LARSON & ZIRZOW, LLC
ZACHARIAH LARSON, ESQ.
Nevada Bar No. 7787
E-mail: zlarson@lzlawnv.com
MATTHEW C. ZIRZOW, ESQ.
Nevada Bar No. 7222
E-mail: mzirzow@lzlawnv.com
810 S. Casino Center Blvd. #101
Las Vegas, Nevada 89101
Telephone: (702) 382-1170
Fascimile: (702) 382-1169

Attorneys for Debtor

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re: NW VALLEY HOLDINGS LLC, Debtor.	Case No.: BK-S-15-10116-abl Chapter 11 Confirmation Hearing: Date: May 21, 2015 Time: 9:30 a.m.

DEBTOR'S (I) BRIEF IN SUPPORT OF CONFIRMATION OF CHAPTER 11 PLAN OF REORGANIZATION, AND (II) OMNIBUS REPLY TO OBJECTIONS TO CONFIRMATION

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd., # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd., # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

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LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd., # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

NW Valley Holdings, LLC, a Nevada limited liability company, as debtor and debtor-in-possession (the "Debtor"), in the above-captioned bankruptcy case pending under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") hereby submits its brief (the "Confirmation Brief") in support of confirmation of its *Chapter 11 Plan of Reorganization* (as modified, the "Plan") [ECF Nos. 44 and 51], and its omnibus reply to the following: (1) the *Limited Objection of KB Home to Debtor's Chapter 11 Plan of Reorganization* (the "KB Home Objection") [ECF No. 61][1] filed by KB Home, KB Home Nevada, Inc., and KB Home Kyle, Inc. (collectively, "KB Home"); and (2) the *Objection to Confirmation of Debtor's Plan of Reorganization and Adequacy of Accompanying Disclosure Statement* (the "KH Trusts Objection" and together with the KB Home Objection, the "Objections") [ECF No. 66] filed by U.S. Bank, N.A. as the Plan Administrator for the KHI Post-Consummation Trust and the Liquidating Trust Administrator for the KHI Liquidation Trust (collectively, the "Kimball Hill Trusts").[2]

This Confirmation Brief is made and based on the points and authorities herein, the *Declaration of Charles Reardon in Support of Debtor's (I) Brief in Support of Confirmation of Chapter 11 Plan of Reorganization, and (II) Omnibus Reply to Objections to Confirmation* (the "Reardon Declaration"), the papers and pleadings on file in this matter, judicial notice of which are respectfully requested, and any arguments made at the Confirmation Hearing on the Plan.[3]

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[1] For the avoidance of doubt, KB Home is neither a creditor of the Debtor, nor an equity security holder in the Debtor, and thus has only very limited standing to file an objection to the Plan. Specifically, as hereinafter addressed, to the extent KB Home is allegedly affected by the exculpation provision in the Debtor's Plan, which it is not, it would arguably have standing, however, with respect to the rest of the Chapter 11 Case and the Plan, it lacks standing, and thus the Court should refuse to hear and consider any other objections it may attempt to raise. See In re Thorpe Insulation Co., 677 F.3d 869, 884 (9th Cir. 2012) ("To have standing in bankruptcy court, [a party] must meet three requirements: (1) they must meet statutory "party in interest" requirements under § 1109(b) of the bankruptcy code; (2) they must satisfy Article III constitutional requirements; and (3) they must meet federal court prudential standing requirements."); see also In re Seasons Partners, LLC, 439 B.R. 505, 514 (Bankr. D. Ariz. 2010); In re Quigley Co., Inc., 391 B.R. 695 (Bankr. S.D.N.Y. 2008); 7 Collier on Bankruptcy ¶ 1128.04, at 1128-7 (Alan N. Resnick & Henry J. Sommer, 16th ed. 2013).

[2] The KH Trusts also filed the *Declaration of David B. Simons* (the "Simons Declaration") [ECF No. 67] and the *Declaration of Cindy Woodward* (the "Woodward Declaration") [ECF No. 68] in support of the KH Trusts Objection.

[3] Unless otherwise indicated, all capitalized terms herein shall have the same meaning as set forth in the Plan.

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

I. JURISDICTION AND VENUE

On January 10, 2015 (the "Petition Date"), the Debtor filed its voluntary petition for relief under chapter 11 of the Bankruptcy Code, thereby commencing its bankruptcy case (the "Chapter 11 Case"). Debtor is authorized to manage its property as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request has been made for the appointment of a trustee or examiner, and no official committees have been formed in the Chapter 11 Case.

The Court has subject matter jurisdiction to consider and determine this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Pursuant to LR 9014.2, the Debtor consents to the entry of final orders and judgments by the bankruptcy judge. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

II. INTRODUCTION

The KH Trust Objection makes numerous arguments predicated on mistaken assertions of fact, including principally that: (a) the Debtor was fully released of any and all claims by the Original Homebuilders in the 2011 Settlement Agreement, when in fact, no such release occurred, and thus KEH, as the successor to those Original Homebuilders and various other homebuilders and obligors to the Credit Agreement, does in fact have valid claims for indemnity and contribution against the Debtor; and (b) the Kimball Hill Trusts also have valid claims for indemnity and contribution, among other alleged theories, against the Debtor, when in fact, the Kimball Hill Trusts have no such claims because they are barred, waived and/or must be disallowed. A resolution of the foregoing two critical issues frames many of the rest of the analysis with respect to the confirmation of the proposed Plan.

The KB Home Objection is satisfied by a proposed modification herein to provide a clear disclaimer in the exculpation provision of the Debtor's Plan. The balance of the arguments raised in the KB Home Objection must be dismissed for lack of standing because it is neither a creditor of the Debtor's bankruptcy estate, nor an equity security interest in the Debtor.

III. STATEMENT OF FACTS

A. The Kimball Hill Trusts' Recently Filed Proof of Claim in this Chapter 11 Case.

On May 13, 2015, which was the Bar Date, the Kimball Hill Trusts filed their Proof of

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

Claim, being Claim No. 1, as amended (the "Proof of Claim"). In their Proof of Claim, the Kimball Hill Trusts asserted that it was for contingent and unliquidated amounts allegedly owing as a result of "reimbursement, indemnification, contribution and subrogation under applicable law, including without limitation, NRS §§ 86.411 through 86.451, and applicable agreements, including without limitation the various agreements described in the Nevada Claims as well as the Debtor's Articles of Organization and its Operating Agreement dated as of January 10, 2005 as thereafter amended from time to time." The "Nevada Claims" are defined in the Kimball Hill Trusts' Proof of Claim as the thirty (30) separate proofs of claim that the Lender, the Debtor, and the Debtor's former general manager and manager/members (being all of the homebuilders) filed in KHI's chapter 11 cases pending in the U.S. Bankruptcy Court for the Northern District of Illinois (the "Chicago Case").

KEH and/or affiliates holds the power to assert all of the Nevada Claims against KHI (being Tabs 1-11 and 16-30 attached to the Proof of Claim) except obviously the four claims asserted by the Debtor against KHI (being Tabs 12-15 attached to the Proof of Claim). In fact, the Debtor really only has two remaining claims asserted against KHI in the Chicago Case because the Company's later two claims amended their earlier two claims. Critically, the Debtor specifically indicated that it was not seeking any affirmative recovery against KHI, but rather simply filing them as a precaution in case the various operative agreements were rejected. As explained in the Company's claims filed in KHI's Chicago Case, the Company did not anticipate any amounts would ever be due and payable to it from KHI because KHI either (a) forfeited or was divested of KHI's membership interest in the Company as a result of KHI's rejection of the Company-related agreements (the Company's Operating Agreement or Acquisition Agreement) in KHI's Chicago Case by failing to assume them, or (b) any amounts remaining with the Company and attributable to amounts paid by KHI may be retained by the Company as liquidated damages under the terms of the operative agreements.

As to the remaining 27 claims comprising the remainder of the Nevada Claims asserted against KHI in the Chicago Case, which claim are held by KEH (not the Debtor), the Kimball Hill Trusts claim a right of reimbursement, indemnification, contribution and subrogation as against

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

Debtor under the terms of the Company's articles of organization, applicable agreements and/or Nevada law as a result. The Debtor asserts that such claims are clearly disallowable pursuant, without limitation section 502(b)(1) of the Bankruptcy Code as being "unenforceable against the debtor and property of the debtor, under any agreement or applicable law . . . ." 11 U.S.C. § 502(b)(1).

