Gregory A. Cross (*pro hac vice*)
Christopher R. Mellott (*pro hac vice*)
Frederick W. H. Carter (Tex. Bar. No. 03914600)
Catherine Guastello Allen (*pro hac vice*)
VENABLE LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21202
Telephone: (410) 244-7400
Facsimile: (410) 244-7742
Email: crmellott@venable.com
fwcarter@venable.com
cgallen@venable.com

-and-

Steven R. Smith (TX Bar No. 18685870)
PERKINS COIE LLP
2001 Ross Avenue, Suite 4225
Dallas, TX 75201
Telephone: (214) 965-7702
Facsimile: (214) 965-7752
E-mail: SteveSmith@perkinscoie.com

*Attorneys for CWCapital Asset Management LLC, solely in its capacity as Special Servicer for U.S. Bank National Association, as Trustee, successor-in-interest to Bank of America, N.A., as Trustee for the Registered Holders of Wachovia Bank Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2006-C23*

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
|---|---|---|
| In re | § | Case No. 13-30402-hdh11 |
| | § | |
| NNN 3500 Maple 26, LLC, | § | Chapter 11 |
| | § | |
| Debtor. | § | (Jointly administered) |
| | § | |
| | § | |

**OPPOSITION TO CONFIRMATION OF**
**DEBTORS' JOINT PLAN OF REORGANIZATION**

U.S. Bank National Association, as Trustee, successor-in-interest to Bank of America, N.A., as Trustee for the Registered Holders of Wachovia Bank Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2006-C23 (the "Trust"), by and through CWCapital Asset Management LLC ("CWCAM"), solely in its capacity as Special Servicer, hereby files this opposition (the "Opposition") to confirmation of the Debtors' Joint Plan of Reorganization (the "Plan"), [Docket No. 588].[1]

## I. PRELIMINARY STATEMENT[2]

The Debtors have had more than a year to solidify unanimity among the TIC Investors and to develop and propose a confirmable plan, but they have not done so. Instead, the Debtors, who own less than 100% of the Property, are seeking confirmation of a Plan with no binding source of funding and no completed or binding plan documents.

The Plan does not have:

- Any source of funding – the funding under the Plan is premised upon non-binding statements by the proposed 10% investor in a yet to be formed joint venture.
- Any binding documents to effectuate the Plan, including:
  - Formation documents for NewCo, the Successor Debtor or the Managing Member;
  - A contribution agreement between the proposed Joint Venture and the Successor Debtor;
  - Transfer documents to provide for the transfer of the members of the TIC Investors' membership interests to the Successor Debtor or to NewCo;
  - A management agreement or terms for the proposed property manager's management of the Property;

[1] Capitalized terms used, but not defined herein shall be defined as set forth in the Proof of Claim No. 3 filed by the Trust in the NNN Maple 1, LLC Bankruptcy Case No. 13-34362 pending in the United States Bankruptcy Court for the Northern District of Texas.

[2] Capitalized terms used but not defined in the Preliminary Statement shall be defined as set forth elsewhere in this Opposition.

- An identified manager of the Successor Debtor, terms for the manager's engagement or an agreement; or
- Binding financing documents.

- An identified replacement guarantor or guaranty agreement.
- A concrete number of members in NewCo and the Successor Debtor.
- The amount of TIC Investors' interests that will be transferred to Breakwater and the entity in which Breakwater will hold such interests has not been determined (nor is there any indication whether such interests will be held by Breakwater or some other entity).
- The Debtors have not identified a lending source or entered any discussions or negotiations regarding the payoff of the Trust's Loan, which matures in less than 23 months in January 2016.
- The Debtors have not identified the means of calculating the value of the TIC Investors' membership interests for purposes of transfer through the Cash Payout Option (as defined in the Plan), the New Equity Option (as defined in the Plan) or for compensation in connection with the Debtors' proposed 363(h) sale or use of the Call Option.

***Even if all of the foregoing were in place, the Plan being proposed is not for the benefit of the constituents of the Bankruptcy Cases, as the Property value would have to increase by approximately 89% from the Debtors' current value of $48,100,000[3] to a new value of more than $91 million[4] before one dime is realized by the current TIC Investors.*** The Plan represents a highjacking of the bankruptcy process by a rogue borrower's consultant whereby the consultant receives additional fees and equity interests, the CRO selected by the consultant receives additional fees and future employment and the investor selected by the consultant receives a substantial preferred equity position and payout, while the only potential benefit to the existing Debtors is a highly speculative junior and diluted distribution to be made five years after confirmation and only if the Property is sold for a sufficient amount. Indeed, no one involved in

[3] The Trust hereby reserves and does not waive its right to dispute the Debtors' valuation of the Property.

[4] The Debtors' projections assume that the investors will be repaid approximately $11 million prior to the sale of the Property. As established herein, this is unlikely to occur. However, even if that were to occur, the Property would need to be sold for more than $79 million, an amount requiring an increase in Property value of more than 64%.

the creation of the Debtors' Plan has even performed the necessary calculations to determine the sale price required for the Debtors to receive any distribution.

The Debtors themselves have had no input on the Plan. Their CRO, who was hired by the borrower's consultant, has provided no input on the Plan, does not have a clear understanding of the terms of the Plan, does not know the amount of cash or membership interests that the Debtors will receive and has not reviewed the operative plan documents.

The Plan itself, which purports to provide for the cure and reinstatement of the Trust Loan, cannot be confirmed because it (i) does not satisfy the requirements for reinstatement and is predicated upon terms which themselves trigger additional and incurable defaults under the Loan Documents; (ii) provides for the sale of the Property, but does not give the Trust the right to credit bid as required by Section 363(k); (iii) improperly compels the transfer of non-debtor Property; and (iv) as discussed above, the Plan was proposed and structured to provide an investment opportunity for non-debtors – providing no reasonably foreseeable benefit to the Debtors.

