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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In re. . . **PRIUM SPOKANE BUILDINGS, L.L.C.,** Debtor.	No. **10-06952-FLK11** Chapter **11** **MOTION FOR ORDER AUTHORIZING COMPROMISE OF CLAIMS AND APPROVING SETTLEMENT AND RELEASE AGREEMENT, AND MOTION FOR ORDER OF DISMISSAL** **(PRIUM SPOKANE BUILDINGS, L.L.C., GLENN R. DAVIS, JEFFREY SILESKY, FRANCINE GAILLOUR, AND STERLING SAVINGS BANK)**

1. MOTION. Prium Spokane Buildings, L.L.C. ("Prium Spokane"), by and through its counsel Davidson Backman Medeiros PLLC, files this Motion for Order Authorizing Compromise of Claims and Approving Settlement Agreement and Release, and Motion for Order of Dismissal.

2. SETTLEMENT AND COMPROMISE. Prium Spokane, subject to Court approval, has reached agreement on the terms of a Settlement and Release Agreement (the "Agreement") by and between the following parties (the "Parties" and each a "Party"): Prium Spokane, Glenn R. Davis, Jeffrey Silesky and Francine

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Gaillour (Glenn R. Davis and Jeffrey Silesky are collectively referred to as "D&S"), and Sterling Savings Bank, as the successor in interest to Intervest-Mortgage Securities Company ("Sterling"). The Agreement provides for a compromise of the claims of the Parties against one another, and for dismissal of this proceeding.

3. BACKGROUND. On or about September 8, 2006, Prium Spokane executed and delivered to Sterling a Promissory Note in the original principal amount of $25,575,000.00 (the "Note"), the payment and performance of which is secured by a first priority Deed of Trust, Assignment of Rents and Security Agreement (the "Deed of Trust") encumbering the real property and improvements commonly known as the "Wells Fargo Center" located at 601 West 1st Avenue, Spokane, Washington (the "Property").

Prium Spokane defaulted on its obligations to Sterling under the Note and, as a consequence, Sterling commenced a statutory nonjudicial foreclosure of its Deed of Trust against the Property (the "Foreclosure"). On the eve of the Foreclosure sale, Prium Spokane filed this bankruptcy proceeding in the United States Bankruptcy Court, Eastern District of Washington (the "Bankruptcy Case" and "Bankruptcy Court," respectively).

Following commencement of the Bankruptcy Case, pursuant to the terms of stipulated Cash Collateral Orders agreed upon between Prium Spokane and Sterling, and approved by the Bankruptcy Court, the rents and revenues of the

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Property have been deposited into a bank controlled debtor in possession account (the "DIP Account"), and Prium Spokane has been using a portion of such revenue to pay certain expenses of the Property as permitted in the budget incorporated into the Cash Collateral Orders.

On November 29, 2011, Prium Spokane filed a Disclosure Statement and Plan of Reorganization, pursuant to which it sought the approval of the Bankruptcy Court for the Disclosure Statement in order to solicit votes from and approval of creditors for its Plan of Reorganization. Sterling has objected to the Disclosure Statement and has advised Prium Spokane that it cannot support, and will object to, its proposed Plan of Reorganization, alleging, in part, that the Property does not have sufficient value to adequately protect and secure Sterling's position and that the Plan of Reorganization is not feasible, as Prium Spokane lacks sufficient liquidity, through either equity or financing, to implement its terms, perform required maintenance work, or attract needed additional tenants.

D&S own fifty-one percent (51%) of the membership interests of Prium Spokane. In addition, D&S, through multiple assignments, hold second and third priority deeds of trust encumbering the Property (collectively, the "Junior Deed(s) of Trust"). James F. Rigby, solely as Trustee for the Bankruptcy Estate of Michael R. Mastro pending in the United States Bankruptcy Court for the Western District of Washington, Case No. 09-16841-MLB, has alleged that the

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assignments of the second position note and deed of trust to D&S are avoidable, and has alleged that the bankruptcy estate of Michael R. Mastro either still owns the second position note and deed of trust or is entitled to avoid the transfers of the note and deed of trust, with the possible exception of certain funds that are still owing on an underlying obligation assigned to D&S.