Specifically, the Kimball Hill Trusts do not have any viable claims for indemnification or contribution against the Debtor due to the undisputed fact that they long ago defaulted under the terms of the Company's operating documents, and thus by the terms thereof, as a defaulted member, have lost and are not entitled to any such claims thereafter, including as they now assert in their Proof of Claim filed in this Chapter 11 Case. Additionally, KHI never assumed any of the Company's operating documents to the extent they are executory contracts in its bankruptcy case, and thus such matters are deemed rejected pursuant to section 365 of the Bankruptcy Code by the terms of their plan. Given the timing of when the Kimball Hill Trusts filed their Proof of Claim, however--exactly on the Bar Date and on the latest date possible--it is likely that a claim objection and adjudication, and/or an estimation proceeding will be needed prior to or contemporaneously with proceeding with confirmation.

B. <u>The Debtor Was Not Released by the Homebuilders in the Settlement Agreement.</u>

One of the critical assertions made by the Kimball Hill Trusts in its Objection is that not only did the Original Homebuilders obtain a release from the Lenders in the 2011 Confidential Settlement Agreement,[4] but also that <u>the Debtor</u> obtained a release as well. Interestingly, however, <u>the Debtor was not even a party or signatory to that Settlement Agreement</u>; rather, only the Original Homebuilders and the Lenders were a party to that agreement. In other words, the Kimball Hill Trusts assert that the Debtor obtained a release from the Original Homebuilders, all while the Debtor was <u>never a party to, nor a signatory of that Settlement Agreement in the first place</u>.

In addition to the fact that the Debtor was not a party to nor signatory of the Settlement Agreement, the plain language of that Settlement Agreement clearly indicates that it is between

[4] This Settlement Agreement is attached to the Simons Declaration as Exhibit "A."

two sets of parties--the Original Homebuilders, as a group, on the one hand, and the Lenders, as a group, on the other hand. The Kimball Hill Trusts misleadingly reference certain definitions in Section 4(a) of that Settlement Agreement, yet ignore the fact that the actual operative mutual release provision appearing in Section 4(b) of the Settlement Agreement clearly provides that it is a release only between the Original Homebuilders, on the one hand, and the Lender, on the other hand, and to which the Debtor is not a party. Specifically, Section 4(b) provides, in pertinent part, as follows: "Upon receipt of each Home Builder's Settlement Payment described in paragraph 1 above, the Lender Releasors shall and hereby do release, acquit, and forever discharge the applicable Home Builder Releasees from and against any and all liability or potential liability which it now has, has had, or may have in the future, arising out of or relating to any Released Claims." (emphases added). The term "Home Builder Releasees," in turn, is defined in Section 4(a)(ii) of the Settlement Agreement as follows:

> "Home Builder Releasees" and "Home Builder Releasors" as the context requires, means each Home Builder together with its respective current and former principals, officers, directors, managers, members, shareholders, employees, parent companies, subsidiaries, affiliates, agents, attorneys, trustees, accountants, insurers, predecessors, successors, assigns and representatives of any kind, and all those who may have the right to claim against whom a Released Claim is brought based on the alleged liability of any of the foregoing."

The term "Home Builder," in turn, is defined in the very first paragraph of the Settlement Agreement and only with reference to the Original Homebuilders, and notably not the Debtor (which is defined as "Kyle" in the Settlement Agreement).

The obvious fact that the Settlement Agreement and the mutual release therein is only between the Home Builders, as a group, on the one hand, and the Lenders, as a group, on the other hand (and not "Kyle"), is further confirmed by the third full recital on page 2 of the Settlement Agreement, which provides, in pertinent part, as follows:

> WHEREAS, the Home Builders, on the one hand, and Wachovia and the Lenders (inclusive of all current Lenders), on the other hand, without admission of liability, desire to compromise and fully resolve fully and finally all disputes and controversies now existing

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

> or that may, in the future, exist between them arising out of or in any way relating to Kyle, the debt incurred by Kyle, the Credit Agreement, the Amended Credit Agreement, the Reaffirmation Agreement, the Loan Documents, the Home Builders' Guaranties, the Acquisition Agreements, the Deficiency Action, the Kyle Operating Agreement (including all amendments thereto), the Collateral, and/or the Project (collectively, the "Disputes") on the terms and conditions set forth in this Settlement Agreement.

(emphases added and footnote omitted).

The Debtor takes seriously its fiduciary duties to the estate and certainly would make every reasonable attempt to want to minimize, object to, and seek the disallowance of any improperly asserted claims against the bankruptcy estate. Indeed, the Debtor has illustrated its willingness to do so by its refusal to agree to KEH's assertions of a remaining deficiency claim, and instead listing such claim as disputed. In fact, the Debtor did so only after conducting its own independent research and analysis of that asserted claim. Likewise, as to the remaining KEH claim for indemnity or contribution that the Kimball Hill Trusts claims was extinguished as a result of the Settlement Agreement, however, the Debtor cannot engage in what it believes is a blatant misreading of the operative Settlement Agreement that the Kimball Hill Trusts espouses. As such, it is clear that the claims that KEH is now asserting--being the former claims of the Original Homebuilders as against this Debtor were not released by the Settlement Agreement, and thus is was correct and proper for the Debtor to schedule such claims as allowed and to agree to the Restructuring Letter with KEH premised on those claims being allowable, subject to this Court's approval of that matter through confirmation of the Plan. Finally, even if there are potential grounds for disallowance of KEH's claim, the Plan proposes a compromise of such claims, which compromise can also be approved through the Plan as well as hereinafter explained.

Additionally, the Kimball Hill Trusts reference to the various Nevada litigations (the Supreme Court Decision and the District Court Decision), see KH Trusts Objection, p. 5, however, the decisions therein is inapposite because those litigations involved the issue of whether the Debtor was released by the Lenders thereby, not any alleged release in favor of the Debtor by the Original Homebuilders (per the 2011 settlement agreement). Similarly, the Kimball Hill Trusts also do not indicate how the Debtor was allegedly released by the applicable parties as a result of

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

the separate settlement agreement with Focus Kyle and Ritter in 2014, and absent that, KEH also has the power to enforce those claims as well. See Disclosure Statement, § V.F.

IV. LEGAL ANALYSIS

A. The Burden of Proof.

As the proponent of the Plan, the Debtor has the burden of demonstrating that its Plan satisfies each provision of section 1129 of the Bankruptcy Code by a preponderance of the evidence. See Liberty Nat'l Enters. v. Ambanc LaMesa Ltd. P'ship (In re Ambanc LaMesa Ltd. P'ship), 115 F.3d 650, 653 (9th Cir. 1997).

B. 11 U.S.C. § 1129(a)(1): Plan Compliance With the Bankruptcy Code.

Section 1129(a)(1) of the Bankruptcy Code requires that a plan must "[c]omply with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1). This provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code governing classification of claims and contents of plans, respectively. See H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); In re G-I Holdings, Inc., 420 B.R. 216 (D.N.J. 2009); In re Journal Register Co., 407 B.R. 520, 531-32 (Bankr. S.D.N.Y. 2009). An analysis of the specific requirements from each of these sections follows.

1. 11 U.S.C. § 1122: Classification of Claims.

The Plan classifies the Debtor's creditors and equity security holders into the following four (4) classes: Class 1 (Secured Claims), Class 2 (Priority Non-Tax Claims),[5] Class 3 (General Unsecured Claims), and Class 4 (Equity Interests). Accordingly, the Plan complies with section 1122 of the Bankruptcy Code.

2. 11 U.S.C. § 1123(a): Mandatory Plan Requirements.

The Plan satisfies the seven (7) requirements in section 1123(a) of the Bankruptcy Code. First, the Plan classifies all claims as required by section 1123(a)(1) of the Bankruptcy Code. See Plan § 4. Second and third, the Plan specifies which classes of claims are impaired, and the

[5] The Debtor is not aware of any creditors in Classes 1 and 2 and thus pursuant to Section 3.7 of the Plan, any such vacant classes are eliminated.

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

treatment of each impaired class as required by sections 1123(a)(2) and (3) of the Bankruptcy Code. Id. Fourth, the treatment of each claim in each particular class of the Plan is the same as the treatment for each other claim in such class as required by section 1123(a)(4) of the Bankruptcy Code. Id. Fifth, the Plan provide adequate means for implementation as required by section 1123(a)(5) of the Bankruptcy Code via a distribution of all remaining assets. See Plan §§ 4 and 6. Additionally, the Plan provides for the full preservation of any and all Causes of Action, including Avoidance Actions, for the benefit of General Unsecured Claims. See Plan § 10.6. Sixth, section 1123(a)(6) of the Bankruptcy Code is satisfied as the Debtor's Plan prohibits non-voting equity securities. See Plan § 4.1.2. Seventh, section 1123(a)(7) of the Bankruptcy Code is met because on and after the Effective Date and until its dissolution, the Debtor will be managed by Asgaard. See Plan § 4.3. Finally, section 1123(a)(8) of the Bankruptcy Code is inapplicable as it applies only to bankruptcy cases in which the debtor is an individual. As a result, the Plan satisfies the mandatory requirements of section 1123(a) of the Bankruptcy Code.