## II. OVERVIEW OF PLAN

This is the third plan proposed by the Debtors and is substantively identical to the two facially unconfirmable plans that preceded it. Although the Plan characterizes its treatment of the Trust Loan[5] as a cure and reinstatement, it does not satisfy the requirements for a cure and reinstatement under Bankruptcy Code § 1124(2). The Plan instead proposes a restructuring of the Trust Loan whereby the membership interests of the Debtors and consenting non-debtor TIC Investors will be transferred to "NewCo" – a to be formed limited liability company which, by virtue of its ownership of the membership interests, will effectively hold title to the Property and become a new borrower under the Trust's Loan Documents. See Plan at § 6.2. NewCo will

[5] The "Trust Loan" is the loan in the original principal amount of $47 million, which is evidenced by the Note.

have two or three members, the membership has not yet been finalized. See Plan at § 6.2; Aliniazee Dep.[6] at 81:14-18 (Debtors' representative stating that he does not know if Breakwater[7] will hold membership interests in NewCo or the Successor Debtor); Breakwater Dep.[8] at 43:5-44:5 (stating that it has not been determined whether Breakwater will hold an interest in the Successor Debtor or NewCo); Steelbridge Dep.[9] at 34:15-25 (same). The managing member is also a yet to be formed limited liability company (the "Managing Member") owned by a 90-10 joint venture consisting of two investors (the "Joint Venture"). See Plan at § 6.2(b); Steelbridge Dep. at 29:25-30:25. The Joint Venture will infuse a yet to be determined amount of equity in the Property in exchange for managing membership interests in NewCo and preferred distribution rights. See Plan at § 6.2(b); Steelbridge Dep. at 35:1-20; Breakwater Dep. at 49:9-50:16.

The second member of NewCo is the Successor Debtor (as defined in the Plan), which is a third to be formed limited liability company that will be owned by the members of the Debtors and consenting non-debtor TIC Investors. See Plan at § 6.2(a); Aliniazee Dep. at 71:14-24. The Successor Debtor will be a silent member, with junior distribution rights. See Plan at § 6.2. The members of the Debtors[10] and consenting non-debtor TIC Investors (the "TIC Owners") will

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6 The "Aliniazee Dep." is the Oral Deposition of the Debtors by and through their designated representative Mubeen Aliniazee dated February 11, 2014.

7 "Breakwater" is Breakwater Equity Partners, LLC.

8 The "Breakwater Dep." is the Deposition of Breakwater Equity Partners, LLC by and through its designated representative Armand Nicholi dated February 13, 2014.

9 The "Steelbridge Dep." is the Oral Deposition of Steelbridge Capital, LLC by and through its designated representative Gavin Campbell dated February 12, 2014.

10 The "Debtors" are (i) NNN 3500 Maple 1 LLC, (ii) NNN 3500 Maple 2, LLC, (iii) NNN 3500 Maple 3, LLC, (iv) NNN 3500 Maple 4, LLC, (v) NNN 3500 Maple 5, LLC, (vi) NNN 3500 Maple 6, LLC, (vii) NNN 3500 Maple 7, LLC, (viii) NNN 3500 Maple 10, LLC, (ix) NNN 3500 Maple 12, LLC, (x) NNN 3500 Maple 13, LLC, (xi) NNN 3500 Maple 14, LLC, (vii) NNN 3500 Maple 15, LLC, (xiii) NNN 3500 Maple 16, LLC, (xiv) NNN 3500 Maple 17, LLC, (xv) NNN 3500 Maple 18, LLC, (xvi) NNN 3500 Maple 20, LLC, (xvii) NNN 3500 Maple 22, LLC, (xviii) NNN 3500 Maple 23, LLC, (xix) NNN 3500 Maple 24, LLC, (xx) NNN 3500 Maple 26, LLC, (xxi) NNN 3500 Maple 27, LLC, (xxii) NNN 3500 Maple 28, LLC, (xxiii) NNN 3500 Maple 29, LLC, (xxiv) NNN 3500 Maple 30, LLC, (xxv) NNN 3500 Maple 31, LLC, (xxvi) NNN 3500 Maple 32, LLC, and (xxvii) NNN 3500 Maple 34, LLC.

transfer their membership interests to the Successor Debtor, which will then immediately transfer those interests to NewCo, in exchange for an as-yet undetermined amount of interests in the Successor Debtor. See Plan at § 6.2; Aliniazee Dep. at 65:7-66:25 (stating that he does not know the amount of cash or equity the TIC Owners will receive in exchange for their membership interests and has not been involved in any discussions regarding this amount).

The Debtors' financial advisors, Breakwater Equity Partners LLC ("Breakwater"), will receive a "Success Fee" consisting of membership interests either in NewCo or in the Successor Debtor, but the exact entity has not yet been determined. See Plan at n. 1; Aliniazee Dep. at 81:14-18; Breakwater Dep. at 43:5-44:5; Steelbridge Dep. at 34:15-25. ***Breakwater's membership interest will be approximately 24% of the TIC Investors' equity interests in the Property*** and will be taken from the TIC Investors' interests. See Plan at n. 1; Steelbridge Dep. at 35:1-18. ***Breakwater will also receive a capital placement fee equal to $447,893.13 at closing***.[11] See Disclosure Statement at n. 8.

The Plan seeks to compel the transfer of non-consenting, non-debtor TIC Investors' interests in the Property to the Reorganized Debtors (as defined in the Plan) through the exercise of either the Call Option in the TIC Agreement or through a transfer under Bankruptcy Code § 363(h). See Plan at § 6.2(a). As established below, the Debtors cannot effectuate the proposed transfers.

The Plan is to be funded through an $8.5 million Cash Infusion (as defined in the Plan) from the Joint Venture and additional equity contributions (the "Additional Equity

[11] To the extent that there is a distribution to the class B interest holders, Breakwater's Success Fee will be offset by the capital placement fee. See Disclosure Statement n. 8.

Contributions"), which are projected to total $10,169,418. See Disclosure Statement[12] at Art. VI(D)(4). Although the Plan and Disclosure Statement state that the Plan will also be funded by net operational profits from the Property, ***the Debtors and the investors do not anticipate that there will be any net cash flow during the first two years covered by the Projections***. See Disclosure Statement, Ex. E (Projections).

Under the Plan, no distributions will be made to the Successor Debtor for five years. See Disclosure Statement, Ex. E (Projections); Steelbridge Dep. 72:20-73:7. Instead, the Debtors' stated goal is to stabilize the Property and achieve a 90% occupancy rate within the five year term covered by the Projections. See Disclosure Statement at Ex. E (Projections). At the end of the five year term, the Debtors plan to sell the Property, with sale proceeds distributed to the members of NewCo, in accordance with an as-yet unfinalized waterfall. See Plan at § 6.2(b); see generally Plan Supplement[13]; see also Steelbridge Dep. 72:20-73:7. As currently proposed, the Joint Venture will receive 100% of any distribution until it has received a 16.5% internal rate of return ("IRR") and 1.5 times equity multiple on its invested capital. See Plan at § 6.2(b). Under the Plan, the Joint Ventures' invested capital totals more than $19 million, which means that ***based upon the Debtors' own projections, the Property must be sold for more than $91 million in order for a single dime to flow to the existing TIC Investors***. See Plan at § 6.2; Disclosure Statement, Ex. E (Projections). The Joint Venture will then receive 75% of all distributions until it receives a 20% IRR and 1.75 times equity multiple and the Successor Debtor will receive 25%.

