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

In re:	§	Chapter 11
	§	
NNN 3500 MAPLE 26, LLC, et al.,	§	Case No. 13-30402-HDH-11
	§	
Debtors.	§	Jointly Administered

REPLY OF STRATEGIC ACQUISITION PARTNERS, LLC TO LENDER'S OBJECTION TO CONFIRMATION OF SAP PLAN OF REORGANIZATION

TO THE HONORABLE HARLIN D. HALE, U.S. BANKRUPTCY JUDGE:

COMES NOW Strategic Acquisition Partners, LLC ("SAP") and files this its *Reply* (the "Reply") to the *Opposition to Confirmation of Amended Plan of Reorganization of Strategic Acquisition Partners, LLC* (the "Objection"), filed by 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, by and through CWCapital Asset Management LLC as Special Service (the "Lender"), respectfully stating as follows:

I. SUMMARY OF REPLY

1. The Plan pays the Lender's claim in full, according to its terms. Rare indeed is such a result. The Plan removes the biggest impediment to the Lender's ability to enforce its rights, by leaving the Lender with one owner of the Property to exercise remedies against. Thus, if there is a postconfirmation default, the Lender is no worse off. It is in fact much better off, with a clean route to foreclosure and with millions of dollars in its pocket and millions of dollars in improvements of its collateral. The Plan returns to the Lender exactly what the Lender bargained for, and more, and compensates the Lender for all defaults. What then can the Lender find objectionable about the Plan? The answer will become readily apparent to the Court. Just as SAP would like the Property and potential future profits, so would the Lender. However, SAP pays everyone in full for it and leaves millions of dollars in value for equity, while the Lender plans to take everything for itself with nothing for other creditors and for equity owners.

2. Ultimately, what the Lender's Objection boils down to is its allegation that the Plan does not reinstate the loan because it denies the Lender certain alleged rights to consent to certain aspects of what the Plan does. Nevermind that collapsing the present untenable TIC structure into one borrower and one owner of the Property is very much in the Lender's best interest, as it is to have professional and highly expert local owners and management, which will invest millions of dollars into the Lender's collateral. No, the Lender insists on its consent rights even though it cannot qualify or quantify any harm that would result.

3. The Bankruptcy Code permits a cure and reinstatement even on account of postpetition defaults that the Lender alleges are caused under the Plan. The Plan compensates the Lender in full for such alleged defaults. After confirmation, all Lender rights remain intact. That is the essence of a cure and reinstatement, and that is all that matters.

II. SUMMARY OF PLAN

4. The Debtors constitute twenty-seven (27) of thirty-three (33) tenants in common (the "TIC Owners") who own an 18-story commercial office building situated at and commonly known as 3500 Maple Avenue, Dallas, Texas 75219 (the "Property"). Separately, there are six (6) TIC Owners who have not filed a bankruptcy case and who own the remaining interests in the Property (the "Non Debtors").

5. The nature of the TIC Owners' relationship with one another and their rights and responsibilities with respect to the Property are set forth in that certain *Tenants in Common Agreement* effective as of February 15, 2006, which was recorded in the official records of Dallas County, Texas, on February 15, 2006, as instrument number 200600057022 (as subsequently altered, amended, or modified, the "TIC Agreement").

6. On January 14, 2014, SAP filed its *Amended Plan of Reorganization of Strategic Acquisition Partners, LLC* [Bankruptcy Case docket no. 541] (as may be subsequently amended or modified, the "Plan").

7. Other than the secured claim of the Lender, the Plan pays all creditors their allowed claims in full in cash. No class of creditors is impaired.

8. With respect to the Lender, the Plan proposes a cure and reinstatement, whereby all defaults under the Lender's loan documents are cured by cash payment, and the Lender's debt is reinstated without modification: the same interest, the same maturity, the same principal and interest payments, etc. The Lender's claim is accordingly unimpaired under the Plan.

9. With respect to equity interest holders, the only impaired class under the Plan, the Plan cancels current equity interests in the Debtors and grants equity holders an election to share in a cash payment of $2,200,000.00, or to receive Class B membership interests in NewCo,

which will entitle equity holders to a profit participation after certain thresholds are met. The Plan does not require equity interest holders to fund anything towards the Plan or the Property.

10. All of this is accomplished through equity investments from new equity contributors under the Plan who not only provide the funds for Plan payments, but also invest millions of dollars to improve the Property. That, however, is at the heart of the Objection raised by the Lender.

11. This is because no reasonably prudent funder would step into the current thirty-three (33) TIC Owner structure. Such a structure is simply not feasible for too many reasons to recount. In fact, each party who has appeared before the Court with an interest in the Property has made it a condition that there be just one owner at the end of the process. This is also the result under the Plan: (i) the interests of the Non Debtors in the Property are transferred to the Debtors; (ii) the Debtors are reorganized; and (iii) the Debtors are consolidated into and merged with NewCo, leaving NewCo as the sole owner of the Property. The Plan fully preserves the Lender's liens.

12. It is that requirement that there be one owner of the Property at the end of the process that has made this a far more complicated process than it needs to be. First, the Plan invokes the "Call Option" provided for in the TIC Agreement to force the Non Debtors to transfer their interests in the Property, if they will not consent to the same. Second, the Plan changes the ownership of the Debtors. Third, the Plan results in NewCo as the sole owner of the Property (albeit without a "transfer" as a matter of law on account of the merger).

