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13 **UNITED STATES BANKRUPTCY COURT**

14 **FOR THE DISTRICT OF ARIZONA**

15 In re	Chapter 11 Proceedings
16 SWANSEA PROPERTIES, L.L.C., an 17 Arizona limited liability company,	Case No. 2-08-11486-CGC
18 Debtor,	(Jointly Administered)

19 In re	Case No. 2-08-11496-SSC
20 EAGLETAIL BIGHORN, L.L.C., an 21 Arizona limited liability company,	
22 Debtor,	

23 In re	Case No. 2-08-11532-JMM
24 MPK ENTERPRISES, INC., an Arizona 25 corporation,	DEBTORS' MOTION FOR AUTHORITY TO REJECT EXECUTORY CONTRACTS ("DEVELOPMENT AGREEMENTS") AMONG THE DEBTORS AND CIVICA DEVELOPMENT, LLC, CIVICA PROPERTIES, LLC, CIVITERRA DESIGN-BUILD, LLC, THE CITY OF GOODYEAR ARIZONA, AND RELATED THIRD PARTIES (ACCELERATED HEARING REQUESTED)
26 Debtor.	

27 Swansea Properties, L.L.C. ("Swansea"), Eagletail Bighorn, L.L.C. ("Eagletail"), and
28 MPK Enterprises, Inc. ("MPK"), Debtors and Debtors-in-Possession in these jointly

1 administered cases, by and through their counsel, hereby move for entry of an Order
2 authorizing the rejection of any and all of their existing executory contracts (written or oral)
3 among the Debtors, the City of Goodyear, Arizona, Civica Development, LLC, Civica
4 Properties, LLC, and CiviTerra Design-Build, LLC, as well all of their affiliates, predecessors
5 in interest, etc. (as more specifically defined below, the "Development Agreements," the
6 "City Agreements," and the "Construction Agreements") and certain third parties. Because
7 the termination of these agreements and contracts also affects certain third parties subject to
8 them, the Debtors request that the relief requested extend to such third parties, primarily the
9 City of Goodyear, Arizona. This motion is filed pursuant to 11 U.S.C. § 365(a). This motion
10 is supported by the following Memorandum of Facts and Law, which is fully incorporated
11 herein by this reference.
12

13 Dated this 9th day of September 2008.

14
15 **OSBORN MALEDON, P.A.**

16 /s/ James E. Cross (009063)

17 James E. Cross

18 Brenda K. Martin

19 Jason J. Romero

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22 Proposed Attorneys for Debtors and Debtors-in-
23 Possession
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MEMORANDUM OF FACTS AND LAW

1 On August 29, 2008, Debtors Eagletail and Swansea each filed a voluntary petition
2 under Chapter 11 of Title 11, U.S. Code. Debtor MPK filed its petition for Chapter 11 relief
3 on August 31, 2008. The three Debtors remain in control of their estates as Debtors-in-
4 Possession. On September 3, 2008, the Court entered an Order for joint administration of
5 these three cases. Debtors MPK, Swansea and Eagletail provide the following factual
6 recitation in support of this motion. The Debtors have this same date filed an adversary
7 complaint against many of these same parties. The factual allegations herein are for the most
8 part a summary of the more detailed allegations set forth in the adversary complaint.
9 Furthermore, the pertinent facts in support of this motion are more fully substantiated by the
10 attached affidavit of Phillip D. Meyers, the Debtors' Chief Restructuring Officer or "CRO"
11 (see Exhibit 1 attached hereto).

14 **I. PARTIES**

15 1. Debtor MPK Enterprises, Inc. ("MPK") is an Arizona corporation, authorized
16 to do business in Maricopa County, Arizona.

17 2. Debtor Swansea Properties, L.L.C. ("Swansea") is an Arizona limited
18 liability company authorized to do business in Maricopa County, Arizona.

19 3. Debtor Eagletail Bighorn, L.L.C. ("Eagletail") is an Arizona limited liability
20 company authorized to do business in Maricopa County, Arizona.

21 4. Each of the above named entities is a Debtor-in-Possession ("DIP") in
22 Chapter 11 filings pending before this Court. Swansea is a Debtor and DIP in Case No. 08-
23 11486-CGC; Eagletail is a Debtor and DIP in Case No. 08-11496-SSC; and MPK is a Debtor
24 and DIP in Case No. 08-11532-JMM (hereinafter collectively referred to as the "Debtors").
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1 5. Wood Family Enterprises Limited Partnership (“WFE”) is an Arizona limited
2 partnership authorized to do business in Maricopa County, Arizona. WFE is not a debtor.
3 WFE and the Debtors are sometimes referred to as the “Wood Entities”.