3. 11 U.S.C. § 1123(b): Permissive Plan Provisions.

a. Plan Exculpation.

The exculpation provision in Plan § 10.2 is consistent with section 1125(e) of the Bankruptcy Code and is of the type that has consistently been approved by courts. See 11 U.S.C. § 1125(e)[6]; In re Heartland Publ'ns, LLC, No. 09-14459(KG), 2010 WL 2745973, at *18 (Bankr. D. Del. Apr. 16, 2010); In re Granite Broad. Corp., 369 B.R. 120, 139-40 (Bankr. S.D.N.Y. 2007); In re Wash. Mutual, Inc., 442 B.R. 314, 350-51 (Bankr. D. Del. 2011).

As the Objections point out, the U.S. Court of Appeals for the Ninth Circuit (the "Ninth Circuit") has generally prohibited the nonconsensual release of one non-debtor's claims against another non-debtor under certain circumstances, concluding that bankruptcy courts lack the power

[6] Section 1125(e) of the Bankruptcy Code provides as follows: "(e) A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities."

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

under the Bankruptcy Code to discharge the liabilities of third parties who are not seeking bankruptcy protection. Meritage Homes of Nev., Inc. v. JPMorgan Chase Bank, N.A. (In re S. Edge, LLC), 478 B.R. 403, 414 (D. Nev. 2012) (collecting cases). As articulated by the District Court in South Edge, "[t]he question thus becomes whether the exculpation clause . . . improperly releases third parties liability or whether it merely sets the standard of care in this bankruptcy proceeding which would preempt the assertion of any state law claims which seek to impose a different standard of care." Id. at 415.

In conformity with these principles, the South Edge Court noted that some courts, even within the Ninth Circuit, have found exculpation provisions in a chapter 11 plan confirmable because they "do [ ] not affect the liability of these parties, but rather states the standard of liability under the Code, and thus do[ ] not come within the meaning of § 524(e)." Id. (quoting In re PWS Holding Corp., 228 F.3d 224, 245 (3d Cir. 2000), and citing In re WCI Cable, Inc., 282 B.R. 457, 476–77 (Bankr. D. Or. 2002)). In other words, as explained by the District Court, "the exculpation clauses do not affect a change in third party liability to nondebtors" because state law claims are preempted, and thus there is no liability to release. Id. In light of the above authorities, the District Court in South Edge held that the exculpation provision at issue, when properly interpreted, was within the bankruptcy court's power because the bankruptcy court has exclusive jurisdiction over the parties and their conduct in the bankruptcy proceedings and because it sets a standard of care to be applied in the bankruptcy proceeding, which is a matter which lies within the bankruptcy court's exclusive jurisdiction and reiterates federal preemption principles. Id. at 415-416.

Consequently, the District Court in South Edge held that the plan exculpation provision at issue did not improperly release third party non-debtors from liability arising out of the plan proponents' activities in relation to the bankruptcy proceeding because, to the extent any particular state law claim is preempted, no such state law claim exists. Id. at 416. As such, the District Court thus held that the exculpation clause at issue did not violate the Ninth Circuit's prohibition on nonconsensual third party releases through plan confirmation. Id.

As applied in the case at hand, the provisions at issue in the Debtor's Plan are appropriate and reasonable under South Edge and the specific circumstances of these cases. Here, the parties

that are the subject of the exculpation clause (the Debtor and its Professionals) are estate fiduciaries and participated in the solicitation of acceptances of the Plan, and thus are entitled to exculpation under section 1125(e) of the Bankruptcy Code, or, in the case of KEH, have contributed to the formulation and negotiation of the Plan and have made a substantial contribution to the Plan, and thus are entitled to exculpation. In re Wash. Mutual, Inc., 442 B.R. 314, 350-51 (Bankr. D. Del. 2011) (discussing appropriate exculpation of directors, officers, fiduciaries, and other parties making a substantial contribution).

Notwithstanding the foregoing, and even though KB Home Objection never specifically explains how the exculpation provision in the Debtor's Plan actually does what it claims, and even though the Debtor also does not believe that provision needs to be clarified, in order to resolve any perceived issue, the Debtor is willing to include a disclaimer provision at the end of the exculpation provision in its Plan (and in the Confirmation Order) erasing any doubt in this regard with respect to KB Home as follows:

> Notwithstanding anything herein to the contrary, nothing herein is intended nor shall be construed as a release or exculpation of any rights or claims, if any, held by KB Home, KB Home Nevada, Inc., and KB Home Kyle, Inc., or any successors or assigns thereof, arising out of and remaining from either: (a) the Confidential Release, Covenant Not to Sue, Indemnity and Settlement Agreement dated February 28, 2011 as against the "Lenders" as defined therein, or any successors or assigns thereof; or (b) the Purchase and Sale Agreement dated as of November 7, 2014 as against Kyle Entity Holdings LLC, or any successors or assigns thereof.

Again, although the Debtor's Plan does not affect such third party issues, especially because the agreements in question clearly happened prior to the Debtor's Chapter 11 Case, whereas the exculpation provision is only as to post-petition matters and happening within the Chapter 11 Case itself, the foregoing addition very clearly and unequivocally targets the specific concerns articulated by KB Home with respect to its prior agreements with such third parties and its rights and/or claims, if any, vis-à-vis such third parties.

With respect to the KH Trusts Objection, because of its own Chicago Case, it was never a party to either the 2011 homebuilders settlement with the Lenders and/or any purchase agreement

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

in 2014 with KEH. As such, the Debtor asserts that the remainder of the exculpation is appropriately tailored to matters arising in the Chapter 11 Case and for the benefit of a plan sponsor, and thus should be approved without modification.

b. Plan Injunction.

Both Objections also apparently question the injunction provisions in the Plan, including in Plan § 1.03, which is the injunction protecting the exculpation provision in Plan § 10.2. In Meritage, with respect to the post-confirmation injunction in the plan at issue in South Edge, the District Court held that the provision was not a *de facto* discharge provision in violation of section 1141(d)(3) of the Bankruptcy Code, but rather merely to effectuate the plan and ensure that the claims, if and when fixed, would be treated in accordance with the plan. Id. at 416-418. As such, the Court upheld such a provision against a challenge on appeal.

As applied in the case at hand, the Plan's injunction provision in Section 10.3 seeks to insure that parties do not interfere with the consummation and implementation of the Plan and all the transactions contemplated therein by requiring parties to look to their rights under the Plan. Such injunction provisions are customary and regularly approved by courts. Further, in light of the clarification and disclaimer language the Debtor has inserted to respond to the KB Home Objection, if the underlying exculpation has been appropriately tailored, then it necessarily follows that the injunction to give effect to that exculpation is also appropriately tailored as well, and should be approved.

c. Setoff and Recoupment Rights in the Plan Injunction.

The KH Trusts Objection also objects to the Debtor's plan injunction provision in Plan § 10.3.1(iv) to the extent it seeks to prohibit rights of setoff and recoupment. Plan injunction provisions against the enforcement of setoff and recoupment rights similar to the Debtor's Plan § 10.3.1(iv) are approved and enforced. See PT-1 Commn'ns, Inc., 403 B.R. 250, 271-72 (Bankr. E.D.N.Y. 2009); Daewoo Int'l (Am.) Corp. Creditor Trust v. SSTS Am. Corp., No. 02 Civ. 9629, 2003 WL 21355214, at *5 (S.D.N.Y. 2003); see also Massey v. Baker O'Neil Holdings, Inc., No. 1:05-CV-1061, 2006 WL 897880, at *3-4 (S.D. Ind. 2006); United States v. Continental Airlines, Inc. (In re Continental Airlines, Inc.), 218 B.R. 324, 330 (D. Del. 1997), aff'd 134 F.3d 536 (3d

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

Cir. 1998).

Plan injunction provisions against the assertion of setoff and recoupment are also regularly approved in this District, and are thus well accepted. See In re Russell Boulder, LLC, Case 10-29724-MKN, Docket Nos. 496 and 473 (Bankr. D. Nev. May 25, 2012) (Section 9.4(iv) of the plan); In re Las Vegas Monorail, Case 10-10464-BAM, Docket No. 1120 (Bankr. D. Nev. May 21, 2012) (Section 10.8(iv) of the plan); In re Stations Casinos, Case No. 09-52477-GWZ, Docket No. 2039 (Bankr. D. Nev. August 27, 2010) (Article X(F)(1)(D) of the plan); In re The Rhodes Cos., LLC, Case 09-14814-LBR, Docket No. 1053 (Bankr. D. Nev. March 12, 2010) (Article VIII(H)(4) of the plan).

