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POST INVESTORS, LLC

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re

POST STREET, LLC, a Delaware limited liability company; and POST 240 PARTNERS, LP, a California limited partnership,

Debtors.

Jointly Administered Debtors and Debtors in Possession

Affects:
☐ Post Street, LLC Only
☐ Post 240 Partners, LP Only
☒ BOTH DEBTORS

Case No. 11-32255-TEC

Chapter 11

Jointly Administered with Case No. 11-33788

POST INVESTORS, LLC'S OBJECTIONS TO DEBTORS' PROPOSED NEW LOAN DOCUMENTS RE CONFIRMATION OF DEBTORS' PLAN OF REORGANIZATION (OCTOBER 28, 2011)

Date: February 22, 23, & 29, 2012
Time: 9:30 a.m.
Place: Hon. Thomas E. Carlson
235 Pine Street, 23rd Floor
San Francisco, CA

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I. INTRODUCTION

Secured creditor Post Investors, LLC ("Post Investors") hereby objects to the approval of the new loan documents submitted by debtors Post Street, LLC ("Post Street") and Post 240 Partners, L.P. ("Post 240")(collectively, "Debtors"). Debtors' proposed new loan documents that they seek to implement as part of the confirmation of the Debtors' Plan of Reorganization (October 28, 2011) (the "Plan") are overreaching and make extensive and unnecessary changes to the loan documents. Further the modifications are part of the Debtors' plan to exclusively benefit Stanley Gribble ("Gribble") who now controls both Debtors, at the expense of Post Investors. One example is seen by the timing and handling of rents. Under the modified loan documents and the Plan, once Brooks Brothers is in place and starts paying rent, Gribble can start withdrawing funds from the business. *See,* the Plan at Section V.A, p. 17-18. However, the new loan documents remove any requirement of the Debtors to create reserve accounts for insurance, property taxes and capital repairs. This is just one example of how the Debtors seek to improperly modify documentation of a $60 million loan to benefit one individual, Gribble. The Debtors' proposed new loan documents are not fair and equitable, can not be justified under any legal or factual scenario in light of the 100% loan to value, and they should not be approved.[1]

II. POST INVESTORS' OBJECTION TO THE NEW LOAN DOCUMENTS

Debtors' proposed new loan documents render the Plan unfair and inequitable. A bankruptcy court can confirm a plan over the objection of an impaired creditor "'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.'" *In re Arnold and Baker Farms*, 85 F.3d 1415, 1420 (9th Cir. 1996) ; 11 U.S.C. § 1129(b)(1). 11 U.S.C. § 1129(b)(2)(A) then identifies three alternative requirements under the fair and equitable standard with respect to a secured creditor. *In re Arnold and Baker Farms, supra*, at 1420. However, as stated *In the Matter of D & F Const. Inc.*, 865 F.2d 673, 675 (5th Cir. 1989):

[1] Post Investors requests the Court to take judicial notice of its Legal Opposition and Objections to Confirmation of Debtors' Plan of Re-Organization (October 28, 2011), (the "Legal Objections"), Docket Entry No. 111, in support of the objections asserted herein.

> Section 1129(b)(2) then sets forth requirements which must be met for a plan to be "fair and equitable." A plan which does not meet the standards set forth in § 1129(b)(2) cannot be "fair and equitable." However, technical compliance with all the requirements in § 1129(b)(2) does not assure that the plan is "fair and equitable."…Section 1129(b)(2) merely states that "the condition that a plan be fair and equitable with respect to a class *includes* the following requirements...." 11 U.S.C. § 1129(b)(2) (emphasis in original)(citations omitted).

Under the standard set by *D & F,* a plan may technically satisfy the requirements of Section 1129(a) and (b), but nevertheless will not be confirmed if the plan is not "fair and equitable" to a dissenting creditor. In this case, Post Investors contends the Plan can not be confirmed as it fails to satisfy the requirements of Section 1129(a) and (b) and it is not fair and equitable under Section 1129(b). The Debtors have rewritten the original loan into an entirely different obligation, removing many of the standard commercial protections that a lender is entitled to in a loan such as the one at issue and were specifically obtained by the original lender, Eurohypo, AG ("Eurohypo"). The Debtors also seek to make numerous prohibited revisions to the original loan documents which prohibitively impacts Post Investors' lien rights, which is not allowed under the Bankruptcy Code. The Debtors should not be allowed to unduly shift the risk to Post Investors in such an unfair and inequitable manner. *In re TCI 2 Holdings, LLC*, 428 B.R. 117, 167 (D.N.J. 2010) ("Nevertheless, the most fundamental aspect of the New Term Loan is that it must not unduly shift the risk relating to the operations and financial performance of the reorganized debtor, and must be fair and equitable to the secured creditor.")