4 6. The Wood Entities’ principals are the three Wood family siblings: Margaret
5 Wood Carl, Kenneth Wood, and Clarence Wood (collectively, the “Wood Family
6 Members”). The Wood Family Members are the adult children of the original family farmers
7 who have owned and farmed real property in Goodyear, Arizona since 1933.

8 7. Jack D. Rose is the husband of Vanessa P. Rose. The Roses reside in
9 Maricopa County, Arizona.

10 8. Civica Development, LLC, f/k/a Rose Properties Management, LLC (“Civica
11 Development”), is an Arizona limited liability company doing business in Maricopa County,
12 Arizona. Upon information and belief, Civica Development is operating and has operated
13 during relevant times hereto as an unlicensed real estate broker.

14 9. CiviTerra Design-Build, LLC (“CiviTerra”) is an Arizona limited liability
15 company doing business in Maricopa County, Arizona. Upon information and belief, since
16 its creation in March of 2007, CiviTerra has operated as a general contractor/construction
17 manager.

18 10. Civica Properties, LLC, f/k/a Rose Properties Southwest, LLC (“Civica
19 Properties”), is an Arizona limited liability company doing business in Maricopa County,
20 Arizona. Upon information and belief, Civica Properties is operating and has operated during
21 relevant times hereto as an unlicensed real estate broker.

22 11. Civica Development, CiviTerra, and Civica Properties are collectively
23 referred to herein as the “Civica Entities.”
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1 12. Upon information and belief, Jack Rose is the alter ego of Civica
2 Development, CiviTerra, and Civica Properties. He formed each of these entities, controls
3 each of these entities and, upon information and belief, has disregarded the corporate
4 formalities, has co-mingled their assets, has used as his personal bank account the accounts of
5 each of these entities, and has otherwise treated himself as one and the same with each of
6 these entities.

7 **II. FACTUAL BACKGROUND**

8 13. The Wood Family Members are part of a family that, through the Wood
9 Entities and now these Debtors (and certain other related entities), have owned for several
10 decades 240 acres of farm land in Goodyear, Arizona (the “Wood Family Farm”). In 2004,
11 the Wood Family Members decided it was time to begin marketing for sale the Wood Family
12 Farm, which is presently owned by in part by the Debtors Swansea and Eagletail and in part
13 by the City of Goodyear.

14 14. The Debtors had no experience in commercial real estate development or
15 commercial construction. As stated above, the Debtors are owned and controlled by the
16 Wood Family Members.

17 15. Jack Rose represented himself and the Civica Entities to the Wood Family
18 Members as sophisticated and experienced real estate developers and contractors. Jack Rose
19 received a law degree from Harvard University and holds an active license to practice law in
20 the state of Arizona. Jack Rose was also a former executive secretary of the Arizona
21 Corporation Commission.

22 16. Relying upon Jack Rose’s representations of his vast real estate and
23 contracting sophistication and experience, the Wood Family Members befriended Jack Rose,
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1 placed their utmost trust in him, and relied upon him and the Civica Entities to negotiate,
2 perform and complete agreements to develop and market the Wood Family Farm which
3 comprises the single most valuable asset of the Debtors.

4 17. Using his position of trust with the Wood Family Members, and using the
5 Wood Family Members' money and the Debtors' real property, Jack Rose personally, and
6 through the Civica Entities which he created and controls, engaged in a pattern of fraud and
7 mismanagement in complete disregard of the interests of those who placed their trust in him
8 and with the sole purpose of financially benefiting himself at the expense of the Wood
9 Entities. Debtors contend these actions not only constitute breaches of the subject
10 agreements but also provide legal grounds to terminate and reject all existing agreements
11 among the Debtors, the Civica Entities, and all other parties thereto, regardless of whether
12 such agreement are written or oral in nature.

14 18. According to an article in the Arizona Republic dated August 12, 2008
15 (attached hereto as Exhibit 2), representatives of Civica acknowledged their consent to
16 termination of these Agreements.

18 **III. THE RELEVANT AGREEMENTS**

19 **A. The Development Agreements.**

20 **1. June 13, 2004 Letter of Intent.**

21 19. The relationship between Jack Rose and the Wood Family Entities/Debtors as
22 it relates to the Wood Family Farm, was first documented in a June 13, 2004, letter drafted by
23 the Civica Entities regarding "Letter of Intent/Goodyear 240" that is just over a page in length
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1 (the “Letter of Intent”).¹ The Letter of Intent was signed by the Wood Family Members on
2 behalf of WFE and Jack Rose on behalf of Rose Properties Southwest, LLC (“Rose
3 Southwest”), which is now known as Civica Properties. The term “Goodyear 240” refers to
4 the Wood Family Farm.