Sterling is the putative owner of forty-nine percent (49%) of the membership interests in Prium Spokane pursuant to a certain Settlement Agreement with Prium Companies, LLC, Prium Tumwater Buildings, LLC, Chelsea Heights, LLC, Hyan J. Um and Jin S. Um ("Um"), and Thomas W. Price and Patricia A. Price ("Price") that was effective on May 3, 2011, and was approved by orders of the United States Bankruptcy Court for the Western District of Washington on July 6, 2011 in the bankruptcy cases of Um and Price.

D&S and Prium Spokane, conditioned upon the entry of a final order approving the Agreement and the transactions referenced therein, ratify and consent to the transfer of the aforementioned forty-nine percent (49%) membership interests from Prium Companies, LLC to Sterling. Sterling, as a putative member of Prium Spokane, consents and votes in favor of the execution and performance of the Agreement by Prium Spokane. D&S, as the managers and members of Prium Spokane, consent to the execution and performance of the Agreement by Prium Spokane, and, conditioned upon the entry of a final order

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approving the Agreement and the transactions referenced therein, consent to Sterling casting a vote as a member in favor of the exercise and performance of the Agreement by Prium Spokane.

Sterling asserts that the Property does not have any value in excess of the amounts owed to it under the Note and Deed of Trust. It is undisputed among the Parties that the Property does not have sufficient value to secure the amount owed on all secured claims against it.

Prium Spokane has concluded that, in the absence of available financing to pay the necessary costs of anticipated renovations and construction of the improvements required to attract additional tenants, the Plan of Reorganization may not be confirmable.

4. THE SETTLEMENT AGREEMENT. A true and complete copy of the Agreement is attached to the Declaration Of Glenn R. Davis In Support Of Motion For Order Authorizing Compromise Of Claims And Approving Settlement And Release Agreement, And Motion For Order Of Dismissal (the "Davis Declaration") as Exhibit A. The Agreement should be read and considered in its entirety. This summary is not intended as a substitute for review of the entire Agreement, nor is it intended to modify the terms of the Agreement, which are controlling. For convenience, certain, but not all, terms of the Agreement are set forth hereafter.

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a. Settlement Terms. Upon full execution of the Agreement, the Parties have filed this Motion, seeking an order approving the Agreed Settlement[1] (the "Bankruptcy Court Order"), as follows: (a) Prium Spokane will stipulate, and D&S will not oppose, to the entry of an order by the Bankruptcy Court granting Sterling relief from the automatic stay of 11 U.S.C. § 362, permitting Sterling to recommence its foreclosure of the Deed of Trust against the Property (the "Property Foreclosure"); (b) neither Prium Spokane nor D&S will oppose, impede, obstruct, or otherwise interfere with the Property Foreclosure, either directly, indirectly or through an affiliate or related person or entity; (c) D&S will release any and all ownership interests which they have, or may claim to have, in, to, or against the Property including, without limitation, the release and reconveyance of the liens of the Junior Deeds of Trust; (d) subject to payment of pre-petition trade debt up to $20,000.00, together with all post-petition debt and administrative expenses accrued through dismissal, ownership of the DIP Account will be transferred to Sterling; (e) until such time as the DIP Account is transferred to Sterling, without Sterling's prior consent, no funds shall be disbursed from such account except as may be specifically provided for in the Cash Collateral Orders; and (f) all of Prium Spokane's right, title, and interest in

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Agreement.