While 11 U.S.C. § 1123(b)(1) is cited by Debtors for the statutory ability to modify loans in Chapter 11, no cases have been handed down which allows such whole sale destruction of existing loan documents as is attempted by the Debtors in this case. In one instance, a district court judge surveyed the case law interpreting Section 1129(b)(2)(A)(i)(I) in search of an applicable standard for the allowance of modification of loan documents. *Corestates Bank, N.A. v. United Chemical Technologies, Inc.*, 202 B.R. 33, 37 (E.D. Penn. 1996). The Court summarized its conclusions as follows:

> "[t]he extent to which liens can be modified and still be 'retained' has hardly been clarified by the courts. Few reported decisions

> have considered how much the cramdown power can modify substantive terms of mortgage agreements". Courts have refrained from confirming plans that substantially modify the rights of the creditor through either an open and notorious removal of the liens or the execution of subordination agreements....
>
> [i]t has become increasingly apparent from recent appellant decisions that the disruption of interests in property caused by bankruptcy cases must be minimal or non-existent ... The concern expressed throughout these appellant decisions is not to diminish or restrict interests in property, but to protect the wide scope of property interests ... Generally, the source of a creditor's interests in collateral is the terms and conditions contained in a security agreement reached with the debtor. Alterations of those terms and conditions disrupts the creditor's rights and interests in collateral. In that connection, this Court will not allow substantial disruption of bargained for rights which accompany interests in property and collateral. [citation omitted] *Id.* at 49-50.

The district court found that the debtor's plan in *Corestates* failed to satisfy Section 1129(b)(2)(A)(i)(I) as the plan attempted to improperly strip cross-collateralization liens on machinery and equipment.

Another court has determined that a debtor's attempt to restructure and extend a loan of a ten year period was not allowed under the fair and equitable standard unless the secured lender was given substantially similar rights. *In re Nolen Tool Company*, 50 B.R. 488 (W.D. Ark. 1985) In the *Nolen Tool* decision, the court stated that:

> "Fair and equitable" does not contemplate the restructuring of City National Bank's debt under Chapter 11 over a ten year period against its objection without requiring the debtor to provide rights substantially similar to the rights in the pre-petition loan agreement that are commercially reasonable under the circumstances. *Id.* at 490.

While no new loan documents were proposed in *Nolen Tool*, the Court noted that the plan attempted to strip the pre-petition lien rights of City National Bank. The Court denied confirmation of the *Nolen Tool's* plan holding that the plan was not fair and equitable.

The Debtors have submitted the direct testimony of Mark Schurgin, Stuart Mercer and Stanley Gribble. However, the Debtors have failed to proffer any evidence in those declarations to show that the current existing loan documents contain any terms that would have a negative effect on this Debtor's ability to reorganize. The Debtor's have also failed to show that

the existing loan documents with the terms that were negotiated in 2007 are commercially unreasonable or interfere with the Debtor's ability to reorganize. Thus, the Debtors have no basis to seek to restructure the loan documents under the proposed new loan documents that exclude numerous previously negotiated and commercially reasonable loan terms. Under the present circumstances, and based on the absence of the Debtor's evidence, in the event that the Court confirms the Plan, the only modification to be allowed to the loan documents should be the amount due, and the interest rate and as set forth in Section II.D below.[2]

A. Debtors Should Not Be Allowed to Remove Certain Industry Standard Terms from the Loan

The subject loan is a commercial mortgage-backed security loan ("CMBS loan"). Debtors, however, have removed many provisions which are standard in all CMBS loans which are there for the protection of the lender and the marketability of the loan. As a result, the new loan documents proposed by Debtors make the new loan unmarketable. Debtors have rewritten the loan so that only Post Investors can hold it.

In the new Loan Agreement, the Debtors have deleted numerous of the following industry standard provisions to which Post Investors objects:

- Debtors have deleted the concepts of cash management and reserves for taxes and insurance. *See e.g.*, Exh. D at 4, 18, 34, 53, Pages 85, 99, 115, 134 of 301. These provisions are standard and present in almost all loans of this type and size for a lender's protection of its collateral. This loan is a structured finance transaction and any prudent lender demands a cash management agreement to make sure that cash is not diverted.
- Debtors have deleted several typical single purpose entity ("SPE") requirements in the new Loan Agreement, including 1) not seeking

[2] The Debtors have previously cited 11 U.S.C. § 1123(b)(5) as the statutory authority to modify the rights of holders of secured claims. *See*, Debtor's Reply to Post Street Investors, LLC's Memorandum of Points and Authorities of Legal Opposition and Objections to Confirmation of Debtor's Plan of Reorganization (October 28, 2011), Docket Entry No. 126, p. 9. A review of the legislative history to this section shows that paragraph (5) to Section 1123(b) applies only to a debtor's principal residence, and thus is not applicable authority to seek to modify the subject loan documents.

dissolution or sale of all of its assets without the lender's consent, 2) having organizational documents that do not permit proceeding with a dissolution or sale of assets, bankruptcy filing, amendment of organizational documents without the unanimous consent of all of its partners or members; and 3) maintaining its intention to remain solvent. *See* Exh. D at 19, Page 100 of 301.