13. Each of the foregoing is actually beneficial to the Lender. As is, the Lender has thirty-three owners to contend with, six of which might yet file bankruptcy or seek to prevent the Lender from exercising its rights. The Lender would readily admit that having thirty-three

owners has not been optimal. Certainly, they have invested not a dime into the Property for several years. The result is that the collateral has been impaired, and will continue to be impaired unless and until someone steps in to properly own and manage the Property and invest millions of dollars into improvements. Nevertheless, the Lender argues that its underlying loan documents provide it with various consent rights to withhold consent to the above-described mechanism. It is those consent rights that are at the heart of the Objection.

III. LENDER'S EQUITABLE ARGUMENTS

A. LENDER'S CONCERN FOR EQUITY INTEREST HOLDERS

14. The Lender's cynical concern for the Plan's treatment of equity owners is strange, to say the least. While the Lender criticizes what it perceives to be a "speculative distribution" to equity holders, if the Lender gets its way, equity gets nothing. As do all creditors, tenants, administrative claimants, and priority claimants. Nothing.

15. In any event, the Lender is wrong. The Plan offers equity interest holders $2.2 million if they so chose. At least one equity interest holder has chosen that option (and more may). Those that choose the new equity option still receive valuable rights, and something is better than nothing. Not a single equity interest holder has objected to the Plan. And, given that no junior class receives or retains anything under the Plan, the cramdown of the equity class (if resort to cramdown is necessary) is straightforward. *See* 11 U.S.C. § 1129(b)(2)(C).

16. Nor does the Lender have standing to complain about the Plan's treatment of equity interest holders—a class of which the Lender is not a member. *See, e.g., In re W.R. Grace & Co.*, 446 B.R. 96, 110 (Bankr. D. Del. 2011); *In re Cramer Inc.*, 100 B.R. 63, 66 (Bankr. D. Kan. 1989). The Court should therefore refuse to consider any arguments that the Lender advances on behalf of equity.

B. PLAY FOR OWNERSHIP OF THE PROPERTY

17. The Lender also complains that SAP purchased a *de minimis* claim for purposes of standing, in order to propose a plan "that would allow [SAP] to seize ownership of the Property." This of course is exactly what the Bankruptcy Code provides for.

18. What the Lender fails to tell the Court is that it too has designs on the Property. In fact, the Lender expects to be able to resell the Property, after foreclosure, for million of dollars more than its debt which would be the Lender's to keep. The Lender also fails to tell the Court that it, too, purchased a claim. It purchased a secured claim for the obvious reason to vote the claim against all plans and to prevent an impaired class of consenting creditors.

19. Yes, there is a "play" for the Property. Multiple parties are trying, and SAP is one of them. But so is the Lender. The Court should recognize that. The difference, however, is that SAP pays all creditors in full, including the Lender, and provides millions of dollars in value to equity holders. What could possibly be wrongful or underhanded about that? Rare is a 100% case with a return to equity, as SAP has proposed. Others, however, wait in the shadows for a foreclosure, taking the Property for as little as possible and leaving all claimants and equity interest holders with nothing. It should not escape the Court's attention that multiple parties in addition to the Lender have filed meaningless documents with the Court urging the Court to permit the Lender to foreclose. There are forces at play in this Bankruptcy Case that have not made their full intentions known to the Court. The Court is entitled to know what those intentions are. SAP, for its part, has been completely transparent and wants only to do right by everyone. Paying all creditors in full, and leaving millions of dollars in value for equity interest holders, is precisely what the Bankruptcy Code hopes to be the result in a Chapter 11 case.

IV. LENDER'S MISUNDERSTANDING OF THE PLAN

A. PAYMENT OF ALL AMOUNTS OWING

20. The Lender argues that the Plan "does not unequivocally provide for the payment of all amounts owed," and that the Plan alters the non-bankruptcy entitlement to all amounts owing. This is not correct, except with respect to the yield maintenance charge (prepayment penalty), which the Lender agrees is not an issue and goes away upon a successful reinstatement since it is intended to compensate for future interest.

21. Section 4.3.6(i) and (ii) of the Plan provides for the immediate payment of all interest, default interest, and late fees, all "at the rates provided for in the Lender Loan Documents." Section 4.3.6(iv) of the Plan also provides for full payment of attorney's fees, property protection advances, and all other fees, charges, and claims arising prior to the Effective Date. The only difference is that the Lender must assert the same by a pleading filed within fourteen (14) days of the Effective Date, on fourteen (14) days negative notice. The reason is simple: the Lender will have incurred additional charges after confirmation and prior to the Effective Date, section 1129(a)(4) requires Court approval of these fees as reasonable, and underlying law and loan documents require that things such as attorney's fees be reasonable. Rather than hindering the Lender, the Plan benefits the Lender by providing an expedited procedure, on negative notice, for the Lender to obtain a determination of reasonableness.

22. The alternative is for SAP to pay the Lender the full amount of its cure claim, subject to a motion for refund. At some point, anyone is entitled to a judicial determination of reasonableness, proof of expenditure, backup, and tying the amounts to loan documents. The Plan preserves those rights without taking anything from the Lender. If the alternative of payment subject to refund is appropriate, then SAP can easily accomplish that.

B. <u>CREDIT BID RIGHTS</u>

23. The Lender complains that the Plan does not preserve its credit bid rights under section 363(k) of the Bankruptcy Code. That section only applies to "sales." The Plan is not a sale plan. Moreover, the Lender is unimpaired under the Plan and section 1129(b)(2)(A)(ii), preserving section 363(k) credit bid rights, has no application.