5 20. The Letter of Intent provided that the parties would “enter into a Definitive
6 Agreement whereby the parties will form a joint venture concerning the development and sale
7 of” the Wood Family Farm. The Letter of Intent continues, providing that “[t]he parties
8 desire to enter into a joint venture agreement whereby Rose Properties Southwest, LLC will
9 develop and market the real property.”
10

11 21. The Letter of Intent also provided that Rose Southwest would “be responsible
12 for obtaining the necessary entitlements” and that it would “conduct the day-to-day
13 management of the venture” while WFE would “pay for all the services necessary to entitle
14 the property, e.g. planning, engineering, legal, filing fees, etc.”
15

16 22. The Letter of Intent further provided that Rose Southwest would be paid “1)
17 \$10,000 a month for five years, beginning July 1, 2004; 2) 6% of the gross selling price of the
18 entitled parcels up to \$100,000 a net acre and 15% of the gross selling price above \$100,000
19 an acre.” However, payment of the 6% or 15% commission was contingent upon Rose
20 Southwest “obtaining a development agreement or zoning from the City of Goodyear.”
21

22 23. Upon information and belief, from the effective date of the Letter of Intent
23 through the present, neither Jack Rose nor any of the Civica Entities has held a valid Arizona
24 real estate license entitling such party to the payment of a real estate commission.

25 ¹ A summary of the various agreements and related documents is included in the Appendix of Executory
26 Contracts (the “Appendix”) filed concurrently herewith. A true and correct copy of the Letter of Intent is
Exhibit B of the Appendix.

1 24. Through this Motion, the Debtors seek to reject and terminate any and all
2 obligations arising from or existing pursuant to the Letter of Intent.

3 **2. The June 14, 2004 Management Agreement.**

4 25. Jack Rose and Debtors/Eagletail and Swansea and WFE did execute a
5 “Definitive Agreement” to develop the Wood Family Farm as contemplated in the Letter of
6 Intent, but not until 2007. The “Definitive Agreement” was signed by Jack Rose, on behalf
7 of Rose Properties Management, LLC (“Rose Properties” which is now known as Civica
8 Development, LLC) and the Wood Family Members, on behalf of WFE, Eagletail and
9 Swansea sometime in late 2007. However, the agreement has an effective date of June 14,
10 2004 (the “Management Agreement”).² Like the Letter of Intent, the Management
11 Agreement was just over a page in length and was drafted by the Civica Entities.
12

13 26. The terms set forth in the Management Agreement are substantially the same
14 terms contained in the Letter of Intent. One major difference was that Rose Properties was
15 assigned all of Rose Southwest’s obligations and duties pursuant to the Letter of Intent. A
16 second major difference was that the Management Agreement did not include the sentence
17 from the Letter of Intent which stated that the named Wood Entities “must approve all
18 expenditures and must approve any contracts or submittals proposed by Rose”.
19

20 27. The Management Agreement, just like the Letter of Intent, provided for the
21 following payment terms: (a) \$10,000 a month until July 1, 2009; (b) 6% of the gross selling
22 price of each parcel of the Wood Family Farm, up to \$100,000 per net acre; and (c) 15% of
23 the gross selling price of each parcel of the Wood Family Farm, in excess of \$100,000 per net
24 acre.
25

26

² A true and correct copy of the Management Agreement is Exhibit C of the Appendix.

1 28. The Management Agreement further provided that Rose Properties agreed to
2 “develop and manage the Property, including the responsibility of obtaining the necessary
3 entitlements and conducting the day to day management activities of the Property” and that
4 WFE would “pay for all the costs and services necessary to entitle the property, including, but
5 not limited to, the planning, engineering, insurance, legal and filing fees.”

6 29. The Management Agreement provided that Rose Properties would also “have
7 the authority to act on [WFE, Swansea and Eagletail]’s behalf under [the Management
8 Agreement] until the final parcel of the Property is sold, including the authorization to collect
9 technical data, hire engineers and lawyers, meet with adjoining property owners, provide
10 campaign support for the City of Goodyear bond election and the ability to continue
11 negotiations with the City of Goodyear on infrastructure and related entitlement issues.”
12 However, WFE, Eagletail and Swansea would “remain the owner of the Property until all
13 parcels of the Property are sold, and [would] remain responsible for all the property taxes for
14 the property” and would “receive all of the farming revenue from the Property.”

15 30. In December 2007, at the time Mr. Rose and the Civica Entities were
16 negotiating on the Debtors’ behalf to obtain and close a \$38,000,000 loan to the Debtors
17 from its current lender, M&I Marshall & Illsley Bank, the Management Agreement was
18 amended. The First Amendment did not change any of the material terms and obligations
19 contained in the Management Agreement, including the compensation terms set forth in the
20 original Management Agreement. The Amendment simply acknowledged that Rose
21 Properties was now known as Civica Development and that Debtor MPK would enter into an
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1 Option Agreement with WFE, Swansea and Eagletail to purchase some or all of the Wood
2 Family Farm.³

3 31. Through this Motion, the Debtors seek to reject and terminate any and all
4 obligations arising from or existing pursuant to Management Agreement.