In any event, and although such provision is proper and enforceable, in light of the objection thereto raised in the KH Trusts Objection, the Debtor will simply strike Plan § 10.3.1(iv) in the Confirmation Order to avoid any issue in this regard.

d. Approval of the KEH Restructuring Letter.

Bankruptcy Rule 9019(a) allows courts to approve proposed compromises, and sections 1123(b)(3)(A) and (b)(6) of the Bankruptcy Code permit plans of reorganization to incorporate and effectuate such settlements. In re Best Prods. Co., Inc., 177 B.R. 791, 794 n.4 (S.D.N.Y. 1995); In re Winn-Dixie Stores, Inc., 356 B.R. 239, 250-251 (Bankr. M.D. Fla. 2006); In re Energy Partners, Ltd., No. 09-32957, 2009 WL 2898876, at *16 (Bankr. S.D. Tex. Aug. 3, 2009). As such, any argument in the KH Trusts Objection that the KEH Restructuring Letter was somehow an unauthorized post-petition transaction in violation of section 363 of the Bankruptcy Code or otherwise, is simply incorrect as a matter of law.

In order to be approved, a bankruptcy settlement must be fair and equitable. See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry v. Anderson, 390 U.S. 414, 424 (1958). In order to determine whether a proposed settlement is fair and equitable, the bankruptcy court generally should consider the following four factors:

(a) the probability of success in the litigation;

(b) the difficulties, if any, to be encountered in the matter of collection;

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

(c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and

(d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Martin v. Kane (In re A&C Props.), 784 F.2d 1377, 1381 (9th Cir. 1986); Schmitt v. Ulrich, 215 B.R. 417, 421 (B.A.P. 9th Cir. 1997); see also In re Endoscopy Ctr. of S. Nev., LLC, 451 B.R. 527 (Bankr. D. Nev. 2011); In re Hyloft, Inc., 451 B.R. 104 (Bankr. D. Nev. 2011).

The debtor is not necessarily required to satisfy each of these factors as long as the factors as a whole favor approval of the settlement. See In re Pacific Gas and Elec. Co., 304 B.R. 395, 417 (Bankr. N.D. Cal. 2004); see also In re Adelphia Commc'ns Corp., 327 B.R. 143, 159 (Bankr. S.D.N.Y. 2005). The settlement does not have to be the best the debtor could have possibly obtained; rather, the settlement must only fall "within the reasonable range of litigation possibilities." In re Adelphia Commc'ns Corp., 327 B.R. 143, 159 (Bankr. S.D.N.Y. 2005).

In considering the factors, "a precise determination of likely outcomes is not required, since an exact judicial determination of the values at issue would defeat the purpose of compromising the claim." In re Telesphere Commc'ns, Inc., 179 B.R. 544, 553 (Bankr. N.D. Ill. 1994) (internal quotations omitted). Thus, rather than determining various issues of fact and law, the Court should "canvass the issues and see whether the settlement fall[s] below the lowest point in the range of reasonableness." In re Lion Capital Group, 49 B.R. 163, 175 (Bankr. S.D.N.Y. 1985) (internal quotations omitted).

An examination of each of the four A&C Properties factors as applied to the KEH Restructuring Letter follows.[7] The settlement embodied therein essentially results in a significant compromise of the amount of the claims that could be asserted by KEH in the Debtor's Chapter 11 Case for indemnity and contribution. Prior to the Petition Date, KEH asserted claims for indemnity and contribution claim against the Company as a result of the payments of not less than the principal sum of $30,000,000. See Disclosure Statement, Art. V.G. As discussed in connection

[7] The KEH Restructuring Letter is attached to the Disclosure Statement as Exhibit 4 thereto and is incorporated into the Disclosure Statement.

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

with the discussion on section 1129(a)(10) of the Bankruptcy Code hereinafter, the KEH Restructuring Letter is a proposed settlement, subject to approval of the Court at the Confirmation Hearing, regarding the amount and allowance of the KEH claim for indemnity and contribution. Specifically, the KEH Restructuring Letter provides a waiver of any amounts of interest on such claim, which would be substantial given the years that have expired, and also subtracts out from the claim the following: (a) $3,588,416 in distributions made in September 2011 to the Original Homebuilders and Focus Kyle; (b) $2,024,200 for the water deposit in December 2014.[8] In short, the KEH claim for indemnity and contribution per the Company's governing documents and Nevada law are significantly compromised with all credits and without the need for any litigation. The Debtor obtains a multi-million dollar savings on this valid claim and also gets a credit for any possible chapter 5 actions as well, and all without ever having to even commence any litigation on such matters, thereby resulting in substantial savings to the estate. Further, and also significantly, KEH agreed to accept whatever distribution it does receive from the Debtor's estate as being in full satisfaction of that claim against the Debtor, which given that the Debtor will only have approximately $600,000 in cash remaining, will be an additional significant compromise. In consideration therefor, the Debtor seeks to allow KEH's otherwise valid claim and obtains KEH's approval of a proposed plan on a specific, but reasonable timetable, and also without having to expend further significant time and resources to bring about some closure to a legacy entity that needs some resolution, and needed it for years.

Second, the Debtor anticipated some difficulties in collection of any affirmative recovery because KEH is a single or limited purpose entity without substantial assets for the satisfaction of any claims.

Third, the litigation regarding the claim amount, including in particular the potential chapter 5 causes of action, would be somewhat complex, especially given the amounts at issue and

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[8] Both of these items are well known to the Kimball Hill Trusts. Indeed, the Trusts have been provided the applicable bank statements as to the 2011 transfers, and the water deposit transfer in 2014 was fully disclosed in the Debtor's *Statement of Financial Affairs*. See ECF No. 1, p. 25. Additionally, the Disclosure Statement explains these matters and the claims and reasons, at length. See ECF No. 45, pp. 6-14, and pp. 31 and 32. Finally, the specific calculation is included in the KEH Restructuring Letter appended to the Disclosure Statement as Exhibit 4.

given the fact that the Debtor's longstanding manager and the person who was principally in charge and knowledgeable when most of the relevant events took place, is no longer associated with the Company. Further, as more fully explained in the Disclosure Statement, given that KEH is the only true general unsecured creditor, and that the Kimball Hill Trusts, in point of fact, do not really have general unsecured claims and notwithstanding their assertion thereof (in contingent and unliquidated amounts), litigating such claims and seeking a recovery thereon would not benefit the estate because they would be filed against the very targets to whom any proceeds generated thereby would be distributed. In other words, such claims would be e ntirely circular and of no benefit to the estate other than the administrative costs associated with pursuing such matters, which would actually reduce the available recovery.

Finally, regarding the paramount interest of the creditors and a proper deference to their reasonable views in the premises, KEH is the only legitimate unsecured creditor, and the KEH Restructuring Letter constitutes a consensual compromise between the Debtor and KEH, of which the settlement of the KEH claim and plan support are necessary components. This compromise is as a result of arms' length and good faith negotiations, and necessary to allow the Plan to be confirmed.

In response, the KH Trusts Objection argues that the lack of a "fiduciary out" provision in the KEH Restructuring Letter is problematic to its approval, yet this would only truly be an issue if it were shown that the compromise proposed thereby was not a fair, equitable and appropriate. So-called "fiduciary out" provisions are often used in sale or merger agreements and are inserted into such agreements to permit a board of directors, or other person in control, to change its recommendation for a signed deal and terminate the agreement if failing to do so would be a breach of its fiduciary duties. Again, there can be no harm in any alleged "failure" to include a fiduciary out unless it is shown that the transaction in question is not demonstrated to be a breach of the applicable parties' fiduciary duties. In the case at hand, the KEH Restructuring Letter really did not oblige the Debtor to do anything that it was not already comfortable with based upon its own diligence. Further, any potential alleged breach of fiduciary duty could be vetted at the Confirmation Hearing wherein the KEH Restructuring Letter is to be approved in any event.

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

Again, as previously noted, the KH Trust Objection makes numerous arguments predicated on mistaken assertions of fact, including principally: (a) the alleged release of the Debtor by the Original Homebuilders in the 2011 Settlement Agreement, when in fact, no such release occurred; and (b) the alleged claim held by the Kimball Hill Trusts against the Debtor, when in fact, the Kimball Hill Trusts have no such claims. With such mistaken factual assertions are proven wrong, most of the Kimball Hill Trusts' arguments also fail.

e. Discharge.