24. Any legal, logical, or practical reading of the Plan demonstrates that there is no "sale" under the Plan. As is discussed in greater detail below, there is not even a "transfer" of the Property. The Debtors own the Property prior to confirmation, the Reorganized Debtors own the Property after confirmation, and the Reorganized Debtors are consolidated into and merged with NewCo which, under governing Texas law, means that there is no transfer of the Property at all. As there is no transfer, there care be no "sale." With respect to the Non-Debtors, SAP is not relying on section 363(h) of the Bankruptcy Code. If it were, there might be a "sale." Instead, SAP is relying on the Call Option provided for in the TIC Agreement. The Lender has no right of first refusal, no right to trigger the Call Option, and no right to credit bid the Call Option.

25. In support of its argument, the Lender cites *In re Olde Prairie Block Owner, LLC*, 464 B.R. 337 (Bankr. N.D. Ill. 2011). In that case, the debtor owned two parcels of land, and the lender's lien against one parcel would be released in exchange for payment under the plan. *See id*. at 340-41. Here, there is no release of the Lender's liens. The court considered the cramdown requirements, as the lender was impaired. While the court deemed the transaction a sale, the issue arose only because the court had to decide whether the cramdown treatment fell under the "indubitable equivalent" standard or the sale standard. And, with due respect, the opinion is incorrect. Under the opinion, any transfer of ownership of the debtor under a plan is a "sale" of the debtor's underlying property requiring credit bid rights.

26. The better reasoned opinion is that of the Third Circuit in *In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000). In that opinion, the circuit rejected the argument that a plan, which cancelled old equity and transferred the assets to a "newco" owned by the creditors, was a "sale" plan:

> This argument fails because these provisions of the Code, even if they do impose a duty to fully market assets in some circumstances (a question we do not address), are simply inapplicable to this situation. The plan wiped out old equity and issued new stock to the creditors. For tax purposes, this transaction was accomplished by transferring substantially all of the assets of the Debtors to a creditors' representative and immediately thereafter to the newly created Bruno's Supermarkets, a corporation whose equity is owned by the senior lenders. But just because a transaction is a sale or exchange for tax purposes does not mean that it is a sale within the meaning of the Code.
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> * * *
>
> That the assets passed though the hands of a creditors' representative before being returned to the reorganized Debtors does not transform this plan from a stand-alone, internally generated plan of reorganization to a sale of assets to a third party. <u>To hold otherwise would be to read § 1129 of the Code as characterizing the many reorganizations involving the transfer of control from a corporation's old equity to its creditors as involving a sale, a position without support in our jurisprudence</u>.

Id. at 247-48 (emphasis added).

27. That is SAP's main point: if the transfer of equity in a debtor, which is what the Plan does, is a "sale" of the debtor's underlying property, and assuming that section 1129(b) even applies, then such a plan could never be confirmed without granting credit bid rights and convening a sale. Yet this is what most Chapter 11 plans provide for. And it is specifically provided for in the Bankruptcy Code. *See* 11 U.S.C. § 1123(a)(5)(J).

28. The Plan does not provide for a sale. In fact, there is no transfer of the underlying Property at all pursuant to Texas law. There is merely a transfer of equity in the Debtors.

C. NO TRANSFER FREE AND CLEAR AND NO RELEASE OF NON-DEBTORS

29. The Lender argues the following: "[t]he 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. The transfer of the Property free and clear of the Trust's lien, cannot be accomplished . . ." Objection at p. 10 (internal citation omitted). This argument is without merit, for the Plan does no such thing.

30. The Plan is very clear that the Lender retains all liens, including any and all liens against any property of the Non Debtors. *See* Plan at §§ 4.3.4 (providing that transfer from Non Debtors "shall continue to be subject to all liens and security interests of the Lender") & 5.3(i) (providing for transfer of Non-Debtor property under Call Option "subject to the liens and security interests of the Lender"). The Plan is very clear that it does not release any of the Non Debtors from any liability to the Lender. *See* Plan at § 4.3.4 ("notwithstanding anything contained in this Plan to the contrary, any and all rights of the Lender against any non-Debtor on account of the Lender Secured Claim are preserved").

31. All that the Plan says on the subject is that "no such liability [of Non Debtors] shall be exercised against the Reorganized Debtors, NewCo, or any of their property so long as the Lender Secured Claim, as reinstated under this Plan, is not in default." *Id*. This does not limit the rights of the Lender against the Non Debtors. With respect to the Reorganized Debtors, NewCo, and their property, of course the Lender cannot proceed against them unless there is a future default: the Lender's claim will have been cured and reinstated. That is precisely what a plan should do, by providing for the cure of defaults, on account of which secured rights are not available for the simple reason of a cure, and the preservation of those rights for a postconfirmation default.

D. STANDING TO INVOKE CALL OPTION

32. The Lender argues that SAP lacks the standing to invoke the Call Option because it is not a TIC Owner subject to the TIC Agreement and it is not an intended third party beneficiary of the TIC Agreement. This is true. But it is not SAP that will invoke the Call Option under the Plan. It is the Debtors. The Debtors are TIC Owners, they are parties to the TIC Agreement, and they represent the requisite two-thirds supermajority.

33. As provided for in the Plan, the Call Option will take place only *after* the Plan is confirmed. *See* SAP Plan at §§ 5.2(i)(a) and 5.3(i). It will be the Debtors, and not SAP, who will invoke the call option. The only difference is that, at that point in time, the Debtors will be under the control of the Plan and not their current equity owners. The whole point of the competing plan process is that someone other than current management tells the debtor, by judicial fiat, what the debtor will do. That is exactly what occurs under the Plan: the Court confirms the Plan and directs the Debtors to do certain things, one of which is to invoke the Call Option.[1] The Debtors certainly have the right to do so, and that right belongs to their estates. It is by no means certain that the Debtors will stay in control of their estates, and whoever is in control of their estates can direct how and when the estates enforce their rights, subject to Court approval.

