’s concessions on these issues, the Debtor remains intent on
15 extracting as much from the bank as possible and, as such, has proposed a plan that provides for
16 treatment of the bank’s claim that fails the section 1129(b) fair and equitable test. In particular,
17 the Debtor’s proposed plan would improperly shift the entire risk of reorganization to Wells
18 Fargo by repaying the more than \$11 million debt owing to the bank based on a 30-year
19 amortization while the Debtor retains more than \$1.2 million of the bank’s cash collateral,
20 reserving the right to make unfettered distributions to equity and omitting any restrictions on the
21 Debtor’s use of cash collateral, failing to provide the bank with an appropriate paydown from the
22 Debtor’s cash on hand, and stripping all of the “financial covenant” protections under the
23 operative loan documents. Under the proposed plan, insider management—consisting of the
24 Debtor’s largest equity holder—would continue to control the Debtor and make all decisions
25 with respect to Wells Fargo’s cash collateral, including whether to distribute cash to itself prior
26 to satisfaction of the indebtedness to Wells Fargo. The Debtor’s proposed plan also
27 inappropriately purports to “cure” the Debtor’s defaults under its loan from the bank.
28

1 Wells Fargo has filed a motion seeking relief from the automatic stay or dismissal of this
2 case in the event the Court again declines to confirm the Debtor’s plan. Here, the Debtor is again
3 overreaching and its proposed plan cannot be confirmed. Accordingly, and as discussed below,
4 confirmation should be denied and the bank’s stay relief/dismissal motion should be granted.

5 **I. FACTUAL AND PROCEDURAL BACKGROUND.**

6 1. On July 13, 2011 (the “Petition Date”), the Debtor filed its petition for relief
7 under chapter 11 of the Bankruptcy Code, thereby commencing this chapter 11 case.

8 **The Loan**

9 2. Wells Fargo, as successor-by-merger to Wachovia Bank, National Association,
10 made a prepetition loan to the Debtor in the original principal amount of \$11,350,000 (the
11 “Loan”).¹ The Loan is secured by, among other things, a first position lien on: (i) the Debtor’s
12 retail shopping center located at 25 through 75 East Horizon Ridge Parkway in Henderson,
13 Nevada (the “Property”); and (ii) all rents and other personal property in any way related to the
14 Property.

15 3. The Debtor is in default of its obligations under the Loan by, among other things,
16 failing to repay the Loan when it matured on February 13, 2011.

17 4. Wells Fargo filed its proof of claim on November 15, 2011 [Claim No. 4], setting
18 forth that the Debtor is indebted to Wells Fargo in an amount no less than \$11,225,639.40 as of
19 the Petition Date, plus accrued and accruing interest, fees and costs, and post-petition interest.

20 **The Initial Plan and the Initial Stay Relief Motion**

21 5. On October 25, 2011, the Debtor filed its first chapter 11 plan. [Docket No. 81]
22 On December 29, 2011, the Debtor filed an amended chapter 11 plan that made certain
23 amendments to the Debtor’s first plan (collectively, the “Initial Plan”). [Docket No. 138]
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26 ¹ Additional facts regarding the Loan are set forth in the declaration of Kyle A. Hunt filed
27 on December 20, 2011 [Docket No. 116], the declaration of Kyle A. Hunt filed on January 5,
28 2012 [Docket No. 152], and any additional declarations or testimony offered at the combined
hearing on confirmation of the Second Amended Plan and the Stay Relief/Dismissal Motion.
Such facts are incorporated herein by reference.

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1 6. On December 16, 2011, Wells Fargo filed an objection to confirmation of the
2 Initial Plan. [Docket No. 105]

3 7. On December 20, 2011, and in connection with its plan objection, Wells Fargo
4 filed a motion seeking stay relief with respect to all of its collateral as an alternative to
5 confirmation of the Initial Plan (the “Initial Stay Relief Motion”). [Docket No. 114]

6 8. The Court held combined hearings on the Initial Stay Relief Motion and
7 confirmation of the Initial Plan on January 9, 10, and 12, 2012. After conclusion of the hearings
8 and submission of post-trial briefing, the Court took the Initial Stay Relief Motion and the Initial
9 Plan under advisement.