5 **B. The City Agreements.**

6 32. A Management Agreement between Jack Rose and the Wood Family
7 Members was required in 2006 -- two years after the parties signed the Letter of Intent --
8 because that is when the Civica Entities and the City of Goodyear began negotiating the
9 agreements that related to the development of the Wood Family Farm into what is now the
10 Goodyear Spring Training Complex.

11 33. The City of Goodyear's selection of the Wood Family Farm pursuant to a
12 Request For Proposal issued by the City of Goodyear occurred because the Wood Family
13 Farm was partially within and adjacent to an area in and around the intersection of Estrella
14 Parkway and Yuma Road that the City of Goodyear was interested in developing as its new
15 downtown or "City Center." The initial development and anticipated catalyst for the new
16 City Center was a new Major League Baseball "Spring Training Complex" or "ballpark"
17 consisting of a ballpark and practice facilities for two Major League Baseball clubs (which
18 are now known to be the Cleveland Indians and Cincinnati Reds), and a surrounding
19 "Ballpark Village" consisting of a mixed-use urban village with a retail component
20 (collectively, the "Project").

21 34. In connection with the development of the Project, the City of Goodyear
22 negotiated and entered into several agreements with one or more of the Wood
23

24
25
26 ³ A true and correct copy of the First Amendment to the Management Agreement is Exhibit D of the Appendix.

1 Entities/Debtors and Civica Entities, which are collectively referred to herein as the “City
2 Agreements.” The Wood Family Members and Wood Entities (including the Debtors) were
3 not involved in any negotiations regarding the essential terms of the City Agreements. The
4 Debtors completely trusted and relied upon Jack Rose and the Civica Entities to negotiate
5 these contracts in a manner that would protect the Wood Family Members’/Debtors’ interests
6 and support the Project. Indeed, in many cases, the Wood Family Members/Debtors did not
7 read the agreements that were presented to them for signature by Mr. Rose and/or the Civica
8 Entities. The Debtors were not afforded a reasonable amount of time to review these
9 documents which, on many occasions, were presented to them by the Civica Entities at their
10 homes for their signature at the eleventh hour. If necessary, the Debtors shall provide
11 testimony that Mr. Rose would typically demand that Wood Family Member signatures were
12 required immediately in order to meet some vague deadline or other activity, such as an
13 impending Goodyear City Council meeting.
14

15 35. The City Agreements included, among other agreements and memoranda of
16 understanding, the following:
17

18 (a) A Ballpark Village/Wood Corporate Campus Development
19 Agreement, dated May 29, 2007, and entered into by the City of Goodyear, Rose Southwest,
20 WFE and the Eagletail and Swansea Debtors (as amended, the “Ballpark Village
21 Development Agreement”).

22 (b) An Infrastructure Development Agreement, dated May 29, 2007, and
23 entered into by the City of Goodyear, Rose Southwest, WFE, the Eagletail and Swansea
24 Debtors (as amended, the “Infrastructure Development Agreement”).
25
26

1 (c) A Ballpark Village/Wood Corporate Campus Agreement for
2 Conveyance of Real Property, dated May 29, 2007, entered into by the City of Goodyear,
3 Civica Properties, WFE, the Eagletail and Swansea Debtors (as amended, the “Conveyance
4 Agreement”)

5 (d) A Memorandum of Understanding and Agreements Regarding Retail
6 Liner Space Adjacent to Ballpark Owned by the City of Goodyear, dated September 18,
7 2007, and entered into by the City of Goodyear, Rose Southwest, and the Eagletail Debtor (as
8 amended, the “Retail Liner Space MOU”). Certain pertinent terms from each of these City
9 Agreements are discussed in greater detail below. MPK became an obligor under these City
10 Agreements on December 31, 2007.
11

12 36. Through this Motion, the Debtors seek to reject and terminate any and all
13 obligations arising from or existing pursuant to Ballpark Village Development Agreement,
14 Infrastructure Development Agreement, Conveyance Agreements, and Retail Liner Space
15 MOU. As referenced hereinabove, a more specific listing of all applicable agreements subject
16 to this Motion are listed in the Appendix.
17

18 **1. The Ballpark Village Development Agreement.**

19 37. The Ballpark Village Development Agreement provides the framework for
20 the development of the Project, covering the zoning, entitlement, land use and incentive
21 agreements relating to the development of the Project.

22 38. Debtors allege that Jack Rose negotiated the Ballpark Village Development
23 Agreement on behalf of Rose Southwest, WFE, the Eagletail and Swansea Debtors. The
24 Wood Family Members did not participate in any of the negotiations with the City
25
26

1 concerning the Ballpark Village Development Agreement and signed this document relying
2 upon the recommendations and advice of Jack Rose and the Civica Entities.