The Debtor's Disclosure Statement § VIII.A.3 indicates that the Debtor will receive a discharge, whereas the Plan is silent on the matter. For the avoidance of doubt, the Debtor clarifies that it is not seeking a discharge because, after some operations post-confirmation, it is essentially liquidating. The Debtor will include language in the Confirmation Order to this effect and consistent with section 1141(d) of the Bankruptcy Code.

C. 11 U.S.C. § 1129(a)(2): Proponent Compliance With the Bankruptcy Code.

1. Standard of Decision.

Section 1129(a)(2) of the Bankruptcy Code requires a plan proponent to "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). Section 1129(a)(2) of the Bankruptcy Code is intended to encompass the disclosure and solicitation requirements under section 1125 of the Bankruptcy Code. See H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); In re Trans World Airlines, Inc., 185 B.R. 302, 313 (Bankr. E.D. Mo. 1995). The determination of adequate information for disclosure statement purposes is made on a case-by-case basis. See Computer Task Group, Inc. v. Brotby (In re Brotby), 303 B.R. 177, 193 (B.A.P. 9th Cir. 2003). Case law has developed a non-exhaustive list of criteria that may be considered in evaluating the sufficiency or the adequacy of a proposed disclosure statement. See In re Metrocraft Pub. Servs., Inc., 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984). A disclosure statement must provide adequate information of a kind and in sufficient detail as far as is reasonable practicable such that the holders of claims or interests in the case can make an informed judgment about the Plan. See 11 U.S.C. § 1125(a)(1) (defining "adequate information").

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

2. The Kimball Hill Trusts Have More Than Adequate Information.

The Court has conditionally approved the Debtor's Disclosure Statement based on the previous certification of Debtor's counsel. See ECF Nos. 46-48. The Kimball Hill Trusts first argue that the Disclosure Statement contains inadequate information pursuant to section 1125 of the Bankruptcy Code regarding the calculation of KEH's claim. As an initial matter, the Debtor has been nothing but readily transparent and cooperative with the Kimball Hill Trusts during this Chapter 11 Case. For example, the Debtor provided a lengthy written response, with supporting documents, to the informal information requests of the Kimball Hill Trusts, including regarding the very issues that they raise in the KH Trust Objection.

Second, the Disclosure Statement provides detail about all of the matters referenced in the KH Trusts Objection, including in particular the calculation of the KEH claim as agreed to and set forth in detail in the KEH Restructuring Letter, see Disclosure Statement, §§ V and XI, and Ex. 4 (KEH Restructuring Letter), other than an assessment of the anticipated impact on the Chicago Case in which the Kimball Hill Trusts are involved. Collateral effects on another bankruptcy estate, however, are really outside the scope of this Debtor's proper inquiry as it involves neither an asset nor liability of this bankruptcy estate and this Chapter 11 Case. In fact, had Debtor or its Professionals done any investigation or analysis it likely would not have been compensable because such time and expense would have not been necessary to the administration or beneficial to this bankruptcy estate within the meaning of section 330 of the Bankruptcy Code.[9]

Third, on February 27, 2015 the Kimball Hill Trusts sought and in March 2015 obtained 2004 exam discovery in its own bankruptcy proceeding relating to the Debtor and the claims asserted in this case. Even though the Debtor believe such discovery in the Chicago Case on matters in this Chapter 11 Case was not appropriate, it did not seek to retain Chicago-based bankruptcy counsel to oppose such matter in order to avoid unnecessary cost and expense.

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[9] For example, section 330(a)(1)(C) of the Bankruptcy Code provides that "[i]n determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--. . . (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title; . . ."

Regardless, the Kimball Hill Trusts a more than adequate opportunity to review and analyze matters. Regardless, this was yet another way that the Kimball Hill Trusts were well apprised of any necessary and adequate information. Indeed, the Kimball Hill Trusts' knowledge is self-evident from the Settlement Agreement it attaches to the Simons Declaration, but also the previously e-mail the Debtor's counsel sent (with backup documentation) explaining the same to them. As a result, the Plan satisfies section 1129(a)(2) of the Bankruptcy Code.

D. 11 U.S.C. § 1129(a)(3): Good Faith and Not By Any Means Forbidden by Law.

1. Good Faith.

Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Section 1129(a)(3) does not define "good faith." Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.), 314 F.3d 1070, 1074 (9th Cir. 2002). The good faith determination pursuant to section 1129(a)(3) of the Bankruptcy Code is based on the "totality of the circumstances." Id. "[B]ankruptcy courts should determine a debtor's good faith on a case-by-case basis, taking into account the particular features of each . . . plan." Id. at 1075. "A plan is proposed in good faith where it achieves a result consistent with the objectives and purposes of the Code." Id.

The objectives and purposes of the Bankruptcy Code, and Chapter 11 in particular, have been described as including, among other matters, "to maximize the value of the bankruptcy estate," Toibb v. Radloff, 501 U.S. 157, 163 (1991), and "to satisfy creditors' claims," United States v. Whiting Pools, Inc., 462 U.S. 198, 203 (1983). See In re Sagewood Manor Assocs. Ltd. P'ship, 223 B.R. 756, 762 (Bankr. D. Nev. 1998). The foregoing objectives are fully evident with the Plan in the case at hand. Moreover, there are no allegations in the case at hand evidencing the typical situations where courts have found a lack of good faith. See In re Trans Max Techs., 349 B.R. 80, 88-89 (Bankr. D. Nev. 2006).

2. The Reason for this Chapter 11 Case and Irrelevance of the Chicago Case.

The Debtor has consistently and repeatedly throughout its Chapter 11 Case explained the reason and rationale for its filing for bankruptcy. The Company has a lengthy and involved history. It was proposed to be a massive real estate project, yet it failed and now has had nearly all of its

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

property foreclosed out by its Lender. For most of its existence, indeed from its inception until late 2014, the Company was run by Ritter and Focus Kyle as General Manager, who are no longer associated with the Company, and indeed was removed after making a settlement payment for its longstanding part on a guaranty of the Company's underlying indebtedness. The Company's former manager is no longer involved whatsoever in the Company, and instead a new, third party, independent manager was installed with separate counsel to review its remaining options.

Given the Company's lengthy history and the uncertainties and potentially unknown liabilities resulting from its failed real estate project, and in an effort to bring clear finality to the situation, the Company resolved to conduct an orderly liquidation of the remaining legacy assets under the supervision of the Bankruptcy Court. When the new independent manager assumed control of the Company, there were concerns about legacy liabilities other than the alleged claims of the Company's members. The Company believed that the bankruptcy process would allow it to provide a forum for the identification and adjudication of any claims and interests in and to the remaining legacy assets, and provide an organized and supervised process for the distribution of such remaining assets to the appropriate creditors and interest holders. As such, this filing is an emanantely proper use of the Bankruptcy Code and indeed the need for the filing is only underscored by the claim filed by the Kimball Hill Trusts.

Specifically, the Debtor holds various legacy assets not otherwise foreclosed out by the Lender, which assets principally consisted of cash on hand of $722,344.35 as of the Petition Date [ECF No. 22, p. 4], and the Remaining Real Property. Both Objections repeatedly ignore the fact that the Debtor has this substantial amount of cash that must be distributed to the applicable creditors and parties in interest, and instead, misleadingly refer only to "non-cash" assets such as the Remaining Real Property. This cash on hand must be distributed as well and cannot be ignored.

Second, in questioning the need for this Chapter 11 Case, both Objections ignore that the universe of potential claims from the Company's failed real estate project were wide and uncertain as of the Petition Date. This substantial uncertainty regarding potential outstanding claims was due to the scale of the proposed project, the length of time involved between its inception and present, the fact that the project ultimately failed, and the fact that the Company's prior and

longstanding manager is no longer involved with the Company and indeed was in a largely adverse position to the Company for years. For example, the Company was concerned about potential legacy liabilities from professionals such as attorneys and engineers/surveyors that may have been involved in the initial diligence for the Company's project, among other potential liabilities, both prior to and after its failure and the Lender's foreclosure. Without the bankruptcy filing, and the claims procedures and bar dates imposed thereby, the Debtor and its estate could have no certainty regarding the scope of the entire universe of claims, and thus could not be in a position to make distributions to any parties unless and until such matters were established through a bankruptcy proceeding. Both of the Objections, by contrast, assume without any basis that only the Debtor's members were the only possible creditors, which was far from certain and certainly not known or established as of the Petition Date.