34. Under the Lender's argument, there can never be a competing plan which, for example, provides for a sale, a compromise of a claim, obtaining debt, the assumption of leases, etc., since under the Bankruptcy Code only a debtor (or a trustee) may do such things and a

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[1] As SAP has previously informed the Court, SAP filed an adversary proceeding against the Non Debtors only to ensure to the maximum extent possible due process and compliance with Bankruptcy Rule 7001. SAP still maintains, however, that the transfer of non-debtor TIC interests can occur by virtue of the plan process itself.

creditor or party-in-interest may not. *See* 11 U.S.C. §§ 363(b), 364, 365; FED. R. BANKR. P. 9019. Such an argument would render the competing plan process a nullity. On the contrary, section 1123(b)(3) of the Bankruptcy Code specifically provides that a plan may provide for the retention and enforcement of claims and interests, and section 1121(d)(1) of the Bankruptcy Code and this Court's prior order specifically enabled SAP to file its Plan. It cannot be that SAP is entitled to file a plan, yet is not entitled to the same plan tools that the Debtors are entitled to.

V. CURE AND REINSTATEMENT

35. The heart of the Plan is the reinstatement of the Lender's claim. The Lender correctly focuses much of its Objection to this issue. The Lender is wrong, however, with respect to its conclusion. All that reinstatement requires is that the Lender's rights be preserved *after* the Effective Date. Defaults may occur before that, for which the Lender is compensated.

36. The Plan generally does the following things, which the Lender alleges breach the Lender's loan documents because the Lender does not consent to the same:

(i) First, the Plan removes any prohibition on merger that may exist in the Debtors' organization documents, and the Plan changes the ownership of the Debtors.

(ii) Second, the Plan invokes the Call Option and provides for the transfer by the Non Debtors of their interests in the Property to the Reorganized Debtors.

(iii) Third, the Reorganized Debtors are merged into and consolidated with NewCo.

(iv) Fourth, the Plan provides for a different property manager.

(v) Fifth, there is an alleged transfer of the Property.

37. The Lender also argues that the "existing borrowers will cease to exist." Objection at p. 6. This is simply not correct: the Debtors exist postconfirmation and are merged into and consolidated with NewCo.

A. NO DEFAULT FOR TRANSFER OF PROPERTY OR OWNERSHIP

1. Transfer of Property

38. With respect to the alleged transfer of interest in the Property from the Debtors and Reorganized Debtors to NewCo, there is no such transfer to complain of. As provided for in Texas law governing mergers:

> all rights, title, and interests to all real estate and other property owned by each organization that is a party to the merger is allocated to and vested, subject to any existing liens or other encumbrances on the property, in one or more of the surviving or new organizations as provided in the plan of merger without . . . any transfer or assignment having occurred.

TEX. BUS. ORG. CODE ANN. § 10.008(a)(2)(C) (emphasis added). In other words, there can be no default and therefore no cure or reinstatement, because there is no transfer at all as a matter of law.[2]

39. With respect to the argument concerning a transfer of an interest in the Property of the Non-Debtors, it is true that there is a transfer of the Non Debtors' interests. But there is no default. First, the Call Option is specifically provided for in the TIC Agreement, and the Lender approved the TIC Agreement. The Call Option confers no rights on the Lender, either to exercise the Call Option or to consent to it. The Lender will argue that its deed of trust is superior to the TIC Agreement and that the deed of trust prohibits a transfer without consent. As an initial matter, that would constitute the Lender using its consent rights to prevent the curing of a default, since the point of the Call Option is to cure a default. SAP maintains, however, that any restriction on transfer in the deed of trust cannot apply to the Call Option, because the Call Option is the more specific document and the Lender approved the TIC Agreement.

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[2] To the extent that the Court disagrees with this conclusion, SAP would assert the same arguments that it asserts below with respect to the transfer of Non Debtor interests.

40. Assuming the Lender's argument to be correct, however, such an anti-alienability provision is unenforceable under Texas law (which governs the deed of trust). The cases cited by the Lender in support of its argument are wholly inapposite. *Continental Cas. Co. v. Dr. Pepper Bottling Co. of Tex. Inc.*, 416 F. Supp. 2d 497 (N.D. Tex. 2006) concerned an anti-assignment clause as it applied to insurance policies. A contract case. *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n*, 710 S.W.2d 551 (Tex. 1986) concerned an anti-assignment provision in a loan commitment letter. Another contract case. Anti-alienability of real property is something different, and has been for centuries.

41. What the Lender argues that it has is a restraint on alienation; *i.e.* the power to prevent the Non Debtors from transferring their interests in the Property. In *Sonny Arnold Inc. v. Sentry Sav. Ass'n*, 633 S.W.2d 811, 813 (Tex. 1982), the Supreme Court of Texas adopted the Restatement of Property with respect to restraints on alienation. The court identified three types of restraints: disabling, promissory, and forfeiture. A "disabling" restraint is one which attempts to make a conveyance void, while a "promissory" restraint is one which imposes contractual liability on the one making the conveyance, while a "forfeiture" restraint is one which attempts to terminate a conveyance. *See* Restatement Property § 404. A "disabling" restraint is invalid. *See id*. at § 405. With respect to a "promissory" or "forfeiture" restraint, the restraint may be enforced if, among other things, it is "reasonable under the circumstances." *Id*. at § 406.