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[12] The "Disclosure Statement" is the Third Amended Disclosure Statement for Debtors' Joint Plan of Reorganization, which is attached to the Notice of Filing of Solicitation Version of Approved Disclosure Statement for Debtors' Joint Chapter 11 Plan, [Docket No. 630], as Exhibit A.

[13] The "Plan Supplement" is the Notice of Filing Plan Supplement Documents and the exhibits thereto dated February 10, 2014, as supplemented by Debtors' counsel on February 11, 2014 and is attached hereto as **Exhibit C**.

See Plan at § 6.2(b). Thereafter, the distributions will be split 60% to the Joint Venture and 40% to the Successor Debtor. See Plan at § 6.2(b).

## III. LEGAL ARGUMENT

### A. Plan Does Not Reinstate the Trust Loan.

The Debtors' Plan alters the Trust's legal, equitable and contractual rights under the Loan Documents. See 11. U.S.C. § 1124(2) (stating the requirements for reinstatement); see also Southland Corp. v. Toronto-Dominion (In re Southland Corp.), 160 F.3d 1054, 1058 (5th Cir. 1998) (holding that reinstatement requires that the creditor's claims to be unaltered under the plan).

Under the Plan, the ownership interests in and control of the borrowers (the TIC Investors), and, correspondingly, in the Property, will be transferred to NewCo. See Plan at § 6.2. NewCo will be managed and controlled by a new Joint Venture, and the existing borrowers either will hold silent and diluted membership interests in NewCo or, if they do not consent, their interests in the Property will be deemed transferred. See Plan at § 6.2.

The Loan Documents expressly prohibit the transfer of an interest in the Property or in any of the borrowers without the Trust's consent, which the Debtors do not have. See **Exhibit A** (Excerpts of Deed of Trust) at § 2.9. "In Texas, anti-assignment clauses are enforceable unless rendered ineffective by an applicable statute." See Continental Cas. Co. v. Dr. Pepper Bottling Co. of Tex., Inc., 416 F. Supp. 2d 497, 509 (N.D. Tex. 2006); see also Island Recreational Dev. Corp. v. Republic Bank of Tex. Savs. Assoc., 710 S.W.2d 551, 556 (Tex. 1986) (holding that an attempted assignment of a letter of commitment that violated the anti-assignment provision was void).[14]

[14] Moreover, although Bankruptcy Code § 365 allows the assignment of certain executory contracts and leases notwithstanding anti-assignment clauses, Section 365 does not apply because (i) the Loan Documents are not

Indeed, the Plan does not even comply with prerequisites for obtaining the Trust's consent. The Loan Documents give the Trust sole discretion to approve of a new entity and require that (i) the Trust be given sufficient information about the borrower's experience and track record in owning similar properties, the financial strength, business standing and relationship and experience with vendors, contractors, tenants, lenders and other business entities; (ii) any entity with an interest in the Property be organized as a single purpose entity consistent with the terms of Section 2.29 of the Deed of Trust; (iii) the borrower pay an assumption fee equal to 1% of the unpaid balance of the Note; (iv) a replacement guarantor suitable to and approved by the Trust and a guaranty agreement in form and substance must be approved by the Trust; (v) appropriate papers evidencing the borrower's capacity and good standing; and (vi) a written No-Downgrade Confirmation from the borrower. See Ex. A (Deed of Trust) at §§ 2.9(c) and 2.29. Yet, none of this information has been provided to the Trust.

The Loan Documents require that when there is a new borrower, a new guaranty must be given ***and*** the existing guaranty must remain in effect. See Ex. A (Deed of Trust) at § 2.9(c)(5) and (10). Under the Plan, a new guarantor (which has not yet even been identified) is to provide a new guaranty, ***but only if*** (i) 100% of the TIC Investors' interests in the Property are transferred and (ii) the existing guaranty terminates. See Plan at § 6.2; Steelbridge Dep. 37:12-18; 38:19-39:5.

The proposed Plan also provides that the existing Property management agreement will be terminated and a new manager will be engaged pursuant to a new management agreement, which also has not yet been fully negotiated or completed. See Plan at §§ 6.2 and 9.1; Dep. The

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executory contracts and (ii) Bankruptcy Code § 365(c)(2) expressly prohibits the assignment of contracts "to make a loan, or extend other debt financing or financial benefits, to or for the benefit of the debtor . See 11 U.S.C. § 365(c)(2) (prohibiting the assignment of "a contract to make a loan, or extend other debt financing or financial benefits, to or for the benefit of the debtor.")

change in manager, termination of the management agreement and creation of a new management agreement all require the Trust's consent, which has not been sought or obtained.

The Debtors have had more than a year to formulate and finalize a proposed restructuring and submit the terms of the restructuring to the Trust, but they have failed to do so. They were directed to supplement their Disclosure Statement by February 10, 2014 to provide the formation documents and other details of their proposed restructuring, but did not comply with this requirement either. Instead, the Debtors have submitted incomplete drafts of documents without completed terms and, the Debtors concede that they did not even review to confirm that they complied with the requirements of the Loan Documents. See Plan Supplement; see also Aliniazee Dep. at 56:7-58:7; 67:1-9; 71:1-24; 73:10-16; 74:19-75:14; 76:10-77:6; 80:15-81:4.

The transfer of interests in the Property, change in control and termination of the Management Agreement on the Effective Date of the Plan each trigger incurable "Events of Default" under the Trust's Loan Documents; accordingly, the Plan does not provide for the reinstatement of the Loan. See Ex. A (Deed of Trust) at §§ 1.18 (TIC Investors represented and warranted that the Management Agreement was and would remain in full force and effect); 2.9 (transfer of any interest in the Property without the Trust's prior written consent constitutes an Event of Default); 4.1 (c), (e), (n) and (p) (stating the applicable Events of Default); see also In re Young Broadcasting Inc., 430 B.R. 99, 115-18 (Bankr. S.D.N.Y. 2010) (holding that plan that provided for change in control of borrower would trigger an incurable event of default under the loan documents and therefore was not a reinstatement under Section 1142).

### B. The Plan Does Not Provide for the Trust's Right to Credit Bid as Required by Section 363(k).

The proposed Plan does not provide for a "recapitalization," of the Trust's Loan, it provides for a sale of interests in the Property, thereby triggering the Trust's right to credit bid

under Section 363(k) of the Bankruptcy Code. See In re Olde Prairie Block Owner, LLC, 464 B.R. 337, 345-46 (Bankr. N.D. Ill. 2011).