3 39. The Debtors repeatedly reminded Jack Rose and the Civica Entities of their
4 desire to maintain agricultural tax status on as much of the Wood Family Farm as was
5 possible. However, the Ballpark Village Development Agreement, negotiated by Jack Rose
6 and the Civica Entities, required the extinguishment of all of the water rights associated with
7 the entire Wood Family Farm. Without water rights, the Debtors could lose their agricultural
8 tax status on the portion of the Debtors' real property that remains undeveloped. In addition,
9 following execution of the Ballpark Village Development Agreement, the Civica Entities
10 withdrew water from the Debtors' water well on the real property for construction purposes.
11 This action subjected the Debtors to liability for breach of the Ballpark Village Development
12 Agreement and for violations of state law arising from the illegal pumping of irrigation water
13 for construction purposes.
14

15 40. The Ballpark Village Development Agreement also provided for Rose
16 Southwest and WFE, the Eagletail and Swansea Debtors to design and/or construct amenities
17 or structures on the northern parcel of the Wood Family Farm valued at \$5 million that either
18 benefit or enhance the appearance of the Ballpark (the "Enhancements").
19

20 41. Under the Ballpark Village Development Agreement, the City of Goodyear
21 also agreed to provide to the Debtors a sales tax rebate of up to \$5,000,000 (the "Sales Tax
22 Rebate"). However, instead of providing for payment of the Sales Tax Rebate to the Debtors
23 who owned and conveyed a portion of the Wood Family Farm to the City for less than its
24 market value pursuant to the Conveyance Agreement, and who also financed and paid for the
25 construction of the facilities that would actually generate sales taxes, the Ballpark Village
26

1 Development Agreement negotiated by Jack Rose and the Civica Entities provided that the
2 City would rebate and pay the Sales Tax Rebate to Rose Southwest, not the Debtors. The
3 Debtors contend this action was a best, an act of conversion, and at worst---plain and simple
4 theft.

5 2. **The Infrastructure Development Agreement.**

6 42. The Infrastructure Development Agreement obligates Rose Southwest, WFE,
7 and the Debtors to design and construct the entire infrastructure required to serve the Project
8 and infrastructure required under the PAD for adjacent areas, at the sole cost of these parties.
9 It also required WFE and the Debtors to convey all of the property needed for the
10 Infrastructure Development Agreement to the City -- at absolutely no cost to the City.
11

12 43. The required infrastructure includes, but is not limited to: streets, roads,
13 curbs, gutters, sidewalks, dry and wet utilities, traffic signals, signs, landscaping and other
14 public or private facilities or utilities.⁴

15 44. The Infrastructure Development Agreement contains several critical
16 performance dates including the following:
17

18 (i) By July 6, 2007, Rose Southwest agreed to provide a detailed
19 break-out of the cost of each segment of work for all infrastructure expenses and establish an
20 engineer's cost estimate for all infrastructure, plus a contingency;

21 (ii) By August 1, 2008, Rose Southwest, WFE, and the Debtors
22 were to cause the Infrastructure required for the Practice Facilities to allow for the Practice
23 Facilities to be completed and fully operational by this date;
24

25
26 ⁴ A true and correct copy of the Infrastructure Development Agreement is Exhibit E of the Appendix.

1 (iii) By February 1, 2009, Rose Southwest, WFE, the Debtors were
2 to cause the Infrastructure for the Ballpark to be completed to allow for the Ballpark to be
3 completed and fully operational by this date. This date is commonly referred to as “First
4 Pitch.”

5 (b) To secure completion of the infrastructure, the City required Rose
6 Southwest, WFE, and the Debtors to provide a Letter of Credit for 105% of the full cost
7 estimate, less \$10,000,000 (which relates to the reimbursable portion of the public
8 infrastructure described below). Based on a budget prepared by Jack Rose and the Civica
9 Entities, the City and Rose Southwest agreed to a Letter of Credit in the amount of \$22
10 million.
11

12 (c) Under the agreement, Rose Southwest could request a reduction of the
13 Letter of Credit from the City of up to 90% of the estimated cost of the completed or bonded
14 portions of the work that is not subject to reimbursement from the City.
15

16 45. The Debtors and the other parties agreed that a portion of the Infrastructure
17 required under the Infrastructure Development Agreement was “Public Infrastructure” that
18 would be designed and bid pursuant to public procurement contracts and regulations and
19 eligible for public reimbursement. The designated Public Infrastructure was publicly bid and
20 a contract was entered into with Turner Construction Company (“Turner”) to construct the
21 Public Infrastructure at a cost of approximately \$10 million. The City agreed to reimburse
22 \$10 million of the total cost of the Infrastructure.
23

24 46. A contract was also entered into between Debtor MPK and Turner for the
25 construction of additional infrastructure on land within the Project which was not subject to
26 bid pursuant to public procurement laws and regulations (the “Non-Public Infrastructure”).