- Debtors have removed the provision giving a lender the right to apply payments received by it after an event of default in any order or manner as it sees fit. *See* Exh. D at 30, Page 111 of 301. This is a standard commercial loan provision which has no effect on the Debtors' ability to reorganize.
- Debtors have removed the lender's general right of set off. *See* Exh. D at 37, Page 118 of 301. This is a standard commercial loan provision which is a commercially reasonable provision.
- Debtors have removed the provision whereby lender can require Debtors to obtain additional insurance. *See* Exh. D at 46, Page 127 of 301. This is a standard commercial loan provision which exists to provide protection to the lender's collateral.
- Debtors have reduced the financial strength of acceptable insurance companies and deleted the requirement for terrorism insurance. *See* Exh. D at 47, Page 128 of 301. These are commercial loan provisions which exist to protect the collateral, both for the lender and a debtor.
- Debtors have removed all references to mold as a hazardous material and the representation that there is no mold within the premises. The Debtors have also removed the representation there have been no environmental investigations or studies the results of which have not been delivered to the lender. *See* Exh. D at 58, 60, Page 139, 141 of 301. No reason is offered by the Debtors for the attempted deletion of these provisions.

- The covenant to hold all tenants security deposits in a segregated account and not comingle the same (if required by law) has been deleted. *See* Exh. D at 63, Page 144 of 301.
- The Debtors seek to be able to cancel or accept surrender or termination of both the Boucheron and Ecco USA leases without lender consent. All such other action would require lender approval, which lender has agreed not to unreasonably withhold or delay. Also, the Debtors are generally not allowed to: (a) entering into a ground lease and master lease, (b) further assignment or encumbrance of any lease, (c) accepting a surrender of termination of any lease and (d) modifying or amending any lease, other than an immaterial manner; but Debtors have eliminated the provision that the foregoing actions can be voided at the election of the lender. *See* Exh. D at 63, Page 144 of 301. These are commercially reasonable lending terms to protect the lender's collateral.
- The Debtors seek considerable improper revisions to the required representations and warranties. The following representations and warranties have been significantly scaled back or deleted: (a) financial statements; (b) pending assessments for public improvements; (c) solvency; (e) full and accurate disclosure (i.e. the so-called "10b-5 representation"); (f) delivery of correct and complete copies of the existing management agreement; (g) status of title and (h) organizational structure of borrower. *See* Exh. D at 65-70, Page 146-151 of 301. These proposed changes have no effect on the Debtors' ability to reorganize bu Debtors' attempt to remove information regarding management and officers is not even allowed under 11 U.S.C. § 1129(a)(5) and cannot be removed.
- The requirement of delivery of annual and quarterly financial statements from the guarantor has been deleted. In addition, the concept of an audit by a big four accounting firm or other acceptable firm in accordance with

GAAP has been deleted. *See* Exh. D at 70, 71, Page 151-152 of 301. *See also*, Post Investors' Legal Objections. This provision is barred as it seeks to alter rights versus non-debtor third parties. *See* 11 U.S.C. § 524(e).

- The prohibition against the admission of a new partner or a change in borrower's organizational documents relating to control, in any case without lender's consent, has been deleted. In addition, in the context of defining "transfer," the qualifier "direct or indirect legal or beneficial" as to ownership of the project or borrower has been deleted. *See* Exh. D at 72, Page 153 of 301. These are standard commercial loan provisions which should not have been deleted. A commercial lender is entitled to know who will be managing its collateral and paying the loan.
- The prohibition against a general partner making loans and the pledging of direct and indirect interest in borrower without lender's consent has been deleted. *See* Exh. D at 75, Page 156 of 301. This proposed deletion creates unreasonable risk to the collateral.
- The covenant regarding compliance with the TIC Agreement has been deleted. This includes removal of the covenant stating that borrower shall not, without lender's prior consent, cancel, modify, or surrender the TIC Agreement. *See* Exh. D at 82, Page 163 of 301. The borrowing entity is a tenancy-in-common and thus compliance with the TIC Agreement must be required. It is an original loan term and Debtors have no legal or factual basis to alter the borrower structure. The only purpose this change can serve is to allow Gribble to manipulate the borrowers, to which Post Investors does not consent.
- The events of default have been modified and, in some cases, deleted, as follows: (a) the existing five business day grace period for monetary default has been increased to 15 days; (b) the default for failure to maintain insurance has been eliminated; (c) the SPE defaults no longer apply to the