10 9. On November 13, 2014, the Court entered a memorandum decision [Docket No.
11 303] (the “Memorandum Decision”) and a final order [Docket No. 304] denying confirmation of
12 the Initial Plan and approval of the corresponding disclosure statement without prejudice. The
13 Court made certain findings in the Memorandum Decision, including that the value of the
14 Property as of the January 2012 confirmation hearings was \$10,845,000 and that an interest rate
15 of 4.25% had to be applied to Wells Fargo’s secured claim. [Memorandum Decision, pp.12, 23]

16 10. Also on November 13, 2014, the Court entered an order granting the Initial Stay
17 Relief Motion that conditioned the automatic stay on the Debtor making adequate protection
18 payments and filing an amended plan by December 29, 2014. [Docket No. 302]

19 **The Amended Plans and the Renewed Stay Relief/Dismissal Motion**

20 11. On December 24, 2014, the Debtor filed an amended plan [Docket No. 310] (the
21 “First Amended Plan”) and disclosure statement [Docket No. 312].

22 12. While the First Amended Plan incorporated certain of the Court’s findings set out
23 in the Memorandum Decision, it also, among other things, (i) eliminated the effective date
24 principal paydown to Wells Fargo that was provided in the Initial Plan, and (ii) retained many of
25 the objectionable features of the Initial Plan, including the elimination of “financial covenants,”
26 the 30-year amortization period, no restrictions on the Debtor’s use of cash on which the bank
27 holds a lien, and the impermissible “cure” of pre-petition defaults.
28

1 13. On December 31, 2014, in an effort to avoid litigating another of the Debtor's
2 unconfirmable plans and to obtain resolution in this case, Wells Fargo filed its own chapter 11
3 plan as an alternative to the First Amended Plan (the "Creditor Plan"). [Docket No. 321]

4 14. On February 6, 2015, after a hearing on motions filed by the Debtor and Wells
5 Fargo regarding proceeding with confirmation on the First Amended Plan and the Creditor Plan,
6 the Court entered an order (the "Disclosure Statement Order") that:

7 ▪ conditionally approved the Debtor's disclosure statement submitted in connection
8 with the First Amended Plan (the "Amended Disclosure Statement") [Docket No. 349] and
9 permitted the Debtor to move forward with confirmation of the First Amended Plan;

10 ▪ stated that in the event the Debtor failed to confirm its First Amended Plan, the
11 Court would likely grant Wells Fargo relief from the automatic stay or dismiss this chapter
12 11 case;² and

13 ▪ ordered that the hearing date set for confirmation of the First Amended Plan shall
14 also be the hearing date for any stay relief and/or dismissal motion filed by Wells Fargo.

15 [Docket No. 346]

16 15. On February 26, 2015, and due to the Debtor's baseless assertions that the bank
17 does not have a lien in certain of the Debtor's cash, Wells Fargo filed a motion seeking a
18 determination of the value of Wells Fargo's secured claim against the Debtor (the "Valuation
19 Motion"). [Docket No. 362]

20 16. On March 27, 2015, Wells Fargo filed a renewed motion seeking stay relief with
21 respect to its collateral or dismissal of this chapter 11 case in the event that the Court again
22 declines to confirm the Debtor's plan (the "Stay Relief/Dismissal Motion"). [Docket No. 371]

23
24 _____
25 ² The Disclosure Statement Order specifically provides: "As indicated at the hearing, the
26 Debtor's failure to confirm its amended plan likely will result in relief from stay being granted
27 under Section 362(d)(2), assuming that the value of property securing [Wells Fargo's] claim is
28 less than the amount owed. In the alternative, dismissal of the Chapter 11 case under Section
1112(b)(1) might be warranted for cause within the meaning of Section 1112(b)(4)(J)." The
Debtor recently claimed in another filing that the Disclosure Statement Order "made no
reference to the Court's inclination relating to stay relief or dismissal of the Chapter 11 Case."
[Docket No. 405, pp.4-5] That is simply false as indicated by the language quoted above.

1 17. The Court has set a combined final hearing on the Debtor's plan and the Stay
2 Relief/Dismissal Motion for April 28, 2015 (the "Final Hearing").