Under a true recapitalization, there is a "new form of the previous participation in the enterprise, ***involving no change of substance of the rights and relations of the interested parties to one another or to the corporate assets***." Id. (quoting Bazley v. Comm'r, 331 U.S. 737 (1947)) (emphasis added). In contrast, "sale" involves the "transfer of ownership of rights in the [d]ebtor and its assets to new owners of those rights in exchange for cash and property." Olde Prairie, 464 B.R. at 347. That is precisely what is proposed by the Plan.

In Olde Prairie, the debtor was seeking to transfer ownership and control of the debtor to a joint venture owned and controlled by plan investors who held no previous interest in the debtor, in exchange for the investors' equity contributions. 464 B.R. at 347. The debtor entity would not change, and title to the debtor's property would not be transferred. Id. The court held that, because this transaction "would effectively constitute a sale, Debtor's Plan must provide [the secured creditor] with a right to credit bid its claim." Id.

The transaction proposed under the Debtors' Plan is the same. Under the Debtors' Plan, the existing TIC Investors (excluding the non-consenting, non-debtor TIC Investors) will in name only, retain ownership of the Property. Their membership interests in the TIC Investors will be transferred to NewCo, an entirely new entity, with an entirely new ownership structure. See Plan at § 6.2. NewCo will be owned and managed by a new entity controlled by the Joint Venture, plan investors with no previous interest in the Debtors, in exchange for the Joint Venture's equity contributions. See Plan at § 6.2. The Debtors (and consenting non-debtor TICs) as will receive silent, subordinated and diluted membership interests in NewCo as a result of its membership interests in the Successor Debtor. A third entity, Breakwater, will receive

interests in the Property through their interests in either NewCo or the Successor Debtor. Indeed, the existing Debtors will have no right to be paid a penny until the property sells for more than $91 million (which is nearly $42.9 million more than the Debtors' current value of $48.1 million for the Property).

This transaction, which entails a transfer of ownership interests and control to a new entity, with a new structure, to be controlled by plan investors with no prior interest in the Debtors or the Property, is a sale, which triggers the Trust's right to credit bid under Section 363(k) of the Bankruptcy Code. The Plan does not satisfy the Trust's right to credit bid.

The Debtors in fact contemplate that their proposal is a sale by seeking to use Section 363(h) and the Call Option to compel the transfer of the non-debtor TIC Investors' interests. Both of these procedures are predicated on the existence of a sale. See infra.

Moreover, the Plan also provides for the sale of the non-debtor TIC Investors' interests in the Property free and clear of the Trust's lien in the Property, either consensually or non-consensually through the use of the Call Option or a transfer pursuant to Section 363(h). The non-debtor TIC Investors are each fully liable for the entire indebtedness owed to the Trust under the Note, and their interest in the Property secures the Trust's lien. The Plan proposes to impermissibly enjoin the Trust from enforcing its lien on their interests in the Property to satisfy the debt owed by these non-debtor TIC Investors. See Plan at §§ 12.1 and 12.2. The transfer of the Property free and clear of the Trust's lien, cannot be accomplished without affording the Trust a right to credit bid. See RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2073, 182 L. Ed. 2d 967 (2012) (holding that a plan that provides for the sale of property free and clear of a secured creditor's lien cannot be confirmed without allowing the lienholder the right to credit bid).

### C. The Plan Does Not Comply With the Requirements of Section 1129.

#### 1. The Plan Does Not Provide Adequate Means of Implementation.

The Plan does not provide adequate means for its implementation as required by Bankruptcy Code § 1123(a)(5) because (i) it is premised upon the transfer of the non-debtor TIC Investors' interest in the Property without satisfying the requirements for such transfers and (ii) provides no binding source of funding for the Plan See In re Patriot Place, Ltd., 486 B.R. 773, 810-11 (Bankr. W.D. Tex. Jan. 11, 2013) (holding that plan that did not provide adequate means for implementation could not be confirmed); In re Moritz Walk, L.P., 2011 WL 4372405 (Bankr. S.D. Tex. 2011) slip op. (holding that plan that was based upon vague post-confirmation capital structure lacked adequate means for implementation and could not be confirmed).

a) *The Debtors Cannot Compel the Transfer of the Non-Debtor TIC Investors' Property.*[15]

The Debtors do not have a binding agreement with all of the non-debtor TIC Investors allowing for the transfer of the non-debtors' interests to the Successor Debtor. The Debtors are instead attempting to compel the transfer of these interests through Section 363(h) of the Bankruptcy Code or through the Call Option in the TIC Agreement. The Debtors cannot compel the transfer of any of the non-debtors' interests in the Property through either method.

If the Debtors are not selling the Property, they cannot use Section 363(h) to compel the transfer of the non-debtors' share of the Property. See 11 U.S.C. § 363(h) (stating that a debtor in possession may "**sell** both the estate's interest . . . and the interest of any co-owner in property" if certain conditions are met) (emphasis added). Alternatively, if the Debtors are

[15] The Trust's response to the Original Adversary Complaint Pursuant to § 363(h) of the Bankruptcy Code, or Alternatively, for Declaratory Relief, [Docket No. 1] filed in Adversary Proceeding No. 14-03003 pending in the United States Bankruptcy Court for the Northern District of Texas is incorporated herein by this reference.

selling the Property, the Trust must be given the right to credit bid as required by Section 363(k). See 11 U.S.C. § 363(k); see also RadLAX Gateway Hotel, LLC, 132 S. Ct. at 2073.[16]

The Debtors cannot use the Call Option to transfer the non-debtors' interests in the Property. Pursuant to Section 11.2 of the TIC Agreement, the Call Option may be used to transfer the interests of TIC Investors that do not consent to a sale or refinancing of the Property or that fail to take action to prevent or cure a default under the Loan Documents. See **Exhibit B** (TIC Agreement) at § 11.2. The Debtors are not purporting to refinance the Property and are not curing a default, but rather are creating additional incurable defaults. In addition, the Debtors have not given the Property Manager the required 30-day right of first refusal with respect to the interests they are seeking to purchase. See Ex. B (TIC Agreement) at §11.2; see also Aliniazee Dep. at 97:19-100:5.

To the extent any of the non-debtor TIC Investors consents to the transfer of their Property, Section 11.2 does not apply. Section 11.2 applies only to ***non-consenting*** TIC Investors. If a TIC Investor consents to the Plan, it is a voluntary transfer, which is prohibited while the Loan is in default. See Ex. A (Deed of Trust) at § 2.9(c)(1) (prohibiting transfers while the Loan is in default).