general partner; (d) failure to pay taxes is no longer an event of default; (e) involuntary bankruptcy is no longer an event of default; (f) default in the payment of other obligations of borrower or general partner is no longer an event of default and (g) the existence of any judgments is no longer an event of default. In addition, the bankruptcy of the general partner or guarantor would no longer be an event of default entitling the lender to accelerate the loan. *See* Exh. D at 82-85, Page 163-166 of 301. These modifications are egregious and meritless. They put Post Investors at risk, and give Gribble unfettered control of the loan. There is no legal basis to seek these alterations.

- The new loan documents change governing law and venue from New York to California. *See* Exh. D at 93, Page 174 of 301. CMBS transactions involving large loans are typically governed by New York law. The new Promissory Note and Amended and Restated Deed of Trust contain the same revision. *See* Exh. B, Page 10 of 301, Exh. F at 28, Page 276 of 301. This is an arbitrary and capricious change with no legal basis. The Debtors have suffered adverse rulings under New York law in the Adversary Proceeding in this Court and only seek this self-serving change which must be denied.
- The lender's ability to assign the loan or sell participation interests in the loan has been deleted, as has lender's ability to disclose information to any prospective assignees or participants. *See* Exh. D at 95, Page 176 of 301. These deletions have been proposed to prevent Post Investors from being able to market and/or sell the loan rights in existence at loan origination. These provisions do not affect the Debtors' ability to reorganize and no basis at law allows these terms to be removed.
- All of the provisions relating to syndication, severance of the loan and creation of a mezzanine tranche have been deleted. The Debtors also

deleted the requirement that it pay any costs of the securitization. *See* Exh. D at 98-101, Page 179-182 of 301. These deletions have been proposed to prevent Post Investors from being able to market and/or sell the loan rights in existence at loan origination. These provisions do not affect the Debtors' ability to reorganize and no basis at law allows these terms to be removed.

- The Debtors have deleted the Letter of Intent requirement and failed to revise the Minimum Rent Guidelines and Maximum Leasing Concessions. *See* Exh. D, Page 205 of 301. In the amended loan agreement, specifically the Leasing Guidelines, the Debtors have attempted to restructure the Leasing Guidelines, but have failed to provide required information. First, the Debtors have deleted the requirement for the borrowers to obtain a Letter of Intent which must be approved by the lender as set forth in paragraph 1 of the original Leasing Guidelines. Second, the Debtors have failed to set forth applicable terms in Section IV, the "Minimum Rent Guidelines" and "Maximum Leasing Concessions Guidelines". These provisions are incomplete and the Debtors should be required to disclose the proposed terms before these provisions can ever be considered for approval.
- The Amended and Restated Deed of Trust delete the standard acknowledgements and waivers by borrowers relating to conduct of a foreclosure sale and the waiver of the right to interpose counterclaims. *See* Exh. F at 28, Page 276 of 301.
- The Amended and Restated Deed of Trust is ambiguous with respect the payment of principal and interest. *See*, Exhibit F, page 250 of 301. In the event the Plan is confirmed, the payment obligation secured by the Deed of Trust should be clarified to mirror any change in payment terms pursuant to the confirmed Chapter 11 Plan.

B. Debtors' New Loan Documents attempt to Improperly Release the Guarantors from their Obligations

As explained in Post Investors' Legal Objections, the Debtors cannot, through their bankruptcies, discharge the guarantors from their guaranties. In *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995), the debtor sought to confirm a plan which included releases of nondebtors. One of the nondebtors included in the release was a pension plan that was to fund the plan. The Ninth Circuit Court of Appeals concluded that the release provided for in the plan was improper, stating:

> The bankruptcy court lacks the power to confirm plans of reorganization which do not comply with applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). Pursuant to 11 U.S.C. § 524(a), a discharge under Chapter 11 releases the debtor from personal liability for any debts. Section 524 does not, however, provide for the release of *third parties* from liability; to the contrary, § 524(e) specifically states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). This court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors. *In re Lowenschuss, supra,* at 1401.