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and to the Property's condominium association including, without limitation, its prorated interest, if any, in any funds held by or deposit accounts of such association, shall be transferred to Sterling, and (g) upon conclusion of the Property Foreclosure, an order dismissing the Bankruptcy Case will be submitted for entry without further notice or hearing.

b. Payment of Settlement Sum. Sterling shall immediately deposit the sum of $400,000.00 with a mutually agreed upon third party (the "Escrow Agent") upon entry of a Bankruptcy Court Order approving the foregoing Agreed Settlement, which order shall be satisfactory, in form and content, to the Parties. Upon written confirmation by Sterling to the Escrow Agent that (a) the Property Foreclosure has been completed, and (b) the successful bidder at the Property Foreclosure has acquired title to the Property free and clear of all junior liens and encumbrances and interests, the $400,000.00 will be disbursed by the Escrow Agent to D&S. Upon entry of the forgoing Bankruptcy Court Order approving the Agreed Settlement, Sterling shall promptly commence, and thereafter diligently pursue to completion, the Property Foreclosure.

c. Settlement and Compromise. The Agreement is a full and complete compromise and settlement of any and all claims known or unknown between the Parties to the date of the Agreement, except for the obligation and

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rights created by or arising out of the Agreement and any other documents executed in compliance with the Agreement.

d. Release of Claims. Upon execution of the Agreement by the Parties and entry of an order by the Bankruptcy Court approving the Agreed Settlement, the following release will become effective:

(i). The Parties, and each of them, on their behalf and on behalf of their past, present, and future descendants, heirs, partners, parent and subsidiary corporations, affiliates, joint ventures, stockholders, officers, directors, employees, predecessors, successors, assigns, attorneys, agents, and representatives, and each of them, hereby release and forever discharge each other, and their past, present, and future parent and subsidiary corporations, divisions, affiliates, partners, joint ventures, stockholders, predecessors, successors, assigns, officers, directors, employees, attorneys, agents, representatives and any other person, firm or corporation with whom any of them is now or may hereafter be affiliated, from any and all claims, demands, obligations, losses, causes of action, whether in law or equity, costs, expenses, attorneys' fees, liabilities and indemnities of any nature whatsoever, whether based on contract, tort, statute or other legal or equitable theory of recovery, whether known or unknown, which, as of the date of the Agreement, that each, now has, or claims or may claim to have against the other, in any way related,

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directly or indirectly, to the Property, the Note, the Deed of Trust, the Property Foreclosure, or Bankruptcy Case except for the Parties' obligations under the Agreement.

(ii). The general release set forth in the Agreement specifically includes any and all claims, demands, obligations and/or causes of action for contract, statutory, compensatory and/or exemplary damages and/or other relief, legal or equitable, relating to or in any way connected with or related to the Property, the Note, the Deed of Trust, the Property Foreclosure, or Bankruptcy Case, whether or not now known or suspected to exist and whether or not specifically or particularly described therein. The Parties expressly waive any right to claim or right to assert hereafter that any claim, damage, obligation and/or cause of action has, through ignorance, oversight, or error, been omitted from the terms of the Agreement.

(iii). The general release set forth in the Agreement expressly excludes the Parties' obligations under the Agreement.

(iv). It is understood and agreed by and between the Parties that other claims or damages not now known may develop or be discovered, or other consequences or other results may develop or be discovered, and the Agreement is specifically intended to cover and include, and does cover and

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include, all such future damages or future consequences or results of known or unknown damages.

5. STANDARD FOR APPROVAL OF COMPROMISE OF CLAIMS. As stated *In re Refco, Inc.*, 2006 WL 3409088 at page 7, aff'd *In re Refco, Inc.*, 505 F.3d. 109 (C.A.2 2007):

> "In undertaking an examination of the settlement ... [the] responsibility of the bankruptcy judge, and ours upon review, is not to decide the numerous questions of law and fact raised by appellants but rather to canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *In re W.T. Grant Co.,* 699 F.2d 599, 608 (2d Cir.1983) (internal citations omitted); *see Nellis,* 165 B.R. at 121 ("The obligation of the bankruptcy court is to determine whether a settlement is in the best interest of an estate before approving it."). Courts in this Circuit have set forth various factors to be considered on a Rule 9019 motion: "(1) the probability of success in the litigation; (2) the difficulties associated with collection; (3) the complexity of the litigation, and the attendant expense, inconvenience, and delay; and (4) the paramount interests of the creditors." *In re Prudential Lines, Inc.,* 170 B.R. 222, 246-47 (S.D.N.Y.1994); *In re Ionosphere Clubs, Inc.,* 156 B.R. 414 (S.D.N.Y.), *aff'd,* 17 F.3d 600 (2d Cir.1994); *see In re Drexel Burnham Lambert Group, Inc.,* 960 F.2d 285, 292 (2d Cir.1992), *cert. dismissed,* 506 U.S. 1088 (1993).