42. The Lender's deed of trust does not appear to invalidate a transfer without consent, and it does not attempt to terminate a conveyance without consent *ex post facto*. It therefore appears that the restraint here is a promissory restraint in that the Debtors promised not to transfer without consent, and such a transfer subjects them to an event of default. Thus, the "reasonable under the circumstances" requirement applies. If unreasonable, the provision is

unenforceable. *See, e.g., Meisler v. Republic of Texas Sav. Ass'n*, 758 S.W.2d 878 (Tex. App. – Houston [14th Dist.] 1988, no writ); *North Point Patio Offices Venture v. United Ben. Life Ins. Co.*, 672 S.W.2d 35, 37 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.) ("[n]o one suggests any social or economic value of the provision here in question except that of the parties being able to contract as they see fit. This is admittedly an important right, but its unfettered application under these circumstances would effectively destroy the rule prohibiting unreasonable restraints on alienation of property"); *Metropolitan Sav. And Loans Ass'n v. Nabours*, 652 S.W.2d 820 (Tex. App. – Tyler 1983, writ dism'd) ("[h]aving concluded that the clause in Metropolitan's deed of trust at issue here was an unreasonable restraint on alienation, the same is void and unenforceable").

43. Here, enforcing the restraint in the deed of trust would be unreasonable under the circumstances:

- the Lender does not own the Property, but only has a collateral interest in it;
- the Lender's lien in any property transferred is preserved;
- the Lender voluntarily lent to some thirty-three (33) TIC Owners and all that is happening is a transfer from some TIC Owners to others, which already own interests in the Property and which have been approved for such ownership by the Lender; *i.e.* no one new is coming into ownership;
- the structure helps the Lender and makes future foreclosure much easier, by having one entity to foreclose on rather than thirty-three (33), each of which could file serial bankruptcies (as they have), could try to block a foreclosure, or could exercise judicial remedies;
- all that happens is that some TIC Owners end up owning a greater percentage of the Property which, from the Lender's perspective, cannot matter legally, factually, or economically, the same as it has not matter to-date, since the Lender has already approved each of the TIC Owners to own the Property;
- the Call Option is provided for in the TIC Agreement, which agreement the Lender approved;

- the reason stated for the anti-alienation provision is that the Lender has "relied upon the principals of Borrower and their experience in owning and operating the Property," yet the Lender thereafter consented to a transfer of most of the interests in the Property to distant and passive investors looking for an investment and tax benefit, with no experience in owning and operating an office tower; and

- critically, the Lender could identify no damages or injury that it would suffer as a result of the transfer.

44. In fact, the Lender has the ability to consent to a transfer and has consented before. The only reason why it refuses to do so now is for litigation leverage concerning the Plan. That is unreasonable on its face.

45. SAP therefore asserts that the transfer of Non Debtor interests in the Property would not even be a breach of the deed of trust, as the anti-alienability provision therein is unenforceable under the circumstances. However, if the Court concludes that the transfer of Non Debtor interests in the Property under the Plan is a default under the deed of trust, such a default is subject to being cured and the loan reinstated the same as all defaults (remembering that such a transfer is still subject to all of the Lender's liens).

2. Transfer of Ownership and Control

46. The Lender also argues that the change in ownership of the Debtors breaches the underlying loan documents. Section 2.9(b) of the deed of trust generally grants the Lender consent rights to a change in ownership of the Debtors that is more than 49% percent and that does not result in a change of control. Here again, the fact that the Debtors are being merged into NewCo results in there being no change of ownership or control as a matter of Texas law.

47. In *TXO Production Co. v. M.D. Mark Inc.*, 999 S.W.2d 137 (Tex. App. – Houston [14th Dist.] 1999, pet. denied), the court considered the effect of a merger on anti-assignment or anti-transfer clauses. In that case, two corporations merged, with one of them having certain contracts rights which the contract prohibited from assignment. *See id.* at 138. The court

reviewed the case law and generally found that mergers do not implicate anti-transfer clauses. *See id*. at 141. The court looked to Texas law and policy, and concluded the same: "the Texas Business Corporations Act was amended to its present wording to prevent the possibility of a merger constituting a transfer and thus violating a non-assignment clause." *Id*. at 141 n.3. Accordingly:

> Under the merger statutes it is clear that all of TXO's interests vested in Marathon immediately upon the merger. Further, under these provisions there is no transfer of the rights of the merging corporation; rather, the rights vest automatically and without further action. Accordingly, a requirement that the surviving corporation pay a fee in the event of a merger unnecessarily hinders the free flow of those rights to the surviving corporation.

Id. at 142.

48. The court held that the anti-transfer provision was unenforceable as a result of the merger because the contract did not specifically provide for its enforcement in light of a potential merger:

> We also reiterate that the Texas Legislature intended by its amendments to the Business Corporations Act that a prohibited transfer would not be implied by merger but would only occur in the event the parties agreed that merger specifically violated an anti-assignment provision. Here, the contracts provided that the data "shall not be sold, traded, disposed of, or otherwise made available to third parties." Arguably, the agreements' prohibitions on making the seismic data "available" could encompass statutory merger, which by operation of law makes all property of the merging corporation the property of the survivor, thereby making that property available to the survivor. However, the possibility of merger was certainly foreseeable under the circumstances. The parties could have easily specified that the non-disclosure provision was implicated by a statutory merger, but they chose not to do so. In accordance with the holdings of the cases cited above and the policy enunciated by the drafters of the Texas Corporations Business Act, we will not imply a violation of the non-disclosure agreement in light of the parties' failure to address this situation.

Id. at 143.

49. Here, none of the Lender's loan documents explicitly provide for the enforcement of any anti-transfer clause in the face of a merger. Added to this fact is the bedrock Texas law:

"[c]ourts will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive. Courts will not declare a forfeiture unless they are compelled to do so by language which can be construed in no other way." *Reilly v. Rangers Mgmt. Inc.*, 727 S.W.2d 527, 530 (Tex. 1987) (internal quotation omitted). Similarly, as held by the Supreme Court of Texas, "courts narrowly construe . . . provisions that effectively restrict the free transfer of stock." *Tenneco Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996).