Third, both Objections ignore the fact that the lack of value in the Remaining Real Property was not a known fact until the Debtor, through its various independent professionals, analyzed the matter and conducted the necessary due diligence to establish that fact. Indeed, it was only after the Debtor spent the money to interview a potential commercial real estate broker regarding marketability and sale of the property, to contact NDOT regarding a possible purchase, to notice NDOT and the FHA of the Chapter 11 Case generally, and to find and to retain an appraiser who could prepare the specialized appraisal needed for this somewhat unusual piece of property that it was properly concluded that the Remaining Real Property had no value. Prior to this time and effort it was very much an open question whether the Remaining Real Property had any value, yet the Objections attempt to paint a picture that this was known all along. Again, the Chapter 11 Case allowed for this diligence process, and for it to be conducted by a neutral third party, not interested creditors, in order to arrive at the conclusion regarding value (or lack thereof) that the Objections assume as true now.

Fourth, whatever issues, claims or defenses, if any, that may result as to matters in the Kimball Hill bankruptcy cases in Chicago is really of no relevance to the Debtor's instant Chapter 11 Case. The Debtor's Chapter 11 Case is principally about providing a forum to identify the relevant universe of claims against this Debtor, and adjudicate those remaining claims to this

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

Debtor's assets, including principally the remaining cash on hand, and provide a distribution thereon. Collateral effects resulting from this Chapter 11 Case on other bankruptcy estates pending in other jurisdictions are issues for those bankruptcy courts and those estate professionals, but really have absolutely no bearing on what should happen in this bankruptcy case, as the assets and claims in this case need to be adjudicated as well.

Indeed, if anything, the Debtor has shown its staunch independence and diligence throughout this process, including as to KEH. Prior to the Petition Date, KEH asserted a general unsecured deficiency claim of nearly $400 million in its communications with the Company, however the Company, the Debtor's independent professionals reviewed the allegations, including the applicable state court filings, and determined that such claims arguably had been released, and thus, while scheduling such claim, as it was required to do, also disputed such claim on its bankruptcy schedules. Scheduling a claim, but listing it as disputed, is not in any way tantamount to an acknowledgment of the validity of the claim; rather, it is an acknowledgment that a creditor has asserted the claim only. The Objections, by contrast, assert that apparently instead of scheduling KEH's unsecured deficiency claim and disputing it that the Debtor apparently should have just left it off of its schedules entirely, which assertion is simply patently incorrect as a matter of law. A debtor is under an affirmative obligation to list any and all claims, even if those claims are disputed (or contingent or unliquidated), and a debtor it not free to simply leave off potential claims simply because it may not agree with them and/or believe it has defenses to them. This is dictated by the interplay of the text of Official Form B 6F (Creditors Holding General Unsecured Claims), the definition of claim in section 101(5)(A) of the Bankruptcy Code as including such items, a claim is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured" (emphasis added), and the caselaw interpreting the term "claim" broadly. Siegel v. Fed. Home Loan Mortg. Corp., 143 F.3d 525, 532 (9th Cir. 1998) (quoting Cal. Dep't of Health Servs. v. Jensen (In re Jensen), 995 F.2d 925, 929 (9th Cir. 1993) ("This 'broadest possible definition' of 'claim' is designed to ensure that 'all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.'" (quoting H.R. Rep.

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

No. 95-595, at 309 (1978), S. Rep. No. 95-598, at 22 (1978) (alteration in original)). In short, the Debtor did not have the luxury of doing what the two Objections claim it could have with respect to the Lender's disputed deficiency claim. That having been said, the Debtor's scheduling of the Lender's deficiency claim as disputed in its bankruptcy Schedule F, notwithstanding the Lender's claims to the contrary, shows that the Debtor acting to protecting the best interests of the state and independent of KEH.

Further, that KB Home's anticipated distribution may arguably be diminished as a result of the Debtor's Chapter 11 Case is utterly irrelevant to whether the filing was proper and whether the Plan could be confirmed. KB Home is a sophisticated commercial party who is responsible for its own position that it finds itself, and simply because its anticipated distribution may be reduced apparently in favor of KEH's from the Kimball Hill Trusts is of no relevance or consequence to this Chapter 11 Case whatsoever.

Finally, the Kimball Hill Trusts proclaim that they will be filing a motion to dismiss the Debtor's Chapter 11 Case on "bad faith" grounds. See KH Trusts Objection, p. 10 n.8. As an initial matter, this is a rather curious statement given that, as of the filing of this brief, the Debtor's Chapter 11 Case has been pending since January 10, 2015, or more than four (4) months.[10]

Additionally, such a dismissal motion completely lacks merit and would be denied as a result. A lack of good faith in the filing of a chapter 11 petition can constitute cause to dismiss or convert a case pursuant to section 1112(b) of the Bankruptcy Code in an appropriate case. See Marsch v. Marsch (In re Marsch), 36 F.3d 825, 828 (9th Cir. 1994) (per curiam); Idaho v. Arnold (In re Arnold), 806 F.2d 937, 939 (9th Cir. 1986). As the theoretical movant seeking to dismiss the bankruptcy case as a "bad faith" filing, the Kimball Hill Trusts would have the burden of proof with respect to such a dismissal motion. Sullivan v. Harnisch (In re Sullivan), 522 B.R. 604, 614

[10] Indeed, the Kimball Hill Trusts threat of a potential dismissal motion on bad faith grounds to be filed more than four (4) months into the Debtor's Chapter 11 Case and only a few weeks before the Confirmation Hearing on the Debtor's Plan appears in keeping with its apparently calculated strategy of filing its Proof of Claim on the Bar Date--the very last day that it could--and so as to delay a more expedient decision on its claim and the confirmation of the Debtor's Plan. By contrast, the Debtor has tried to move this Chapter 11 Case along expeditiously, while also still allowing for an appropriate amount of time for investigation and noticing.

(B.A.P. 9th Cir. 2014).

"The test [of good faith] is whether a debtor is attempting to unreasonably deter and harass creditors or attempting to effect a speedy, efficient reorganization on a feasible basis." Marsch, 36 F.3d at 828. "The existence of good faith depends on an amalgam of factors and not upon a specific fact. The bankruptcy court should examine the debtor's financial status, motives, and the local economic environment." Arnold, 806 F.2d at 939 (citation omitted). Whether cause exists for dismissal or conversion must be determined on a case-by-case basis. Critically, "[g]ood faith is lacking only when the debtor's actions are a clear abuse of the bankruptcy process." Arnold, 806 F.2d at 939 (emphasis added); Sullivan, 522 B.R. at 617 (noting that a "clear abuse" is required).

As applied in the case at hand, the Debtor has a legitimate rehabilitative purpose in winding down its remaining affairs, and indeed doing so under court supervision given the amounts and kind of assets at issue, and thus any dismissal motion that the Kimball Hill Trusts filed could never establish the "clear abuse" standard of decision necessary for the Debtor's Chapter 11 Case to be dismissed. Further, in seeking to convert or dismiss, if the Court opted for conversion of the case to chapter 7, the distributions would be made in accordance with the same priority scale as set forth in the Plan, albeit with much greater administrative expenses due to the costs of a chapter 7 trustee and his or her counsel, not to mention likely delayed distributions as a result of new parties getting up to speed on the rather substantial matters at issue in this case.

3. Not Be Proposed by Any Means Forbidden by Law.

The second prong of section 1129(a)(3) of the Bankruptcy Code requires that the Plan "not be proposed by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The term "law" as used in this section, includes state law, and applies not to the substantive provision of a plan itself but rather to the means employed in proposing a plan. See In re Food City, Inc., 110 B.R. 808, 810 (Bankr. W.D. Tex. 1990). The Plan does not, nor are there any allegations that the Plan somehow runs afoul of, applicable state law.

Accordingly, the Plan satisfies section 1129(a)(3) of the Bankruptcy Code.

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

E. 11 U.S.C. § 1129(a)(4): Payments For Services Reasonable.

Section 1129(a)(4) requires that all payments of professional fees made from estate assets be subject to review and approval by the court. "Section 1129(a)(4) of the Bankruptcy Code has been construed to require that all payments of professional fees made from estate assets be subject to review and approval by the Bankruptcy Court as to their reasonableness." In re Idearc Inc., 423 B.R. 138, 163-64 (Bankr. N.D. Tex. 2009); In re Elsinore Shore Assocs., 91 B.R. 238, 268 (Bankr. D.N.J. 1988) (holding that the requirements of section 1129(a)(4) of the Bankruptcy Code were satisfied where the plan provided for payment of only "allowed" administrative expenses).

Consistent with the foregoing, the Plan provides that all such fees and expenses, as well as all other accrued fees and expenses of professionals through the Effective Date, remain subject to final review by the Court for reasonableness pursuant to section 330 of the Bankruptcy Code. See Plan, Article II.A and C. As such, the Plan satisfies section 1129(a)(4) of the Bankruptcy Code.