1 47. Although the cost of the Public Infrastructure was paid entirely by the
2 Debtors, under this agreement, which was negotiated solely by Jack Rose and the Civica
3 Entities, the \$10,000,000 in Infrastructure Reimbursement that the City agreed to pay (the
4 “Infrastructure Reimbursement”) was payable to Rose Southwest, not the Debtors.

5 48. Also, the Infrastructure Development Agreement allowed for the City to
6 retain 5% or more of the Infrastructure Reimbursement until final completion of the Project.
7 However, instead of providing for the release of the Infrastructure Reimbursement retainage
8 to the parties who actually paid for the infrastructure -- the Debtors -- this agreement
9 provided for the release of the Infrastructure Reimbursement retainage to Rose Southwest.
10

11 49. On August 1, 2008, the City gave notice terminating the Infrastructure
12 Development Agreement effective August 11, 2008, and gave notice of its intent to assume
13 the construction contracts, due in large part to the Civica Entities’ refusal to disclaim any
14 entitlement to the Infrastructure Reimbursement.⁵ The City’s decision to terminate the
15 Infrastructure Development Agreement and assume control over the Infrastructure
16 Reimbursement and all other aspects of the development was explained in an August 4, 2008,
17 e-mail from Assistant City Attorney Sarah Chilton.⁶
18

19 50. In the City’s August 1, 2008, letter regarding the termination of the
20 Infrastructure Development Agreement, the City remarked that “[i]t is clear that the
21 Infrastructure Development Agreement does not work because of the terms of the financing
22 arrangements for this development.”
23
24

25 ⁵ The City's two August 1, 2008, letters giving notice of the City's termination of the Infrastructure Development
26 Agreement are Exhibits F and G of the Appendix.

⁶ A copy of this August 4, 2008, email is Exhibit H of the Appendix.

1 51. Those “unworkable” financing arrangements referred to by the City include,
2 among other terms, the provision negotiated by Jack Rose and the Civica Entities that Rose
3 Southwest receive the \$10,000,000 Infrastructure Reimbursement instead of the Wood
4 Entities. As previously described, the Infrastructure Reimbursement was intended to
5 reimburse the Wood Entities for the construction of the Public Infrastructure. The Letter of
6 Credit provided by the Wood Entities was not provided as security for any of the Public
7 Infrastructure which was subject to reimbursement. The Civica Entities’ demand for the
8 Infrastructure Reimbursement precipitated the City’s termination of the Infrastructure
9 Agreement because the construction lender, M&I Bank, refused to make loan advances for
10 the Non-Public Infrastructure unless the City reduced the Letter of Credit, and also refused to
11 make loan advances for the Public Infrastructure improvements when the Civica Entities
12 were making claim to the \$10,000,000 Infrastructure Reimbursement that was M&I Bank’s
13 intended source of repayment for these costs. The City was unwilling to reduce the Letter of
14 Credit to pay for these Public Infrastructure improvements, because, by the express terms of
15 the Infrastructure Agreement, the Letter of Credit was not provided as security for the Public
16 Infrastructure improvements. The Letter of Credit was provided for the “private”
17 improvements, and the City believed that if it reduced the Letter of Credit in connection with
18 the Public Infrastructure improvements, the City would be left without sufficient security to
19 ensure the completion of the remaining improvements.
20
21

22 52. The City ultimately paid a portion of the \$10,000,000 Infrastructure
23 Reimbursement directly to the trade contractors providing work for the Public Infrastructure
24 improvements, and M&I Bank ultimately funded a portion of Non-Public Infrastructure
25 improvements after the City agreed to reduce its letter of credit. However, this process
26

1 delayed the payment of the draw requests, created unrest among the contractors, and caused
2 the City to ultimately determine that the financing arrangements did not adequately assure
3 completion of the improvements. All of these actions by the City and by M&I Bank were a
4 direct result of the Civica Entities' claim that they were entitled to Infrastructure
5 Reimbursement despite their written assignment of such rights to M&I Bank several months
6 earlier in December 2007.⁷

7 53. The Wood Family Members did not participate in any of the negotiations
8 with the City concerning the Infrastructure Development Agreement and signed this
9 document relying upon the representations, recommendation, and advice of Jack Rose and the
10 Civica Entities.
11

12 3. The Retail Liner Space MOU.