50. Moreover, the Lender's deed of trust contemplates *and permits* the precise present situation without Lender consent. Section 2.29(c) of the deed of trust, applicable to each of the Debtors as Delaware single member limited liability companies, defined as "SMLLC" in the deed of trust, provides as follows:

> Upon the occurrence of any event that causes the Member to cease to be a member of the SMLLC, to the fullest extent permitted by law, the personal representative of Member shall, within ninety (90) days after the occurrence of the event that terminated the continued membership of Member in the SMLLC, agree in writing (i) to continue the SMLLC and (ii) to the admission of the personal representative or its nominee or designee, as the case may be, as a substitute member of the SMLLC, effective as of the occurrence of the event that terminated the continued membership of Member of the SMLLC in the SMLLC. Any action initiated by or brought against Member or Special Member under any creditors rights laws shall not cause Member or Special Member to cease to be a member of the SMLLC and upon the occurrence of such an event, the business of the SMLLC shall continue without dissolution.

51. The confirmation of the Plan is an event that causes the Debtors' present members to cease being the Debtors' members. SAP is the personal representative of the members under the Plan; *i.e.* by agreement or by Court order, SAP has the right to designate a new member. SAP has the right to designate itself or its designee as the new member of each of the Debtors, which it does under the Plan prior to the merger of the Debtors into NewCo. There is no action initiated by or against the Debtors' members under bankruptcy laws. And, <u>none of the foregoing requires lender consent</u>. Not only is consent not required to transfer the ownership of a Debtor,

but by definition this applies to control as well. Each Debtor is a single member entity, and that member is the management and control for the Debtor. As the member may be changed without Lender consent, a change of control must *ipso facto* also be permitted without Lender consent.

52. Thus, the change in ownership and control under the Plan is not a default that is subject to a cure, as the Lender's loan documents permit the change in ownership without Lender consent. If it is a default, then it is subject to being cured as discussed below.

B. DEFAULTS SUBJECT TO BEING CURED AND LOAN REINSTATED

53. To the extent that any of the Plan provisions cause a default under the Lender's loan documents, the Court must decide an issue of law: are such defaults subject to being cured under the Bankruptcy Code and can the loan be reinstated notwithstanding such defaults? That is what the Lender's argument boils down to, to the effect that various rights of the Lender are being ignored and that the Plan does not therefore reinstate the loan. SAP submits a simple proposition: postpetition but pre-effective date defaults can be cured the same as prepetition defaults and a loan reinstated, so long as, after the effective date of a plan, a lender has the same rights it has under applicable contract and law but which it cannot invoke on account of pre-effective date cured defaults.

54. Section 1124 of the Bankruptcy Code specifically provides for the cure of any "default that occurred before or after the commencement of the case." 11 U.S.C. § 1124(2)(A) (emphasis added). Thus, the statute must apply to postpetition defaults as well as prepetition ones. This means that the cure provisions must also apply to postpetition defaults. Additionally, section 1124(2) specifically applies to both monetary and non-monetary defaults. And, if postpetition defaults can be cured through compensation or other means, then the debt can be reinstated.

55. Logically, what will happen under the Plan is as follows. The Debtors have existing defaults which entitle the Lender to a claim. Under the Plan, additional defaults are allegedly committed, leading to a claim for those defaults. Under section 1124(2), all defaults are to be cured prior to the effective date. The cure is in the form of money, even for non-monetary defaults. In fact, section 1124(2)(C) and (D) provide their own measure of cure. As with any breach of contract, the question is what damages the Lender suffers as a result of any alleged breach. This is also the question under section 1123(2)(C) and (D). The evidence will demonstrate that the Lender has no such damages.

56. Also of relevance, section 1124(2)(A) does not require the cure of a default that section 365(b)(2) does not require to be cured. In turn, section 365(b)(2) does not require a cure of a "penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations." 11 U.S.C. § 365(b)(2). To the extent that any of the Lender's alleged rights are penalties for a failure to perform nonmonetary obligations—and forfeiture is a penalty where the Lender can identify no actual damages—the Plan does not have to cure the same.

57. "It is clear that the power to cure under the Bankruptcy Code authorizes a plan to nullify all consequences of default." *In re Entz-White Lumber & Supply Inc.*, 850 F.2d 1338, 1342 (9th Cir. 1988). Construing the statute, courts have construed section 1124(2), as "to give something more than cure and reinstatement, while at the same time offering something less than full default privileges." *In the Matter of Arlington Village Partners, Ltd.*, 66 B.R. 308, 315 (Bankr. S.D. Ohio 1986). Courts have long acknowledged that, although a cure and reinstatement leaves the creditor unimpaired, the creditor's rights "are in fact affected by cure and reinstatement." *In re Kizzac Management Corp.*, 44 B.R. 496, 501 (Bankr. S.D.N.Y. 1984); *In re Masnorth Corp.*, 28 B.R. 892, 894 (Bankr. N.D. Ga. 1983) ("[t]he cure and reinstatement of

a mortgage that is in default necessarily alters a party's legal, equitable, and contractual rights under a contract. However, the cure of default and reinstatement of a mortgage is clearly contemplated by § 1124 of the Bankruptcy Code and is in furtherance of the Congressional purpose of allowing debtors to reorganize").