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[16] In addition, the Debtors cannot satisfy the requirements of Section 363(f) and 363(h) of the Bankruptcy Code because (i) the Trust does not consent to the sale, (ii) the Trust will not be repaid in full, and (iii) the Debtors cannot establish that the benefit to the estate would exceed the detriment to the co-owners, because the sale would not result to any distribution to the estate, as required by Section 363(h)(3). See Kebe v. Central Mortgage Co. (In re Kebe), 469 B.R. 778, 795, 797-98 (Bankr. S.D. Ohio 2012) (denying motion for summary judgment for 363(h) sale where the trustee did not establish that sale would result in net proceeds to the debtor's estate after payment of liens on the property and costs of sale); Spear v. Crow Canyon Office Park Partners (In re Haley), 100 B.R. 13, 17 (Bankr. N.D. Cal. 1989) (denying trustee's request to sell jointly owned property where the trustee could not establish that benefit to the estate outweighed the detriment to the co-owners because there was no equity in the property); Morris v. Youngquist (In re Youngquist), Adv. No. 11-5073, 2012 Bankr. LEXIS *10-13 (Bankr. D. Kan. 2012) unreported (denying 363(h) sale where there would be "minimal or no recovery to the estate if the property were sold."); Lovald v. Tennyson, Adv. No. 09-5010, 2011 Bankr. LEXIS 1597 *14-15 (Bankr. D.S.D. 2011) unreported (denying 363(h) sale where there was no evidence that any debt, other than the voluntary lien on the property, would be repaid from the proceeds of the proposed sale). Moreover, the non-debtor TIC Investors would suffer a detriment as a result of the negative tax consequences that would result from a sale for less than the amounts owed to the Trust.

b) *There Is No Binding Commitment for Plan Funding.*

There is no binding commitment for the funding required by the Plan. The Plan is ostensibly to be funded by an $8.5 million Cash Infusion and an Additional Equity Infusions of $10,169,418, all of which is to be provided by the Joint Venture. See Plan at § 6.4, Disclosure Statement, Ex. E (Projections). In addition, to the extent that additional amounts are needed, the Joint Venture will purportedly fund such amounts, up to an undetermined cap. See Steelbridge Dep. at 43:10-21. ***Yet, despite having had months to solidify its funding commitments, there are still no binding agreements of any kind for the Joint Venture to provide any of the contemplated funding.*** See Steelbridge Dep. at 48:7-15.

c) *The Operative Documents Are Not Complete.*

Similarly, none of the operative documents necessary to consummate the restructuring proposed in the Plan have been completed. NewCo, the Successor Debtor and the Managing Member have not even been formed. See Steelbridge Dep. at 30:2-24; Aliniazee Dep. at 71:1-24; 73:10-16. The Debtors have not completed (i) the Contribution Agreement, which is to provide for the creation of NewCo, the Managing Member and the Successor Debtor; (ii) the Reorganization Agreement, which is to provide for the transfer of the membership interests in the TIC Investors to the Successor Debtor; (iii) the formation documents for NewCo, the Successor Debtor or the Managing Member; or (iv) the new management agreement for the management of the Property. See Plan Supplement (attaching unsigned and incomplete copies of the foregoing); Steelbridge Dep. at 80:8-21. The terms of those agreements are subject to further negotiations and, at least with respect to the LLC Agreements and Management Agreement, must be submitted to the Trust for approval.

The Debtors have had more than a year to develop and implement a workable restructuring plan and were put on notice that they had until February 28th to obtain confirmation of a plan or the Trust would be granted stay relief to exercise its rights against the Property. ***Despite this, the Debtors still do not have any binding source of funding for their Plan and do not have a single executed document necessary to complete the restructuring contemplated in the Plan.***

**2. The Plan Is Not Feasible.**

The Plan is not feasible because:

(i) ***The Debtors do not have any binding source of funding.*** As established above, the Plan is premised upon the Joint Venture providing all of the necessary plan funding, but the Joint Venture has not executed a binding agreement to provide such funding. Moreover, the Joint Venture will not provide funding unless the Debtors are able to obtain 100% ownership of the Property. See Aliniazee Dep. at 53:1-9. The Debtors cannot obtain 100% ownership and therefore, there is no source of funding. In addition, although the Note matures in just 23 months on January 11, 2016, the Debtors do not have a refinancing commitment and have not engaged in any discussions with potential lenders regarding a refinancing. See Steelbridge Dep. at 73:8-11; Aliniazee Dep. at 109:21-110:5.

(ii) ***The Projections are unrealistic.*** The Plan also is dependent upon the stabilization of the Property through yearly increases in occupancy of 3%, resulting in a 90% occupancy rate at the end of the five year term of the Projections. See Disclosure Statement, Ex. E (Projections). The Debtors expect to repay the Loan upon its maturity on January 11, 2016. See Disclosure Statement, Ex. E (Projections). The Property will then be sold at the end of the five year term, and the profit will be distributed in accordance with the waterfall. See

Steelbridge Dep. at 66:5-11. The Joint Venture is providing the financing for the Plan solely as an investment through the stabilization and sale of the Property for a profit at the end of the five year term. See Steelbridge Dep. at 66:5-11.

These projections and assumptions are not realistic. The Property currently has a 63% occupancy rate, there are no potential new tenants for the Property and there are only two small lease renewals in prospect. See Gilbreath Dep.[17] at 45:10-47:7; 49:11-50:14. Two of the "large" tenants at the Property, Estes Okon Throne and Carr, PLLC and Heritage Capital, Inc. dba Heritage Auctions, are likely to vacate the Property within the next year and a half, resulting in an occupancy rate of approximately 25% See Gilbreath Dep. at 49:11-50:14; 76:4-77:6; Steelbridge Dep. at 55:19-56:3. Significant capital expenditures are needed in order to attract and retain new tenants, but no capital improvements will be made for at least the first year of the Projections. See Steelbridge Dep. at 59:15-60:10 (stating that no capital expenditures will be made for the first year of the Projections; Gilbreath Dep. at 42:22-45:9 (stating that approximately $7 million is needed to attract new tenants over an 18-24 month lease up period). The Debtors' own projections demonstrate that the funding amounts and the projected cash flow are insufficient to meet the requirements of the Plan and the Property, but the Debtors have no binding commitment from the Joint Venture or any other source to provide additional funding over the term of the Plan. See Disclosure Statement, Ex. E (Projections); Steelbridge Dep. at 48:7-15.

Moreover, the additional funding contemplated by the Debtors' projections is inadequate to sustain the Property's operations. See **Exhibit D**, Excerpts of Expert Report of SC & H Group, LLC (the "SC&H Report") at p. 2. In order to sustain the Property's operations, the

[17] The "Gilbreath Dep." is the Oral Deposition of the 30(b)(6) Representative for TIC Properties Management, LLC (Ronald W. Gilbreath) dated February 10, 2014.