13 54. Under the Retail Liner Space MOU, the City agreed to convey to Rose
14 Southwest (now Civica Properties) and/or Debtor Eagletail a portion of the Ballpark Parcel
15 upon which Debtor Eagletail, in conjunction with Rose Southwest, would construct
16 approximately 8,500 square feet of retail shop space for use in connection with the Ballpark
17 (the "Retail Liner Space").⁸
18

19 55. The budgeted cost of the Retail Liner Space was not to exceed \$1,905,458,
20 including a contingency.

21 56. Construction costs for the Retail Liner Space would be paid by the City from
22 funds received from Rose Southwest and/or Debtor Eagletail. Rose Southwest is required to
23 timely pay the costs to the City, per the approved budget, on a percentage of completion
24

25 _____
26 ⁷ A copy of the assignment is Exhibit I of the Appendix.

⁸ A copy of the Retail Liner Space MOU is Exhibit J of the Appendix.

1 basis, as billed by the City's consultants. The City would then pay the vendors and
2 contractors. These construction costs are being funded by Debtor MPK under the existing
3 construction loan from M&I Bank.

4 57. As security for these obligations, Rose Southwest and/or Debtors Eagletail
5 and MPK were required to deliver to the City a letter of credit in the amount of \$1,905,458.
6 Debtors Eagletail/Swansea/MPK delivered to the City a letter of credit in the amount of
7 \$1,000,000, which the City accepted. Upon completion of certain improvements, the letter of
8 credit could be proportionately reduced.
9

10 **C. The Construction Agreements.**

11 58. Under the Management Agreement, Civica Development caused two
12 construction agreements to be entered into between CiviTerra (another entity controlled by
13 Jack Rose) and Debtor MPK that relate to the Project. The first agreement was a Standard
14 Form of Agreement Between Owner and Construction Manager (Where the Construction
15 Manager is NOT a Constructor), dated August 21, 2007 (the "CMA Agreement"). The second
16 agreement was a Standard Form of Agreement Between Owner and Construction Manager
17 (Where the Construction Manager is Also a Constructor), dated February 1, 2008 (the "CMc
18 Agreement").⁹
19

20 59. Under the CMA Agreement, CiviTerra was obligated to, among other things:

- 21 (a) Provide for the administration, management and coordination of the
22 various contractors performing the work;
23 (b) Schedule and conduct meetings to discuss procedures, progress and
24 scheduling;
25 (c) Provide and update an overall Project construction schedule;
26 (d) Obtain satisfactory performance from each of the Contractors;

⁹ The CMA Agreement and the CMc Agreement are Exhibit K and L, respectively, of the Appendix.

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- (e) Monitor construction costs and show actual costs for activities in progress and estimates for uncompleted tasks;
- (f) Develop cash flow reports and forecasts for the Project;
- (g) Advise MPK as to variances between actual and budgeted or estimated costs;
- (h) Maintain or at least provide to MPK accounting records on authorized work; and
- (i) Otherwise provide for the sound administration of the work.

60. Under the CMc Agreement, CiviTerra was obligated to, among other things:

- (a) properly supervise, direct and perform the work;
- (b) comply with and give all notices required by applicable laws, ordinances, rules and/or regulations;
- (c) obtain necessary permits;
- (d) provide competent supervision;
- (e) prove and update a construction schedule for the work;
- (f) monitor the costs of construction and include in the Contract Sum all necessary allowances, advising MPK of any variations between an allowance amount and the actual cost of the Work;
- (g) provide detailed cost estimates that clearly identified presumed total construction costs;
- (h) provide MPK cost management suggestions to correct current budget issues in a timely manner;
- (i) provide MPK with cash flow reports and forecasts for the Project;
- (j) advise MPK as to variances between actual costs versus budgeted costs;
- (k) maintain or at least provide to MPK accounting records that clearly communicate the overall construction cost, with amounts showing what is committed and uncommitted;
- (l) provide clear information as it relates to past and present committed versus uncommitted work and authorized work;
- (m) maintain or at least provide to MPK accounting records on authorized work; and
- (n) Otherwise provide for the sound administration of the work.

61. The CMc Agreement replaced a construction agreement entered into between Turner and Debtor MPK covering the Non-Public Infrastructure, primarily dry utilities and road construction. Jack Rose and the Civica Entities induced Debtor MPK to terminate the Turner Non-Public Infrastructure construction contract and enter into the CMc Agreement

1 with CiviTerra by representing to Debtor MPK that MPK would save \$2 million in
2 construction costs if CiviTerra replaced Turner as the general contractor.

3 62. The Civica Entities never told Debtor MPK or the Wood Family Members
4 that Turner would be owed a \$200,000 termination fee when its Non-Public Infrastructure
5 contract was terminated without cause. The Civica Entities refused to satisfy this termination
6 fee and when Turner sought to enforce its lien rights, Debtor MPK had to pay Turner
7 \$200,000 out of its funds in order to obtain a release of the Turner lien arising from such
8 claim.