F. 11 U.S.C. § 1129(a)(5): Disclosure of Management and Insiders.

Pursuant to section 1129(a)(5) of the Bankruptcy Code, the Debtor disclosed that on and after the Effective Date, the Debtor's present management with Asgaard Capital would continue in that role with respect to the windup of the remaining affairs. See Plan, Article V. In light of the foregoing disclosures, the Plan satisfies section 1129(a)(5) of the Bankruptcy Code.

G. 11 U.S.C. § 1129(a)(6): Regulatory Approvals.

Section 1129(a)(6) of the Bankruptcy Code is inapplicable in the instant case because the Debtor does not charge rates that are regulated by a governmental agency within the meaning of section 1129(a)(6) of the Bankruptcy Code.

H. 11 U.S.C. § 1129(a)(7): Best Interests Test.

Section 1129(a)(7) of the Bankruptcy Code requires that a plan be in the best interests of creditors and interest holders, and specifically, that each holder of an impaired claim has either accepted the plan, or "will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date." 11 U.S.C. § 1129(a)(7)(A)(i) and (ii). In order to satisfy the "best interest test," the court

must find that each dissenting creditor will receive or retain value, as of the effective date of the plan, that is not less than the amount it would receive if the debtor were liquidated. See In re Drexel Burnham Lambert Grp., 138 B.R. 723, 761 (Bankr. S.D.N.Y. 1992).

As demonstrated by the Debtor's Liquidation Analysis, each holder of an Allowed Claim in an Impaired Class will receive or retain under the Plan property of a value, as of the Effective Date of the Plan, that is not less than the amount that such Holder would receive or retain if the Debtor were liquidated under chapter 7 of the Bankruptcy Code.

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

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

Class 1 (Other Priority Claims) and Class 2 (Other Secured Claims) are unimpaired and thus deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. See 11 U.S.C. § 1126(f). Moreover, those classes were only inserted in the Plan as "placeholders" and in case such claims were made against the Debtor. There are, in fact, no claims within those classes anyways, and thus those Classes are deemed to be eliminated pursuant to Section 3.7 of the Plan anyways.

Class 3 (General Unsecured Claims) is also unimpaired. Why Class 3 is not impaired is more fully discussed with reference to the discussion on section 1129(a)(10) of the Bankruptcy Code. Notably, the foregoing assumes that the scheduled indemnity and contribution claims asserted by KEH against the Debtor are allowed and the only claims in Class 3, and thus that the alleged claims of the Kimball Hill Trusts are disallowed and are not within Class 3. Because KEH's claims are unimpaired as a resulting of the KEH Restructuring Letter and the Plan's treatment consistent therewith, KEH is deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code.

Class 4 (Equity Interests) is proposed to receive nothing under the Plan and thus are deemed

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. See 11 U.S.C. § 1126(g). Because Class 4 has not accepted the Plan (or is already been deemed to have rejected the Plan), cramdown of the Plan pursuant to section 1129(b) of the Bankruptcy Code is requested as to this Class, which process is discussed below.

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

In accordance with sections 1129(a)(9)(A) and (B) of the Bankruptcy Code, Plan § 2.2 provides for the payment in full of each holder of an Allowed Administrative Claim. Moreover, all requests for payment of Administrative Claims against the Debtor, including but not limited to Professional Fee Claims, must be filed within thirty (30) days after the Effective Date. See Plan §§ 1.1.2 and 2.2.

In accordance with sections 1129(a)(9)(C) of the Bankruptcy Code, the Plan provide that all Allowed Priority Tax Claims and Allowed Other Priority Claims, if any, will be paid in full by the later of as soon as the claim becomes allowed, or as soon as practicable after such claim becomes allowed. See Plan §§ 2.3 and 3.4.

As such, the Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code.

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

Section 1129(a)(10) of the Bankruptcy Code provides that "[i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by an insider." 11 U.S.C. § 1129(a)(10) (emphases added).

Classes of claims may agree to less favorable treatment under section 1123(a)(4) of the Bankruptcy Code, be deemed unimpaired for purposes of sections 1124 and 1129(a)(10), and be conclusively presumed to have accepted the plan pursuant to section 1126(f). Thus, the debtor could propose a plan that is confirmable, notwithstanding that all of its creditors may be insiders.

Based upon the facts and circumstances at issue and the legal arguments presented, and the text of sections 1129(a)(10), 1123(a)(4), and 1124 of the Bankruptcy Code make clear that a debtor can avoid section 1129(a)(10)'s confirmation requirement, notwithstanding that its pool of creditors is exclusively insiders. In particular, there is an exception to section 1129(a)(10) of the

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

Bankruptcy Code where "the plan leaves all classes of claims unimpaired." 7 Collier on Bankruptcy ¶ 1129.02[10] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015). Furthermore, a plan may effectively leave unimpaired all classes of claims, even though its proposed treatment may technically fall under the broad definition of "impaired" in subsections (1) and (2) of section 1124 of the Bankruptcy Code, through an agreement by the creditors to accept less favorable treatment pursuant to section 1123(a)(4).

To begin, there is substantial textual support in the Bankruptcy Code for this exception. Section 1129(a)(10) of the Bankruptcy Code because if no class of claims is impaired under the plan, then section 1129(a)(10) is inapplicable by its terms.[11] Furthermore, the text of sections 1124 and 1123(a)(4) of the Bankruptcy Code suggest that impairment for plan purposes may be established through a pre-confirmation agreement.

Section 1124 of the Bankruptcy Code of the Bankruptcy Code provides, in pertinent part, as follows:

> Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan--
>
> (1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest;

11 U.S.C. § 1123(a)(4) (emphasis added); see also Gen. Elec. Capital Corp. v. Future Media Products. Inc., 536 F.3d 969 (9th Cir. 2008), opinion amended on other grounds, 547 F.3d 956 (9th Cir. 2008) ("A creditor's claim is considered 'impaired' for purposes of voting on a Chapter 11 plan unless the plan leaves the creditor's legal, equitable, and contractual rights unaltered, or the debtor 'cures' any default that occurred prior to or during the bankruptcy case.").

Notably, section 1124 of the Bankruptcy Code begins with "[e]xcept as provided in section 1123(a)(4) of this title." Section 1123(a)(4) of the Bankruptcy Code, in turn, provides that " a plan shall . . . (4) provide the same treatment for each claim or interest of a particular class, unless the

[11] Notably, this provision only refers to classes of "claims" and not classes of "interests," and thus obviously does not refer to Class 4 (Equity Interests) in this case.

holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4) (emphasis added). In sum, section 1124 of the Bankruptcy Code explicitly provides that a creditor may agree to less favorable treatment and be unimpaired under section 1124, notwithstanding that plan treatment (as compared to the pre-agreement claim) may have otherwise fallen under the broad definition of impairment in section 1124(1) of the Bankruptcy Code.

Various courts and other authorities have recognized the exception and concluded that an agreement pursuant to section 1123(a)(4) of the Bankruptcy Code can conclusively establish that a class of claims is not impaired for purposes of sections 1124 and 1129(a)(10). According to Collier on Bankruptcy:

> In some cases, the debtor or trustee and the other party to a contract may negotiate a modification of the agreement and obtain court approval for the modification before the filing of a plan. If a plan filed in a case adopts the agreement as modified, and thus leaves "unaltered the legal, equitable, and contractual rights" of the contracting parties, the claim of the other party to the contract will not be impaired. It is the creditor's preplan consent to the modification that makes performance pursuant to the modification the standard for impairment.

See Collier on Bankruptcy ¶ 1124.03[3] (italics added) (footnotes omitted).

Several bankruptcy courts have also recognized this exception to impairment under section 1124 of the Bankruptcy Code. For example, the bankruptcy court in K Lunde wrote that:

> Actually, the introductory clause of § 1124 contains a third exception to the presumption of impairment in its prepositional phrase, "[e]xcept as provided in section 1123(a)(4) of this title." 11 U.S.C. § 1124. Section 1123(a)(4) states that a plan shall "provide the same treatment for each claim . . . of a particular class, unless the holder of a particular claim . . . agrees to a less favorable treatment of such particular claim . . . ." 11 U.S.C. § 1123(a)(4) (emphasis added). An agreement or consent to a particular treatment removes the claim from the presumption of impairment. "Agreement" or "consent" of a creditor is not to be confused with a class vote accepting the plan. Impairment is to be specified in advance of voting and, in fact, unimpaired classes are deemed to accept the plan and, therefore, solicitation of unimpaired classes is not required. 11 U.S.C. §§ 1123(a)(2) and 1126(f). But whenever a particular creditor has agreed or consented to less favorable

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

> treatment, which is usually evidenced through some form of stipulation or agreement, then the claim of this creditor is deemed unimpaired under § 1124.