3 18. On April 7, 2015, and in an effort to narrow the issues to be decided by the Court
4 at the Final Hearing, Wells Fargo and the Debtor filed a stipulation (the "Final Hearing
5 Stipulation") providing that: (i) Wells Fargo's allowed claim includes the amount of
6 \$11,225,639.40, and that Wells Fargo's entitlement to pre- and post-petition attorneys' and other
7 professionals' fees and post-petition default interest, late fees, and other charges shall be
8 adjudicated as part of the claims allowance process and not plan confirmation; and (ii) for
9 purposes of the Final Hearing only, (a) an interest rate of 4.25% with respect to Wells Fargo's
10 secured claim satisfies the "market rate of interest" requirement of section 1129(b)(2)(A)(i) as
11 provided in the Memorandum Decision, (b) the as-is, fair market value of the Property and
12 improvements as of the confirmation date of the Debtor's plan remains no less than \$10,845,000
13 as provided in the Memorandum Decision, (c) Wells Fargo is an oversecured creditor without a
14 deficiency claim in the Debtor's case, and (d) Wells Fargo will not challenge whether the Debtor
15 has satisfied section 1129(a)(11) of the Bankruptcy Code (feasibility) or section 1129(a)(3) of
16 the Bankruptcy Code (good faith). [Docket No. 390]

17 19. In light of the stipulation that Wells Fargo is an oversecured creditor in this case,
18 Wells Fargo and the Debtor have also stipulated to continue the hearing on the Valuation Motion
19 until after the Final Hearing. [Docket Nos. 391, 392]

20 20. On April 15, 2015, and as required pursuant to Section 2.7 of the Final Hearing
21 Stipulation, the Debtor filed the Second Amended Plan.³ The Second Amended Plan is simple
22 and may be summarized as follows:

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24
25 ³ The Final Hearing Stipulation required the Debtor to amend the First Amended Plan to
26 eliminate the deficiency class and to defer all issues raised in Section 4.1.2 thereof regarding the
27 bank's entitlement to default interest and other charges. The Debtor did not provide Wells Fargo
28 a copy of the Second Amended Plan prior to its filing, and Wells Fargo did not consent to the
language added to the Second Amended Plan addressing this issue. Wells Fargo objects to new
Section 4.1.2 of the Second Amended Plan to the extent it is inconsistent with the Final Hearing
Stipulation. Wells Fargo reserves all rights with respect to this issue.

<u>Class</u>	<u>Description</u>	<u>Impairment</u>	<u>Estimated Claim</u>
Class 1	Wells Fargo's Claim	Impaired	\$11,225,639.40+
Class 2	Other Secured Claims	Unimpaired	\$0
Class 3	Priority Unsecured Claims	Unimpaired	\$0
Class 4	General Unsecured Claims	Impaired	\$16,500.00
Class 5	Equity Securities	Unimpaired	N/A

[Second Amended Plan § 3.1; Final Hearing Stipulation § 2.3; Amended Disclosure Statement § IV.A]

21. With respect to the treatment of Wells Fargo's claim, the Second Amended Plan would provide for repayment of more than \$11 million in principal debt based on a 30-year amortization period and provide the bank with a modest effective-date paydown of only \$585,000 while the Debtor currently holds cash on hand of more than \$1.8 million [Second Amended Plan § 4.1.1(d)],⁴ include no restrictions on the Debtor's ability to use its remaining cash in which the bank holds a lien, and strip all of Wells Fargo's "financial covenant" protections under the Loan [*id.* § 4.1.1(h)]. This treatment is a clear attempt to shift substantially all of the risk of the Debtor's reorganization efforts to the bank.

22. The Second Amended Plan also is a totally transparent device set up to protect the guarantors who are also directing the actions of the Debtor, in that it impermissibly tries to "cure" all existing defaults under the Loan in a collateral effort to shield the guarantors from the defaults that now exist under their guaranties. [*Id.* §§ 4.1.1(i), 4.1.3]

23. Wells Fargo has submitted its ballot voting to reject the Second Amended Plan. Wells Fargo does not consent to its treatment under the Second Amended Plan, and as set forth herein the Second Amended Plan cannot be confirmed over Wells Fargo's objection.

24. Wells Fargo filed the Stay Relief/Dismissal Motion so that the Court can "test" the Second Amended Plan at the Final Hearing and decide whether the Debtor has met its burden

⁴ The Debtor's March 2015 monthly operating report discloses that the Debtor had cash on hand as of March 31, 2015 of \$1,806,659. [Docket No. 398, p.1]

1 of proof under section 1129 of the Bankruptcy Code, or whether the Court should resolve this
2 case through stay relief or dismissal. The Stay Relief/Dismissal Motion should be granted.