These standards are similar in the Ninth Circuit, as stated by the Bankruptcy Court *In Re Pac. Gas and Elec.*, 304 B.R. 395 (Bankr.N.D.Cal.2004), at 416:

> This court's role in approving any settlement under Rule 9019 is limited. Rather than an exhaustive investigation or a mini-trial on the merits, this court need only find that the settlement was negotiated in good faith and is reasonable, fair and equitable. *A &*

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C Properties, 784 F.2d at 1381. It has been held that the court's proper role is "to canvas the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *In re Drexel Burnham Lambert Group, Inc.,* 134 B.R. 493, 496-97 (Bankr.S.D.N.Y.1991) (citations and internal quotation marks omitted); 10 L. King, *Collier on Bankruptcy* ¶ 9019.02 at p. 9019-5 (15th ed. rev. 2003). Applying these general principles, this court must consider:

(a) The probability of success in the litigation;

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

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

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

It is not necessary to satisfy each of these factors provided that the factors as a whole favor approving the settlement. *See, e.g., In re WCI Cable, Inc.,* 282 B.R. 457, 473-74 (Bankr.D.Or.2002) (although debtor "likely would prevail on one or more causes of action" and court-appointed examiner suggested that "probability of success on the merits, considered in isolation, militated against the proposed settlement," nevertheless court agreed with examiner that settlement should be approved because of other factors).

a. Probability of Success. The Parties entered into a mediated settlement of their differences. Regardless of the legal positions that have been asserted by Prium Spokane and Sterling, it is undisputed that the Property does not have any value in excess of the amounts owed to it under the Note and Deed of Trust; the Property does not have sufficient value to secure the amount owed on all secured claims against it; and, in the absence of available financing to pay

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the necessary costs of anticipated renovations and construction of the improvements required to attract additional tenants, the Plan of Reorganization may not be confirmable. In light of these factors, the probability of success does not weigh against approval of the Agreement, especially considering the substantial risk, time, uncertainty, and expense of further litigation over plan confirmation and related issues, including the use of cash collateral over the objections of Sterling.

b. Difficulty of Collection. The second factor, involving the difficulty of collection, is not relevant, as this is not an action for collection.

c. Complexity of Litigation. Any litigation between Prium Spokane and Sterling over plan confirmation, use of cash collateral, or related issues would be complex, time consuming, and expensive to try and resolve through the judicial process, with significant inconvenience, and delay. This Motion, if granted, will bring closure to those issues.

d. Paramount Interest of Creditors. The fourth factor, involving the paramount interest of creditors and a proper deference to their reasonable views, is achieved through the proposed settlement, which is among the only significant undisputed creditors. Adequate allowance is also made for the reasonable payment of trade creditors.

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The Agreement is the result of good faith arms-length negotiations among Prium Spokane, D&S, Francine Gaillour, and Sterling, with each Party represented by counsel. In the considered independent business judgment of Prium Spokane, the Agreement is fair and equitable, in the best interests of all concerned, and constitutes a reasonable resolution of all claims of Prium Spokane.

6. DISMISSAL. Pursuant to 11 U.S.C. § 1112(b)(1), the court shall convert a case to a case under chapter 7 or dismiss a case, whichever is in the best interests of creditors and the estate, if the movant establishes cause. In this case, if this Motion is granted, and the Property Foreclosure is completed, there would be no further assets remaining to administer, and it would be appropriate to enter an Order authorizing dismissal of this proceeding.

7. BASIS FOR RELIEF. This Motion is based on F.R.Bankr.P. 9019, 11 U.S.C. § 1112(b)(1), the supporting Davis Declaration, and the records and files herein.

DATED this 22nd day of March 2012.

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