9
10 63. Additionally, CiviTerra represented to Debtor MPK that Civiterra would self-
11 perform the electrical component of the work when, in fact, it had subcontracted out the labor
12 component for this work resulting in an unjustified increase in construction costs.

13 64. The electrical component of the work that was subcontracted to Power Plus!
14 was at a contract price of \$2,864,345, plus at least 7% in profit and general conditions costs.
15 However, the estimated contract and material costs should not have exceeded \$1,400,000,
16 including an estimated normal contractor profit of 15% on material and 6% on the scheduled
17 value. Considering this instance alone, CiviTerra hid from the Debtors an unjustified
18 construction cost increase of over \$1.4 million in order to further enrich itself at the Debtors'
19 expense.
20

21 65. By separate letters dated June 10, 2008, Debtors terminated both the CMA
22 Agreement and the CMc Agreement for cause.¹⁰ However, in an abundance of caution and to
23 insure there is no possible chance of CiviTerra presenting any further claims arising from the
24 Construction Agreements, the Debtors seek a ruling from this Court that all such agreements
25

26 ¹⁰ A true and correct copy of the letters of termination are together Exhibit M of the Appendix.

1 with CiviTerra are forever terminated and all of the Debtors' legal and financial obligations
2 thereunder have ceased.

3 66. Through this Motion, the Debtors seek to reject and terminate any and all
4 obligations arising from or existing pursuant to Construction Agreement.

5 **IV. LEGAL ARGUMENT**

6 The Debtors desire to reject all of the Development Agreements, City Agreements,
7 and Construction Agreements pursuant to 11 U.S.C. § 365(a). Debtors submit that the
8 information provided herein substantially complies with the disclosure requirements set forth
9 in Local Rule 6006-1, and that rejection is appropriate pursuant to 11 U.S.C. § 365(a).
10

11 Pursuant to 11 U.S.C. § 365(a), rejection is appropriate if warranted under the
12 debtor's business judgment. *In re Food Barn Stores, Inc.*, 107 F.3d 558, 567 n.16 (8th Cir.
13 1997); *In re Audra-John Corp.*, 140 B.R. 752, 755 (Bankr. D.Minn. 1992). "Thus, in
14 evaluating the rejection decision, the bankruptcy court should presume that the debtor-in-
15 possession acted prudently, on an informed basis, in good faith, and in the honest belief that
16 the action taken was in the best interests of the bankruptcy estates...[and it] should approve
17 the rejection of an executory contract under § 365(a) unless it finds that the debtor-in-
18 possession's conclusion that rejection would be advantageous is so manifestly unreasonable
19 that it could not be based on sound business judgment, but only in bad faith, or whim or
20 caprice." *In re Pomona Valley Medical Group, Inc.*, 476 F.3d 665, 670 (9th Cir. 2007)
21 (citations omitted).
22

23 It is the Debtors' business judgment that rejection of the Development Agreements
24 and the City Agreements is in the best interests of the Debtors, their creditors, and all other
25 interested parties, and should be approved. The Development Agreements and the City
26

1 Agreements have resulted in great harm to these Debtors. Pursuant to the Development
2 Agreements and the City Agreements, the Civica Entities negotiated contracts on behalf of
3 the Wood Entities, which greatly favored the Civica Entities to the detriment of the Wood
4 Entities.¹¹ The primary ground given for the City's termination of the Infrastructure
5 Agreement, while the development was on budget and on time, was the wrongful claim by
6 Civica Properties to the Infrastructure Reimbursement. The Development Agreements are
7 not only not essential to the Debtors' reorganization, but are, in fact, burdensome to the
8 estates.
9

10 Moreover, as indicated above, the completion of construction of the Spring Training
11 Complex is extremely time-critical. The Spring Training Complex is scheduled to be fully
12 completed and operational no later than February 1, 2009, when it is contracted to serve as
13 spring-training home to the Cleveland Indians, to be joined the following year (2010) by the
14 Cincinnati Reds Baseball Club. The Debtors must be permitted to immediately reject the
15 Development Agreements and the City Agreements in order to enter into new agreements
16 with the City of Goodyear that will allow the Debtors to attempt to preserve the millions of
17 dollars they have invested in the Spring Training Complex and surrounding land. The City
18 has advised the Debtors that until the Development Agreements and the City Agreements are
19 rejected, the City will have no ability to discuss or negotiate the Debtors' continued role in
20 the Spring Training Complex.
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25 ¹¹ Prior to termination of the CMA and CMC, the Wood Entities paid CiviTerra over \$5,000,000 in construction
26 costs and over \$130,000 in construction management fees. During the course of the Development Agreements,
the Wood Entities paid the Civica Entities in excess of \$1,300,000 in development fees, \$410,000 in project
management fees, and more than \$1,640,000 in commissions.

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