3 **II. LEGAL ARGUMENT.**

4 This Court is well-versed in the confirmation requirements of the Bankruptcy Code.
5 Thus, Wells Fargo will not set forth in a belabored fashion the legal principles applicable here.⁵
6 Section 1129(a) of the Bankruptcy Code provides that a court shall confirm a plan only if all of
7 the requirements contained in sections 1129(a)(1) through (13) are met. 11 U.S.C. § 1129(a). If
8 a debtor is unable to satisfy the requirements of section 1129(a)(8) that each unimpaired class
9 has accepted the plan, the debtor must meet the rigorous requirements of “cramdown” under
10 section 1129(b) to confirm its plan over a dissenting creditor’s objection. *Id.* § 1129(b)(1). A
11 cramdown plan, like the Debtor’s plan, may only be confirmed upon a showing that the plan
12 does not discriminate unfairly and is fair and equitable with respect to the dissenting class of
13 creditors. *Id.* Here, the Debtor must meet that standard with respect to Wells Fargo’s secured
14 claim. Of course, the plan proponent bears the burden of proving that its plan satisfies each of
15 these requirements. *See In re Perez*, 30 F.3d 1209, 1214 n.5 (9th Cir. 1994).

16 **A. Section 1129(b)—The Second Amended Plan Fails To Meet The**
17 **Requirements For “Cramdown”.**

18 Section 1129(a)(8) provides that each class of claims or interests must accept the plan or
19 must be unimpaired under the plan. 11 U.S.C. § 1129(a)(8). Wells Fargo has voted to reject the
20 Second Amended Plan on account of its Class 1 claim, which is impaired. Accordingly, the
21 Debtor must proceed to “cramdown” and prove that its plan does not discriminate unfairly, and is
22 fair and equitable, with respect to all non-consenting impaired classes. 11 U.S.C. § 1129(b).
23 The Second Amended Plan’s treatment of Wells Fargo’s class violates the fair and equitable test
24 and precludes confirmation.

25 Separate and apart from the specific requirements of section 1129(b)(2)(A), the general
26 “fair and equitable” test requires a plan proponent to show that the plan meets the “implicit”

27 ⁵ Particularly in light of the fact that the Court is also dealing with another companion case
28 that is very similar to this case, Wells Fargo has prepared this objection as a notice-type pleading
for the convenience of the Court.

1 fairness standard under section 1129(b)(1). *See, e.g., In re D & F Const., Inc.*, 865 F.2d 673, 675
2 (5th Cir. 1989); *In re Monarch Beach Venture, Ltd.*, 166 B.R. 428, 436 (C.D. Cal. 1993); *In re*
3 *Prussia Assoc.*, 322 B.R. 572, 605 (Bankr. E.D. Pa. 2005); *In re Tri Growth Centre City, Ltd.*,
4 136 B.R. 848, 852 (Bankr. S.D. Cal. 1992). The implicit fairness test focuses on broad notions
5 of fairness and whether a plan unreasonably shifts risk to the party subject to cramdown. *See,*
6 *e.g., Monarch Beach*, 166 B.R. at 436; *see also* Jack Friedman, *What Courts Do to Secured*
7 *Creditors in Chapter 11 Cram Down*, 14 *Cardozo L. Rev.* 1495 (1993). The Second Amended
8 Plan treats Wells Fargo's claim unfairly and shifts virtually all of the risk to the bank.

9 First, the Debtor intends to retain as much cash as possible while forcing Wells Fargo to
10 continue to defer repayment of this debt that has been matured for more than four years. The
11 Second Amended Plan proposes to leave a significant portion of Wells Fargo's debt unpaid until
12 the end of the plan term, hoping for a refinance or sale transaction. In the interim, the principal
13 portion of Wells Fargo's claim is to be repaid over a term of 5 years based on a **30-year**
14 amortization period. Meanwhile, rather than paying down the bank's debt with available cash on
15 hand or advancing the amortization period, the Debtor proposes only a modest \$585,000
16 principal paydown on the effective date from the more than \$1.8 million in cash on hand.⁶ With
17 respect to the remaining \$1.2 million of the Debtor's cash, the Second Amended Plan provides
18 absolutely no restrictions on the Debtor's use of that cash and no safeguards to ensure that the
19 bank's cash collateral is not improperly used, distributed to equity, or diminished. And the
20 Debtor has provided no business rationale for needing to retain all of this cash. Meanwhile, the
21 Debtor's insiders will continue to retain all of the equity.

22 This treatment of Wells Fargo's secured claim is neither fair nor equitable under the
23 circumstances, and the bank should not be forced to bear the entire risk of reorganization. To the
24 extent the Court is otherwise inclined to confirm the Second Amended Plan, Wells Fargo
25 submits that the Debtor should be permitted to retain cash on hand as of the effective date only in

26 _____
27 ⁶ It is worth noting that until the Debtor filed the Second Amended Plan just days ago, the
28 Debtor had apparently reversed course on the treatment that it provided to the bank under the
Initial Plan when it excluded any effective date principal paydown to the bank under the First
Amended Plan.