58. How then to reconcile the fact that a cure and reinstatement must preserve the Lender's rights, while at the same time the cure and reinstatement by definition alters those rights? The answer is that the cure and reinstatement is *retrospective*, while the preservation of rights is *prospective*. The key date is the effective date of the plan. In other words, the Bankruptcy Case and the Plan may cause defaults, but those defaults must be cured and, after the effective date, the Lender's rights must stay intact.

59. Judge Lynn faced a similar issue in *Texas Rangers*, albeit under section 1124(1) of the Bankruptcy Code. *In re Texas Rangers Baseball Partners*, 434 B.R. 393 (Bankr. N.D. Tex. 2010). In that case, the lender argued that it was entitled to approve or disapprove of a sale of the debtor's business, and that not being entitled to such approval rendered it impaired under section 1124(1) of the Bankruptcy Code. *See id*. at 398-99. Even though Judge Lynn considered section 1124(1), that section is virtually identical to section 1124(2)(E). Judge Lynn concluded that the statute does <u>not</u> require:

> recreation of the situation as it was before default. Rather it requires that, as of the plan's effective date, an unimpaired creditor be able thereafter to exercise all its rights vis-à-vis its debtor. Thereafter, the Lenders . . . must be able to exercise their rights under their loan documents vis-à-vis Debtor (though those rights may have lost much of their usefulness).

Id. at 407-08. With respect to pre-effective date breaches, if the lender is damaged by the actions of the debtor, the lender may assert a compensation claim for any "pre-effective date failure to honor the Lenders' rights." *Id*. at 408. Judge Lynn concluded that section 1124 does not grant

the lender "an effective veto over any proposed sale." *Id*. at 407. Otherwise, to permit the lender to exercise its contractual rights "prior to the effective date, while Debtor and its owners are in the custody of the court, would give the Lenders a degree of control over the conduct of this case that is inconsistent with the Code and contrary to its public policy." *Id*. at 409. Rather, what section 1124 requires is that a plan must give lenders "their rights under their loan documents *prospectively*." *Id*. at 410 (emphasis added). Judge Lynn also held that, under section 1124(1), a lender's collateral does not have "to be what it was prior to" the effective date. *Id*. at 408 n. 32. This is not the case here, because under the Plan the Lender's collateral is exactly what it is prior to confirmation.

60. This is also the logical reading and import of section 1124(2) of the Bankruptcy Code. The section begins by noting that both prepetition and postpetition defaults may be cured. The section requires compensation for monetary and non-monetary defaults. Then the section requires that a creditor's rights not be modified. In fact, section 1124(E) provides that the plan must not "*otherwise* alter" rights. Those rights existing prior to the cure and reinstatement may be altered, by way of default which must be compensated for, but rights may not otherwise be altered. Use of the word "otherwise" necessarily means that there is some category or rights that may be affected, provided that the creditor is compensated.

61. All of the foregoing stands for the proposition that the Plan may cause defaults in the Lender's rights prior to the effective date, so long as SAP compensates the Lender for the defaults and, after the effective date, the Lender's rights remain unmodified. By definition, however, because defaults have been cured, any historical default is not the basis of a future default. Thus, for example, if the Court finds that the change in ownership of the Debtors is a default under the loan documents, it is a default in a moment of time (because Lender consent

has not been obtained—not because the loan documents require that owner "x" be the owner forever). The Lender is entitled to damages, if there are any, and the payment of those damages cures the default and reinstates the loan. After the effective date, the fact that there is a new owner is no longer the basis for a continuing or future default, since that was a historical default which has been cured. But there can be no future change in owner except under the unmodified loan documents.

62. This is also the only way to harmonize section 1124(2) of the Bankruptcy Code with its other provisions. Suppose that during the Bankruptcy Case the Debtors rejected their property manager contract and entered into a new one under section 365 of the Bankruptcy Code by Court order, but without consent. Or, suppose that the Debtors obtained secured or unsecured debt under section 364 of the Bankruptcy Code by Court order, but without consent. Or, suppose that the Debtors used cash collateral under section 363 of the Bankruptcy Code by Court order, but without consent and in violation of the Lender's rights upon default to take cash and apply as it sees fit. Or, suppose that the Debtors sold certain property subject to the Lender's lien under section 363 of the Bankruptcy Code, but without consent and in violation of the loan documents. Or, suppose the Court appoints a Chapter 11 trustee, which violates change of control provisions. Would the occurrence of any of these *pursuant to Court order* remove forever the ability to cure and reinstate the debt?

63. That is precisely what Judge Lynn was referring to. Lender rights are suspended during the pendency of the Bankruptcy Case, as the Debtors are subject to this Court's jurisdiction and their estates are in this Court's *custodia legis*. That things may happen during the case in violation of the Lender's rights is of no import. What is of import is that the Lender is compensated at the end, if warranted, thereby curing the default, and that the Lender's

prospective rights are not modified, thereby completing the reinstatement. And that is nothing more than what happens under the Plan *if* the Plan works any default under the Lender's loan documents.

64. As with the Bankruptcy Code examples above, the Plan, prior to the effective date, does exactly what is permitted by the Bankruptcy Code, even if it causes alleged finite breaches of the Lender's rights. Section 1123(a)(5)(I) permits any corporate governance document of the Debtors to be modified. Section 1123(a)(5)(C) permits the Debtors to merge into NewCo. Section 1123(a)(5)(J) permits the cancellation of equity interests and the issuance of new equity interests. It cannot be that, on the one hand, the Bankruptcy Code permits these and other actions, yet on the other hand permanently and conclusively removes a debtor's ability to cure and reinstate debt. The Bankruptcy Code must be harmonized as a unified code, and section 1142(2) is easily harmonized with the balance of the Bankruptcy Code if it is read to enable the cure of any pre-effective date default and the preservation of rights after the effective date, without the restoration of those rights (but requiring compensation)—as exactly as correctly held by Judge Lynn.