Despite this prohibition, the new loan documents proposed by the Debtors seek to release the guarantors. *See also In re Sun Valley Newspapers, Inc.*, 171 B.R. 71, 77 (relying on *American Hardwoods*, stating that debtor's first two plans proposing to release non-debtor guarantors from obligations to creditors violated § 524(e) and were not confirmable). Thus, the Debtor's attempt to alter or provide loan documents that alter the liability or duties of the Guarantors from the original loan terms are barred as a matter of law. The following attempted actions must be rejected:

- The Debtors deleted the defined term "Borrower Party," which meant General Partner and Guarantor. This defined term, however, still appears in the new loan documents. In any case, in general, the representations, warranties, covenants, events of default and other significant provisions that applied to these parties in the original loan agreement no longer applies to the guarantors. *See* Exh. D at 3, Page 25 of 301. For example, in

the new Loan Agreement, the representation that the guaranty is a valid and binding obligation of the guarantor has been removed. *See* Exh. D at 64, Page 145 of 301.

- The Limited Guarantee, which covered "bad boy" acts, has been eliminated from the new Loan Agreement. *See* Exh. D at 12, Page 93 of 301.
- The customary and standard concept that the nonrecourse provisions will not limit the right of the lender to name the guarantor as a party defendant or affect the validity of separate guarantees or indemnification agreements has been deleted. *See* Exh. D at 101, Page 182 of 301.
- In the new Promissory Note, the ability of the lender to name the guarantor as a defendant and the reference to the guaranty have been deleted. *See* Exh. B, Page 9 of 301. In short, the new Promissory Note improperly limits the lender's rights against the guarantors. Similar improper revisions have been made to the Amended and Restated Deed of Trust. *See* Exh. F at 30, Page 278 of 301.
- The Amended and Restated Deed of Trust restricts the beneficiary's right to sue subject to the Plan. The Plan, in its present form, contains a post-confirmation injunction enjoining actions against the guarantors. Thus, this restriction is improper. *See e.g.*, Exh. F at 19, Page 267 of 301.

C. Debtors Have Made Unnecessary Changes in the New Loan Documents

The Debtors have also made unnecessary changes to the Loan Agreement. These revisions, like the other revisions, should be rejected.

- With respect to insurance proceeds being available for restoration, Debtors have increased the time periods to complete restoration, from 9 months to 12 months, and the time to commence restoration from 3 months to 6 months. *See* Exh. D at 50, Page 131 of 301. This is a standard commercial loan provision, but the new time limits imposed by Debtors are too long and commercially unreasonable. The Debtors should be required to

diligently commence restoration, as originally agreed.

- The Debtors have added language stating that modifications to the Leasing Guidelines be deemed approved after 5 business days of lender's receipt of the proposed modifications. Furthermore, the Debtors have also removed the provision stating that security deposits in excess of two months rent be in the form of a letter of credit. These are revisions to terms that do not limit or effect the Debtors' ability to reorganize. They are commercially reasonable terms that exist to protect the lender. *See* Exh. D at 63-64, Page 144-45 of 301.

D. Post Investors Request The Following Additions to the Loan Agreement

Subject to the foregoing objections, Post Investors requests that the New Loan Agreement be further revised as follows:

- The new Loan Agreement appears to not have a requirement that prepayment be made on a specific payment date or that interest through the next payment date accompany any prepayment not made on the payment date. This is a customary requirement that Post Investors contends should be in any new loan.
- The new Loan Agreement provides that transfers are permitted to "Permitted Transferees" (which are entities reasonably acceptable to lender that are not prohibited persons or affiliates of prohibited persons) as long as the guarantor continues to own and hold directly or indirectly at least 25% of the borrower and there is no change of control. The ability to make transfers of 75% ownership should not be allowed and Post Investors requests that this provision be deleted, as the Debtors should be required to maintain ownership and bear responsibility for their reorganization. *See* Exh. D at 15, Page 96 of 301.
- The new Loan Agreement provides that restoration efforts must be completed not later than 90 days prior to the maturity date. Post Investors

requests that this period be changed to 6 months to a year, as 90 days is a commercially unreasonable period of time. *See* Exh. D at 50, Page 131 of 301.

- The Subordination, Non Disturbance and Attornment Agreement ("SDNA") makes no express reference to the tenant improvements required to be made in connection with the Brooks Brothers lease. There should be a clear statement that no transferee is responsible for the costs of such build-out if it succeeds to the ownership of the property through a foreclosure.

III. CONCLUSION

Based on the foregoing, Post Investors respectfully requests that the Court deny the Debtors' ability to use the modified loan documents and for such other and further relief as requested herein by Post Investors.

Dated: February 1, 2011

STEIN & LUBIN LLP

By: _____

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