1 an amount necessary to fund the Debtor's operations and reserves as established based on an
 2 articulated business rationale consistent with the Debtor's projections and be required to use the
 3 remainder of the Debtor's cash to increase the effective date paydown on Wells Fargo's secured
 4 claim or to fund a debt service escrow to be used only for the repayment of Wells Fargo's
 5 secured claim.

6 Second, the Second Amended Plan proposes to gut all "financial covenants" in the loan
 7 documents, which are standard protections provided to all lenders in commercial transactions.
 8 The Debtor's attempt to strip these covenant protections further increases the risk shifted to
 9 Wells Fargo and is in contravention of well-reasoned case law to the contrary. *See In re P.J.*
 10 *Keating Co.*, 168 B.R. 464, 473 (Bankr. D. Mass. 1994) (stating that stripping of loan covenant
 11 was not fair and equitable); *In re Kellogg Square P'ship*, 160 B.R. 343, 368 (Bankr. D. Minn.
 12 1993) ("In exchange for the forced entry into that loan, the creditor is entitled to demand both
 13 pecuniary and nonpecuniary terms that are sufficient to shelter it from the risks inherent in the
 14 Debtor's proposal."). The Second Amended Plan should not be confirmed with the inclusion of
 15 this unreasonable and unfair provision.

16 **B. Section 1129(a)(5) And Section 1123(a)(7)—Debtor's Post-Confirmation**
 17 **Management Is Not Consistent With The Best Interests Of Creditors And**
 18 **Public Policy.**⁷

19 Section 1129(a)(5) of the Bankruptcy Code requires the plan proponent to disclose the
 20 identity and affiliations of any individuals expected to serve (or continue to serve) as a director,
 21 officer, or voting trustee of the reorganized debtor. Often taken for granted is the additional
 22 requirement that any such appointments (or proposed continuation of service) be "consistent with
 23 the interests of creditors and equity security holders and with public policy." 11 U.S.C. §
 24 1129(a)(5)(A)(ii); *see also* 11 U.S.C. § 1123(a)(7) (plan must be consistent with best interest of
 25 creditors and public policy with respect to post-confirmation management). The Second
 26 Amended Plan fails to satisfy the adequate disclosure of the "identities and affiliations" of post-

27 ⁷ While Wells Fargo has stipulated in the Final Hearing Stipulation that it will not
 28 challenge whether the Debtor has satisfied certain requirements under section 1129(a) of the
 Bankruptcy Code for purposes of the Final Hearing only, the Debtor still must affirmatively
 satisfy all of the requirements of section 1129(a).

1 confirmation management *and* such management is not in the best interest of creditors or
2 consistent with public policy.

3 The Debtor's proposed management is the single largest equity security holder, refuses to
4 provide any reasonable safeguards for Wells Fargo's cash collateral, and would have unfettered
5 discretion to make distributions to itself under the Second Amended Plan. The Debtor has failed
6 to disclose with any precision the identity and affiliations of the insiders who will run the Debtor
7 and their compensation structure, which appears to depend on equity distributions. *See In Re*
8 *Beyond.com Corp.*, 289 B.R. 138, 144-45 (Bankr. N.D. Cal. 2003) ("While the disclosure
9 statement identifies Barratt as the initial Liquidation Manager, it fails adequately to disclose his
10 affiliations. In particular, it fails to disclose the terms of the agreement that governs Barratt's
11 duties."). Indeed, nothing in the Second Amended Plan would prohibit the Debtor's
12 management from making a distribution of \$1 million or more to itself and the other equity
13 security holders after confirmation, all while Wells Fargo is "termed out" on a loan that naturally
14 matured four years ago. In many ways, the Second Amended Plan appears to be designed to
15 accomplish precisely that result. *E.g., In re Digerati Technologies, Inc.*, 2014 WL 2203895
16 (Bankr. S.D. Tex. May 27, 2014) (denying confirmation because insider management could
17 trigger lucrative benefits after confirmation).

18 In addition, management's inherent conflicts of interest compromise its ability to pursue
19 avoidance actions against various insiders, all of whom are related to the Debtor's proposed
20 management. *See In re WRN 1301, Inc.*, 2007 WL 1555812 (Bankr. E.D. Tex. May 24, 2007)
21 (continued service of existing president of debtor approved because court found he was
22 "disinterested person" under the Bankruptcy Code). It appears that, to date, the Debtor has not
23 even analyzed its retained causes of action, let alone thought about pursuing avoidable transfers
24 to insiders.