65. To hold otherwise would be to read section 1124(2) out of the Bankruptcy Code, unless the debtor does nothing during the Bankruptcy Case and does nothing under a plan except cure and reinstate. That cannot be the result.

66. Here, the Lender's loan documents, on the topics of which the Lender complains, do not state that "x shall always own the property," or "y shall always own a borrower," or "z shall always manage the property," or "f shall always manage a debtor," or "g shall always be the borrower." Rather, the Lender's loan documents provide for the right to consent to the foregoing. In fact, the Lender has given its consent in the past to each of these on multiple

occasions. Thus, if that right to consent is not honored, it is a breach. It is a historical breach. Like any breach of contract, it is subject to damages. The adjudication of those damages and their payment is a cure. Where there once was a breach, it has been cured and is no longer a breach. That is all the Plan does, and it is exactly what section 1124(2) provides for. SAP is not saying that it will not cure breaches by payment or otherwise. It is saying the very opposite—to the extent the Plan causes breaches, SAP will compensate the Lender for them the same as all prior breaches. Indeed, the Lender admits that most breaches, like non-payment of interest, can be cured. There is no reason why all other breaches cannot be cured and, of importance, section 1124(2) specifically applies to both monetary and non-monetary breaches.

67. In this respect, the evidence will demonstrate that the Lender cannot identify, much less quantify, any "damages" by way of "reasonable reliance," or any "actual pecuniary loss," that the Lender may suffer as a result of the breaches it alleges the Plan will cause. That is important legally. But it is also important and indicative equitably and practically—if the Lender cannot identify or quantify any harm that it may suffer, then why in the world would it insist on hyper-technical consent rights, especially when the end result—in addition to millions of dollars in payment—is a much simplified corporate structure with a much cleaner route to future foreclosure for future breaches.

68. The Lender does identify one alleged loss and form of damage, stemming from the transfer by the Non Debtors of their TIC interests under the Plan. The Lender argue that the damage is $54 million, which right it presently has against the Non Debtors. This is nonsense. The Lender can still sue the Non Debtors under the Plan. More importantly, there is a *cure and reinstatement*. In other words, everything is brought current and it stays current. There is no longer an uncured default for the Lender to sue and recover for, since SAP pays all cure and

compensation. And the Lender's lien against the Non-Debtors' property is fully preserved. In short, the Plan takes nothing away from the Lender *vis a vis* the Non Debtors. It *pays* the Non Debtors' defaulted obligations to the Lender. But, if the Lender wishes to continue suing the Non Debtors after confirmation, the Plan does not prevent that.

C. FEASIBILITY

69. The Lender questions the feasibility of the Plan. Feasibility is a question of fact, and SAP will demonstrate that its Plan is feasible within the meaning of the Bankruptcy Code.

70. SAP will add that certainty is not required. "The court need not require a guarantee of success." *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enter., Ltd., II)*, 994 F.2d 1160, 1165 (5th Cir.1993). Rather, feasibility requires "[o]nly a reasonable assurance of commercial viability is required." *Id.* at 1166 (internal quotation omitted). SAP will also correct a statement in the Objection, to the effect that "[a]lthough Plan contemplates that NewCo will fund itself through operations of the Property after the initial $500,000 capitalization, Strategic does not anticipate any net cash flow during the first three years covered by the Projections." Objection at p. 5. That is not what the Plan provides. Rather, the Plan provides that:

> As of the Effective Date, NewCo shall be capitalized with $500,000.00 in funds (over and above the Plan Funding) and will thereafter fund itself through operations, although the Class A members intend to invest additional funds and to make additional capital available to NewCo, in their discretion, as may become necessary or advisable to make capital improvements to the Property.

Plan at § 6.5.

71. The evidence will show that the Plan is supported by two exceptionally well qualified sponsors, with extensive commercial real estate experience, who will be investing millions of dollars under the Plan. The sponsors have ready access to many millions of dollars in

capital. The evidence will show that the sponsors stand ready, willing, and able to ensure that Plan payments are made and to invest in the Property. They would not be investing up to $9 million in equity funding on the front end just to walk from the project weeks or months later. Should something happen, however, and the sponsors abandon the project—which is an exceptionally unlikely event—the Lender will be no worse off. It will still have its lien and foreclosure rights, and will be millions of dollars the better for the Plan.

72. Finally, the Lender argues that the Plan is not feasible or otherwise confirmable because certain alleged definitive plan documentation has not been completed. SAP is not aware of any law requiring that plan implementation documents be submitted prior to confirmation. The Lender has cited to no such law. In fact, plan implementation documents are routinely executed after confirmation (*e.g.* new promissory notes, transfer deeds, etc.), and case law confirms that this is appropriate and acceptable practice. *See, e.g., In re Williams*, 97 B.R. 330, 333 (Bankr. N.D. Tex. 1989) (ordering the drawing up of certain post-confirmation documents).

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, SAP respectfully requests that the Court overrule the Objection and confirm the Plan and, alternatively, that, to the extent that the Court finds any provision of the Plan not confirmable as is, that the Court provide SAP with a reasonable opportunity to cure the same.

RESPECTFULLY SUBMITTED this 24th day of February, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 24th day of February, 2014, true and correct copies of this document were electronically served by the Court's ECF system on parties entitled to notice thereof, including on counsel for the United States Trustee, the Debtors, the Lender, and Maple Avenue Tower.

By: /s/ Davor Rukavina
Davor Rukavina, Esq.