Debtors will need $11,100,000 for the five-year period ending December 31, 2018. See id. In addition, the Property will not generate sufficient cash flows to service the existing Loan or to enable the Debtors to refinance the Property. See id.

The anticipated capital expenditures and tenant improvement amounts in the Debtors' projections are also inadequate. The Debtors allocate only $2.5 million, to be paid out in years 2-4 to address the significant deferred maintenance issues at the Property. See Disclosure Statement, Ex. E (Projections). At least $3,638,063 is actually needed immediately for deferred maintenance. See Ex. D (SC&H Report at Ex. 2 (Analysis and Source of Assumptions Used in Projections)); **Exhibit E**, Excerpt of Property Condition Assessment Report dated January 17, 2014 ("PCA Report") at p. 6. A $3,016,274 replacement reserve is also required, of which over $1.4 million will be used in year two of the Projections. See Ex. E (PCA Report) at p. 6.

Under the Debtors' projections, tenant improvement costs total $6,051,023 for the five year projection period, based upon an assumption that new leases will receive an allowance of $25 per square foot and renewals will receive an allowance of $5 per square foot. See Disclosure Statement, Ex. E (Projections). In reality, a tenant allowance of $23.07 per square foot for new leases and $12.71 per square foot for renewals will be required based upon applicable market terms. The tenant improvement amount for the Heritage lease alone (the Property's largest tenant) will total more than $6 million.

**3. The Plan Contains A Non-Consensual Non-Debtor Injunction.**

The Fifth Circuit has conclusively determined that a plan cannot release non-debtor third parties and impose a permanent injunction of claims against them. See Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de CV (In re Vitro S.A.B. de CV), 701 F.3d 1031, 1062 (5th Cir. 2012) (stating that the Fifth Circuit has "firmly announced its opposition" to non-debtor releases); In re Pac. Lumber Co., 584 F.3d 229, 251 (5th Cir. 2009) (noting that Fifth Circuit

precedent "seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions," and striking non-debtor releases). A creditor may still seek recovery from other non-debtors that are liable on the debt. See In re Continental Airlines, 203 F.3d 203, 211 (3rd Cir. 2000) (stating that Bankruptcy Code § 524(e) does not discharge non-debtors and holding that a release and permanent injunction of claims against non-debtors was not allowed); Landsing Diversified Props-II v. First Nat'l Bank & Trust Co. (In re Western Real Estate Fund, Inc.), 922 F.2d 592, 601-2 (10th Cir. 1991) (stating that permanent injunction of claims against non-debtors violates Bankruptcy Code § 524(e)).

Each of the TIC Investors is a single purpose entity, whose only asset is its fractional interest in the Property. See Ex. A (Deed of Trust) at §§ 1.1 and 2.29. Under the Plan, the non-debtor TIC Investors' ownership interests in the Property will be transferred to the estate and the Trust will be enjoined from exercising its rights in the Property. See Plan at §§ 12.1 and 12.2. Each of the non-debtor TIC Investors is fully liable for the entire indebtedness owed to the Trust, which is currently due and owing because of the TIC Investors' pre-petition defaults. See **Exhibit F** (Note) at § 4.1 (stating that each borrower is jointly and severally liable for the obligations owed under the Note). The Trust is entitled to exercise its rights and remedies against the non-debtor TIC Investors and their fractional interests in the Property (which is their only asset), but the Plan enjoins the Trust from exercising these rights. As a result, the Plan contains an impermissible non-debtor injunction.

**4. The Debtors Do Not Have An Accepting Impaired Class.**

The Trust's claim is impaired because the Plan requires modifications to the Trust's Loan Documents. See 11 U.S.C. § 1124 (discussing impairment). Because the Trust is impaired, the Trust has the right to vote and the Trust has submitted a ballot voting against the Plan. Accordingly, for the Plan to be confirmed, the Debtors must have an accepting impaired

class, not including the votes of any insiders. See 11 U.S.C. § 1129(a)(10). However, the only classes entitled to vote on the Plan consist of classes of claims or interests held by insiders: (i) the non-debtor TIC Investors, which jointly own the Property and are jointly liable on the Debtors' debts and (ii) the members of the Debtors. See Plan at §§ 2.3, 4.7, 4.8 and 5.1.

**5. The Plan Was Not Proposed in Good Faith.**

The Plan was not proposed in good faith because:

(i) The Plan was developed and structured for the benefit of non-debtors. The Bankruptcy Case was filed at Breakwater's direction and for Breakwater's benefit. Breakwater has received substantial fees in connection with the Bankruptcy Cases and will receive an additional $447,893.13 at closing and 24%[18] of the TIC Investors' equity interests in the Property ***if any plan is confirmed by this Court even a Plan providing for the foreclosure of the Property***. See Disclosure Statement at n. 8. Breakwater selected and retained the Debtors bankruptcy counsel, the location for the initial bankruptcy filing, the Debtors' chief restructuring officer (Mubeen Aliniazee) and the financing source for the Plan. See Aliniazee Dep. at 116:22-117:8. Breakwater and the Joint Venture developed the terms of the Plan, with no input from the Debtors or their CRO. See Aliniazee Dep. 43:15-46:6; 47:9-18; 48:16-49:17; 50:14-16; 74:19-24; 76:16-77:6; 100:16-102:16; 103:2:11; 105:4-15. In fact, Mr. Aliniazee does not have any communications with any of the Debtors, other than joining, when convenient, the biweekly conference calls between Breakwater, the steering committee and Debtors' counsel. See Aliniazee Dep. 34:7-35:1; 35:8-17. He did not provide any comments or revisions to the Disclosure Statement or Plan and has never disagreed with or opposed a single action proposed by Breakwater. See Aliniazee Dep. at 43:15-46:6; 47:9-18; 48:16-49:17; 50:14-16; 74:19-24; 76:16-77:6; 144:22-145:4. Mr. Aliniazee has not reviewed the Plan Documents and does not

[18] The 24% interest will be reduced by the $447,893.13 payment. See Disclosure Statement at n. 8.

know the amount of cash or interests that the Debtors will receive under the Plan. See Aliniazee Dep. at 56:11-58:7. Incredibly, the Debtors have not even performed a calculation to determine the amount the Property would have to be sold for in order for the Debtors to receive a single penny. See Breakwater Dep. at 63:13-64:20 (stating that no analysis has been performed); Aliniazee Dep. at 111:7-20 (stating that he does not recall any discussions regarding when the debtors would receive a distribution).