25 Proposed management by an entrenched insider is not in the best interest of the Debtor's
26 only meaningful creditor, Wells Fargo, and is not consistent with public policy. The meaning of
27 the term "public policy" in these provisions of the Bankruptcy Code can be traced to the Senate
28 Report accompanying the Chandler Act. That legislative history indicates that the provision

1 “directs the scrutiny of the court to the methods by which the management of the reorganized
 2 corporation is to be chosen, so as to ensure, for example, adequate representation of those whose
 3 investments are involved in the reorganization.” *In re Machne Menachem, Inc.*, 304 B.R. 140,
 4 142 (Bankr. M.D. Pa. 2003). If the Second Amended Plan were confirmed, Wells Fargo would
 5 have no “representation” with respect to the Debtor’s post-petition management, no financial
 6 covenant protection, and no safeguards against the diminution of the significant cash on hand, on
 7 which cash Wells Fargo asserts a lien. The purpose of chapter 11 is to allow the honest but
 8 unfortunate debtor to reorganize and emerge from bankruptcy; it is not to ensure a windfall to
 9 equity by shifting all the risk of reorganization to creditors.

10 **C. Section 1129(a)(1)—The Second Amended Plan Fails To Comply With**
 11 **Applicable Provisions Of The Bankruptcy Code.**

12 Finally, the Second Amended Plan’s proposed “cure” attempt is legally impermissible to
 13 the extent it shields non-debtor third parties from creditor claims. The Debtor’s attempt to
 14 collaterally shield the guarantors from the defaults that now exist under their guaranties violates
 15 section 524 of the Bankruptcy Code. *See In re Am. Hardwoods*, 885 F.2d 621, 626 (9th Cir.
 16 1989). Although the Bankruptcy Code precludes actions against the reorganized debtor or its
 17 property to collect on pre-bankruptcy debts, the same cannot be said with respect to litigation
 18 against non-debtor third parties who share liability for the same debts. Thus, section 524(e) of
 19 the Bankruptcy Code provides that “the discharge of a debt of the debtor does not affect the
 20 liability of any other entity on, or the property of any other entity for, such debt.” 11 U.S.C. §
 21 524(e); *see also id.* § 524(g); *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995). Furthermore, the
 22 Debtor cannot magically “cure” the maturity date default, for example, within the meaning of
 23 section 1124 of the Bankruptcy Code. *See* 11 U.S.C. § 1124(2)(A). The Second Amended Plan
 24 should not be confirmed with the inclusion of this patently unenforceable provision.

25 **III. CONCLUSION.**

26 Based on the foregoing, Wells Fargo respectfully requests the Court enter an Order:

- 27 A. Denying confirmation of the Second Amended Plan; and
 28 B. Granting Wells Fargo such other and further relief as the Court deems just and

1 proper under the circumstances.

2 RESPECTFULLY SUBMITTED this 20th day of April, 2015.

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By: /s/ Bryce A. Suzuki

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CERTIFICATE OF SERVICE

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- 1. On April 20, 2015, I served the foregoing document.
- 2. I served the above-named document(s) by the following means to the persons as listed below:

a. ECF System:

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USTPRegion17.lv.ecf@usdoj.gov

b. United States mail, postage fully prepaid to:

c. Personal Service (*List persons and addresses. Attach additional paper if necessary*)

Delivery was made by handing the document(s) to the attorney or by leaving the documents(s) at the attorney's office with a clerk or other person in charge, or if no one is in charge by leaving the documents(s) in a conspicuous place in the office.

Bryan Cave LLP
Two North Central Avenue, Suite 2200
Phoenix, Arizona 85004-4406

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For a party, delivery was made by handing the document(s) to the party or by leaving the document(s) at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

d. By direct email (as opposed to through the ECF System)

Based upon the written agreement of the parties to accept service by email or a court order, I caused the document(s) to be sent to the persons at the email addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

e. By fax transmission

Based upon the written agreement of the parties to accept service by fax transmission or a court order, I faxed the document(s) to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission is attached.

f. By messenger (List persons and addresses. Attach additional paper if necessary)

I served the document(s) by placing them in an envelope or package addressed to the persons at the addresses listed below and providing them to a messenger for service.

(A declaration by the messenger must be attached to this Certificate of Service).

I declare under penalty of perjury that the foregoing is true and correct.

Signed on April 20, 2015.

/s/ Michael F. Lynch

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