In re K Lunde, LLC, 513 B.R. 587, 595 n.5 (Bankr. D. Colo. 2014).

Though the bankruptcy court in K Lunde provided the most cogent explanation of the exception, several other courts have also recognized the exception. See Matter of Huckabee Auto. Co., 33 B.R. 141, 147 n.3 (Bankr. M.D. Ga. 1981) ("It should also be noted here that the legal rights between GMAC and Debtors are established by the settlement agreement, and Debtors' plan does not alter the rights established therein, in actuality this claim is unimpaired by Debtors' plan."); In re Polytherm Indus., Inc., 33 B.R. 823, 836 (W.D. Wis. 1983) ("Section 1124 provides a statutory definition of impairment. A class of claims is impaired under a plan unless one of the following standards is met: (1) the plan leaves the claimholder' s legal, equitable, and contractual rights unaltered (11 U.S.C. § 1124(1)); (2) the plan cures defaults and reinstates the original terms of an obligation when maturity was brought on or accelerated by the default (11 U.S.C. § 1124(2)). However, a holder of a claim may agree to less favorable treatment of its claim without being characterized as impaired.") (emphasis added); In re SM 104 Ltd., 160 B.R. at 215 n.25 (creditor is not impaired by plan where plan incorporates prepetition settlement agreement); In re Tavern Motor Inn, Inc., 56 B.R. 449, 453 (Bankr. D. Vt. 1985) (the bankruptcy court found that the stipulation between the debtor and creditor eliminating pre-petition accrued default interest removed any default outside the provisions of section 1124).

As applied in the case at hand, the Plan proposes to treat KEH's claims consistent with the KEH Restructuring Letter, and thus leaves the claim unimpaired. As such, and obviously assuming the KEH claim is allowed and the only allowed claim in Class 3 (and thus that any claims of the Trusts are disallowed), section 1129(a)(10) of the Bankruptcy Code is simply inapplicable because all classes of claims (really only Class 3 as that is the only class with any claim in it, as Classes 1 and 2 have no claims and are deleted) are unimpaired. To be sure, Class 4 does not matter for purposes of section 1129(a)(10) of the Bankruptcy Code because it involves interests, not claims.

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

Section 1129(a)(11) of the Bankruptcy Code requires that a proposed plan be feasible.

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

Specifically, a debtor must establish that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). "The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.), 761 F.2d 1374, 1382 (9th Cir. 1985).

In the case at hand, the Plan calls for the distribution of the Debtor's assets. Feasibility pursuant to section 1129(a)(11) of the Bankruptcy Code has a much more limited, if any, application to a liquidation plan than a true reorganization plan. See In re Travelstead, 227 B.R. 638, 651 (D. Md. 1998); Matter of 47th and Belleview Partners, 95 B.R. 117, 120-21 (Bankr. W.D. Mo. 1988); In re Pero Bros. Farms, 90 B.R. 562, 563 (Bankr. S.D. Fla. 1988). Such an interpretation is based on a plain reading of section 1129(a)(11) of the Bankruptcy Court, which, by its own terms applies "unless" such liquidation is contemplated by the proposed plan. Moreover, liquidating plans are expressly authorized by section 1123(b)(4) of the Bankruptcy Code. See 11 U.S.C. § 1123(b)(4). In this regard, the liquidation proposed under the Plan is well set forth in the Plan. As such, the Plan satisfies section 1129(a)(11) of the Bankruptcy Code to the extent it is even applicable in this liquidation context.

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

All fees payable pursuant to 28 U.S.C. § 1930 arising prior to the Effective Date will be paid as an Administrative Claim on or prior to the Effective Date, and all such fees accruing post-confirmation are due on a calendar quarter basis and reported on post-petition operating reports as required by the U.S. Trustee Guidelines. See Plan §§ 12.11 and 12.12. As such, the Plan satisfies section 1129(a)(12) of the Bankruptcy Code.

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

There are no retiree benefits, as that term is defined in section 1114 of the Bankruptcy Code, in controversy in this case, and thus section 1129(a)(13) of the Bankruptcy Code is inapplicable. The Debtor is not required or obligated on any domestic support obligation, and thus

section 1129(a)(14) of the Bankruptcy Code is inapplicable. The Debtor is not an individual, and thus section 1129(a)(15) of the Bankruptcy Code is inapplicable. The Debtor is a moneyed, business and commercial corporation, not an eleemosynary organization, and thus section 1129(a)(16) of the Bankruptcy Code is inapplicable.

O. "Cramdown" of the Plan is Available Pursuant to 11 U.S.C. § 1129(b).

Section 1129(b) of the Bankruptcy Code provides that if a proposed plan meets all the requirements in section 1129(a) of the Bankruptcy Code, except for class acceptance pursuant to section 1129(a)(8) of the Bankruptcy Code, then the plan may still be confirmed "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1).

The Debtor did not solicit votes from the holders of Claims in Class 4 (Equity Interests) of the Plan because the Plan proposes that such Class is not to receive or retain any interest or property under the Plan, and thus such Class is deemed to reject the Plan pursuant to section 1126(g) of the Bankruptcy Code. Class 4, which includes the membership interests in the Debtor, is subject to cramdown pursuant to section 1129(b)(2)(C) of the Bankruptcy Code. Section 1129(b)(2)(C) of the Bankruptcy Code provides, in pertinent part, that with respect to a class of interests, a plan may confirmed nonconsensually if "the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interests any property." 11 U.S.C. § 1129(b)(2)(C)(ii).

As applied in the case at hand, the Debtor is entitled to have its Plan confirmed notwithstanding the deemed rejection of Class 4 because the Plan follows the absolute priority rule--meaning no junior claims or interests receive or retain anything under the Plan. Indeed, there are no classes junior to Class 4. As such, the Plan may be confirmed via cramdown on Class 4 pursuant to section 1129(b)(2)(C)(ii) of the Bankruptcy Code.

P. If Necessary, Plan Modifications Are Permitted.

Section 1127(a) allows for plan modifications pre-confirmation, and Bankruptcy Rule 3019(a) establishes the procedural requirements. See 11 U.S.C. § 1127(a); Fed. R. Bankr. P. 3019(a); In re Rhead, 179 B.R. 169, 176 (Bankr. D. Ariz. 1995). Plan modifications do not require

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169

a new disclosure statement and court approval unless the modifications are material. See Andrew v. Coppersmith (In re Downtown Inv. Club III), 89 B.R. 59, 65 (B.A.P. 9th Cir. 1988)); In re Intercare Health Sys., Inc., No. 2:09-BK-29121, 2013 WL 5979762, at *5 (Bankr. C.D. Cal. 2013) (holding that a plan modification was not material); In re Simplot, No. 06-00002, 2007 WL 2479664, at *11 (Bankr. D. Idaho Aug. 28, 2007).

The word "material" in this context has been described as "so affect[ing] a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance." Downtown Inv. Club III, 89 B.R. at 65 (quoting In re Am. Solar King Corp., 90 B.R. 808, 824 (Bankr. W.D. Tex. 1988)); Intercare Health Sys., Inc., 2013 WL 5979762, at *5 (holding that a plan modification was not material); In re Simplot, 2007 WL 2479664, at *11 (citing Enron Corp. v. New Power Co. (In re New Power Co.), 438 F.3d 1113 (11th Cir. 2006)). After notice and a hearing, the bankruptcy court may deem a claim or interest holder's vote for or against a plan as a corresponding vote in relation to a modified plan unless the modification materially and adversely changes the way that claim or interest holder is treated. See 11 U.S.C. § 1127(d); Fed. R. Bankr. P. 3019(a); Simplot, 2007 WL 2479664, at *11 (citing New Power Co., 438 F.3d at 1117-18).

V. CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court overrule the various objections to confirmation of its Plan, and confirm the Plan. The Debtor also requests such other and further relief as is just and proper.

Dated: May 15th, 2015.

LARSON & ZIRZOW, LLC

By: _____

ZACHARIAH LARSON, ESQ.
Nevada Bar No. 7787
MATTHEW C. ZIRZOW, ESQ.
Nevada Bar No. 7222
810 S. Casino Center Blvd. #101
Las Vegas, Nevada 89101

Attorneys for Debtor

LARSON & ZIRZOW, LLC
810 S. Casino Center Blvd. # 101
Las Vegas, Nevada 89101
Tel: (702) 382-1170 Fax: (702) 382-1169