In actuality, there is no benefit whatsoever for the Debtors under the Plan. The Joint Venture will receive 100% of any distribution from the Property until it has received 16.5% IRR and 1.5 times equity multiple on its invested capital. See Plan at § 6.2. Under the Plan, the Joint Ventures' invested capital totals more than $19 million and no distributions are expected until the Property is sold after year five. See Disclosure Statement, Ex. E (Projections); Dep. ***Based solely on the Debtors' numbers, in order for a single dollar to trickle down to the TIC Investors, the Property must be sold for more than $91 million, an amount approximately 89% more than the current value of the Property asserted by the Debtors.*** In reality, substantial additional equity contributions will likely be required, resulting in a need for the Property to be sold for more than $87.7 million, an amount nearly double the Debtors' current value for the Property, before any of the Debtors will be paid a dime. See Ex. D (SC&H Report) at p. 2 (stating that, based upon SC&H's cash flow projections, the preferred return to the joint venture is $46,134,000).

Indeed, the investment arrangement proposed under the Plan is not the result of a competitive process. Rather, Breakwater selected Steelbridge (an entity with which they have entered other financing arrangements) and declined to explore other potential investment opportunities. See Oral Deposition of 30(b)(6) Representative for Strategic Acquisition Partners,

LLC (Vance Detwiler) dated February 12, 2014 (the "Strategic Dep.") at 21:3-24 (stating that they had contacted Breakwater with respect to the Maple 26 bankruptcy filing regarding an investment opportunity and were informed that Breakwater already had a capital source). An open and competitive bidding process as part of a foreclosure is the only option that will potentially result in a benefit to the Debtors. Rather than waiting five years for a speculative profit contingent on the sale of the Property for nearly double its current value, a foreclosure may allow the Debtors to receive an immediate return on their interests.

(ii) In addition to the fees he will receive as the Chief Restructuring Officer, Breakwater has also proposed to hire Mr. Aliniazee as the manager of the Successor Debtor. See Dep. The terms of his management and compensation have not yet been finalized or disclosed. See generally Plan and Disclosure Statement; see also Aliniazee Dep. at 74:19-77:6.

(iii) At Breakwater's direction, the Debtors have engaged in fraudulent activity and have breached the terms of the Loan Documents. Breakwater directed the Debtors enter into agreements with two vendors, Comm-Fit, L.P. ("Comm-Fit") and Jemm Investments, Inc. (collectively, the "Manufactured Claims"), two weeks before the bankruptcy filing, for the sole purpose of creating an impaired consenting class and in violation of the TIC Agreement and the Loan Documents. See Gilbreath Dep. at 58:2-19; 60:2-62:3; 63:5-14; 65:1-24; Exs. 9-10. Breakwater also directed the Debtors to divert tenant security deposits totaling approximately $247,000 from the security deposit account and operating funds of approximately $38,000 from the operating account to pay Breakwater a portion of its fees. See Gilbreath Dep. at 19:18-22:6; 23:4-7; 23:15-25; 25:24-29:22; 30:18-31:14; Exs. 2-3. After the Plan is confirmed, the Property will be owned and controlled by entities and individuals selected by Breakwater and with which Breakwater has a preexisting relationship. In light of Breakwater's history of directing the TIC

Investors to violate the terms of the Loan Documents and otherwise engage in questionable activity, there is simply no assurance that the Property will be effectively managed or that the Loan Documents will be complied with.

## IV. CONCLUSION

WHEREFORE, based upon the foregoing and the entire record before the Court, the Trust respectfully requests that the Court enter an order denying confirmation of the Plan and granting the Trust such other and further relief as is just and appropriate under the circumstances of these Bankruptcy Cases.

RESPECTFULLY SUBMITTED this 20th day of February 2014.

*/s/ Gregory A. Cross*
Gregory A. Cross (*pro hac vice*)
Christopher E. Mellott (*pro hac vice*)
Frederick W. H. Carter (Tex. Bar. No. 03914600)
Catherine Guastello Allen (*pro hac vice*)
VENABLE LLP
750 E. Pratt Street, Suite 900
Baltimore, Maryland 21202
Telephone: (410) 244-7400
Facsimile: (410) 244-7742
Email: crmellott@venable.com
fwcarter@venable.com
cgallen@venable.com

*-and-*

Steven R. Smith (TX Bar No. 18685870)
PERKINS COIE LLP
2001 Ross Avenue, Suite 4225
Dallas, TX 75201
Telephone: (214) 965-7702
Facsimile: (214) 965-7752
E-mail: SteveSmith@perkinscoie.com
*Attorneys for CWCapital Asset Management LLC, solely in its capacity as Special Servicer for U.S. Bank National Association, as Trustee, successor-in-interest to Bank of America, N.A., as Trustee for the Registered Holders of Wachovia Bank Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2006-C23*

**CERTIFICATE OF SERVICE**

I certify that on February 20, 2014 a copy of this document was served by the Electronic Case Filing System for the Bankruptcy Court, Northern District of Texas on those parties that receive electronic service and via first class mail to the parties identified on the attached service list.

*/s/ Frederick W. H. Carter*
Frederick W. H. Carter

***Debtor***
NNN 3500 Maple 26, LLC, et al.,
c/o Susan Slaughter, Case Manager
Breakwater Equity Partners
3636 Nobel Dr., Suite 350
San Diego, CA 92122

***U.S Trustee***
1100 Commerce Street
Room 976
Dallas, TX 75242-1496
Attn Erin M. Schmidt

***Governmental Agencies***

Internal Revenue Service
P.O. Box 7346
Philadelphia, PA 19101-7346

Internal Revenue Service
1100 Commerce
MC 6610 DAL/Rm 1021
Dallas, Texas 75242

TX Comptroller of Public Accounts
111 E. 17 Street
Austin, TX 78774-0100

Texas Attorney General
P.O. Box 12548
Austin, TX 78711-2548

**Secured Creditors**

Jemm Investments, Inc.
3636 Nobel Drive, Suite 350
San Diego, CA 92122

**NNN 3500 Maple Consolidated Debtors**
**30 Largest Creditors**

ABM Security Services, Inc.
P.O. Box 743252
Los Angeles, CA 90074

Alpha Glass & Mirror Co.
4865 8901 Sovereign Row
Dallas, TX 75247

Allied Waste Services #794
P.O. Box 78829
Phoenix, AZ 85062-8829

April Building Services, Inc.
4865 Gretna St.
Dallas, TX 75207

Aramark Uniform Services
P.o. Box 731676
Dallas, TX 75373

AT&T
P.O. Box 5001
Carol Stream, IL 60197

B Squared Investments Inc.
101 N. Main St., 12th Floor
Greenville, SC 29673

B.J. Glass Co, Inc.
579 County Road 4106
Crandall, TX 75114

Balance Vibration Technologies
P.O. Box 702286
Dallas, TX 75370

Burnett Companies Consolidated, Inc.
P.O. Box 973940
Dallas, TX 75397-3940

Champion Waste Services LLC
P.O. Box 701689
Dallas, TX 75370

City of Dallas
City Hall 1AN
Dallas, TX 75277

Constellation New Energy, Inc.
14217 Collections Center
Chicago, IL 60693

Costar Realty Information
P.O. Box 791123
Baltimore, MD 21279

Entech Sales & Service, Inc.
P.O. Box 650110
Dallas, TX 75265

Fast Trak Construction
1150 Empire Central Pl #124
Dallas, TX 75247

First Maintenance, Inc.
3306 Wiley Post #103
Carrollton, TX 75006

Geary, Porter & Donovan, P.C.
One Bent Tree Tower
16475 Dallas Parkway, Suite 400
Addison, Texas 75001-6837

Greenscape Pump Services
1425 Whitlock Lane
Suite 108
Carrollton, TX 75006

Holiday Seasons LLC
P.O. Box 3577
Grapevine, TX 76099

Joe B. Baines, Jr.
P.O. Box 38161
Dallas, TX 75238-0161

John A. Arnold, Inc.
3904 Main St.
Dallas, TX 75226

Mitech Controls, Inc.
4475 River Green Parkway
Suite 300
Duluth, GA 30096

Precision Water Technologies
1225 Capital Drive
Suite 180
Carrollton, TX 75006

Schindler Elevator Corporation
P.O. Box 93050
Chicago, IL 60673

Secure Options
7263 Envoy Court
Dallas, TX 75247

Staffelbach, Inc.
2525 McKinnon
Suite 800
Dallas, TX 75201

TIC Properties Management
101 N. Main St.
Suite 1200
Greenville, SC 29601

The Brickman Group, Ltd, LLC
3630 Solutions Center
Chicago, IL 60677-3006

Wyche, PA
44 East Camperdown Way
P.O. Box 728
Greenville, SC 29602

**Notices of Appearance (Via ECF/E-Mail)**

Steven Smith
PERKINS COIE LLP
2001 Ross Avenue, Suite 4225
Dallas, Texas 75201
SteveSmith@perkinscoie.com

Mark H. Ralston
State Bar No. 16489460
Estes Okon Thorne & Carr PLLC
3500 Maple Avenue, Suite 1100
Dallas, Texas 75219
mralston@estesokon.com

Kyle B. Mandeville
Passman Jones
1201 Elm Street, Suite 2500
Dallas, TX 75270-2599
mandevillek@passmanjones.com

Raymond J. Urbanik
MUNSCH HARDT KOPF & HARR,
3800 Lincoln Plaza
500 N. Akard Street
Dallas, Texas 75201-6659
rurbanik@munsch.com

Meagan Martin

mmartin@standlyhamilton.com

Josiah M. Daniel, III,
VINSON & ELKINS L.L.P.
Trammell Crow Center
2001 Ross Avenue, Suite 3700
Dallas, Texas 75201-2975
jdaniel@velaw.com

Mark Stromberg
STROMBERG STOCK PLLC

mark@strombergstock.com

Michelle V. Larson, Esquire
Andrews Kurth LLP
1717 Main Street, Suite 3700
Dallas, Texas 75201

Joseph J. Wielebinski, Esquire
Davor Rukavina, Esquire
Munsch Hardt Kopf & Harr, PC
500 North Akard Street, Suite 3800
Dallas, Texas 75201

William B. Finkelstein, Esquire
Dykema Gossett PLLC
1717 Main Street, Suite 4000
Dallas, Texas 75201

James H. Billingsley, Esquire
Polsinelli PC
2501 N. Harwood Street,
Suite 1900
Dallas, Texas 75201

Allied Waste Services #794
P.O. Box 78829
Phoenix, AZ 85062-8829

Alpha Glass & Mirror Co.
4865 8901 Sovereign Row
Dallas, TX 75247

Burnett Companies Cons. Inc.
P.O. Box 973940
Dallas, TX 75397-3940

Business Card
P.O. Box 15796
Wilmington, DE 19886

Crowson, George Jeffrey
150 Eaglepoint Dr.
Carrollton, TX 75007

Denitech
P.O. Box 844173
Dallas, TX 75284-4173

Fast Trak Construction
1150 Empire Central Pl #124
Dallas, TX 75247

Grainger
Debt 870448321
Palatine, IL 60038

Grainger
P.O. Box 419267
Kansas City, MO 64141

Harmon, Inc.
P.O. Box 74794
Chicago, IL 60694-4794

Hirschler Fleischer
P.O. Box 500
Richmond, VA 23218-0500

Joe B. Baines, Jr.
P.O. Box 38161
Dallas, TX 75238-0161

John C. Sellers,
101 N. Main St.
Suite 1203
Greenville, SC 29601

Joyce Cornwell
122 W. John Carpenter Fwy
Irving, TX 75039

LTP, Inc.
725 S. Britain Rd.
Irving, TX 75060

Prism Electric, Inc.
2985 Market St.
Garland, TX 75041

Secure Options
7263 Envoy Court
Dallas, TX 75247

Sprint
P.O. Box 4181
Carol Stream, IL 60197-4181

Zee Medical, Inc.
P.O. Box 781534
Indianapolis, IN 46278-8534

Texas Workforce Commission
PO Box 149037
Austin, TX 78714

TX Comptroller of Public Accounts
111 E. 17 Street
Austin, TX 78774-0100

Mark Baggett, Esquire
Office of the City Attorney
City of Dallas, Texas
1500 Marilla 7DN
Dallas, TX 75201

Jemm Investments, LLC
8677 Villa La Jolla Drive, Suite 1303
La Jolla, CA 92037

Elizabeth Weller, Esquire
Linebarger Googan Blair & Sampson, LLP
2777 N. Stemmons Freeway, Suite 1000
Dallas, TX 75207

Domenico Food Products, Inc.
12900 Stroh Ranch Place, Suite 115
Parker, CO 80134

Meagan Martin, Esq.
Standly Hamilton LLP
325 N. St. Paul Street, Suite 3300
Dallas, TX 75201

Mark Stromberg, Esquire
Stromberg Stock, PLLC
8750 North Central Expressway, Suite 625
Dallas, Texas 75231

The Brickman Group, Ltd., LLC
2275 Research Blvd., Suite 600
Rockville, MD 20850

Davor Rukavina, Esquire
Munsch Hardt Kopf & Harr, P.C.
3800 Ross Tower
500 North Akard Street
Dallas, TX 75201

Joyce Cornwell
305 Thompson Street
Irving, TX 75061