

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION

In re:

WATERBROOK PENINSULA, LLC  
a Florida limited liability company,

Case No. 08-18603-BKC-JKO

Chapter 11

Debtor and Debtor-in-Possession.

---

---

**AMENDED DISCLOSURE STATEMENT IN SUPPORT OF AMENDED PLAN OF  
LIQUIDATION OF WATERBROOK PENINSULA, LLC**

---

DATED: October 22, 2009

**Messana Stern, P.A.**  
Thomas M. Messana  
Scott Underwood  
401 East Las Olas Blvd  
Suite 1400  
Fort Lauderdale, FL 33301  
Fax No.: (954) 712-7401  
Email: [tmessana@mws-law.com](mailto:tmessana@mws-law.com)  
Attorneys for Debtor

WATERBROOK PENINSULA, LLC, the Debtor and Debtor-in-Possession (“Debtor”) in the above referenced bankruptcy case, files this amended disclosure statement (“Disclosure Statement”) pursuant to 11 U.S.C. §1125 and Bankruptcy Rule 3016(c), in conjunction with the Amended Plan of Liquidation of Waterbrook Peninsula, LLC filed by Debtor, dated October , 2009, for the liquidation of the company (“Plan”). All capitalized terms not defined in the Disclosure Statement shall have the definition set forth in the Plan and Annexes thereto.

## **I. INTRODUCTION**

Debtor filed for relief under Chapter 11, Title 11 of the United States Bankruptcy Code (the “Bankruptcy Code” or “Code”) in the United States Bankruptcy Court for the Southern District of Florida, Fort Lauderdale Division on June 25, 2008.

### **A. Purpose of Disclosure Statement:**

Debtor's purpose in providing this Disclosure Statement is to provide the holders of Claims with adequate information about the Plan to enable creditors to make an informed judgment on the merits of the Plan.

This Disclosure Statement does not replace the Plan and therefore creditors are urged to carefully read both the Plan and this Disclosure Statement and consult with counsel concerning the impact that these documents have upon creditors’ legal rights.

Debtor submits this Disclosure Statement to all known Creditors and Equity Holders of Debtor whose Claims are affected under the Plan. The purpose of this Disclosure Statement is to present all information which the Bankruptcy Court has determined to satisfy the requirements of the Bankruptcy Code and to enable Creditors and Equity Holders to make and form prudent decisions in exercising their rights to accept or reject the Plan. By approving this Disclosure Statement, the Bankruptcy Court neither recommends acceptance nor rejection of the Plan. The

hearing on the Disclosure Statement is to determine whether the Disclosure Statement contains “adequate information” as that term is defined in 11 U.S.C. §1125(a)(1), and approval of same is not tantamount to a decision by the Bankruptcy Court on the merits of the Plan. THIS DISCLOSURE STATEMENT HAS NOT YET BEEN APPROVED BY THE BANKRUPTCY COURT, BUT WILL BE SUBJECT TO APPROVAL AT A HEARING IN CONNECTION WITH CONFIRMATION OF THE PLAN.

**B. Source of Information Contained in the Disclosure Statement:**

The information contained in this Disclosure Statement has been developed based upon thorough review and analysis of Debtor’s financial condition. The information contained in this Disclosure Statement has not been subject to audit by independent certified public accountants. Debtor believes the information contained in this Disclosure Statement is substantially accurate and may be relied upon in formulating a decision to accept or reject the Plan. The books and records of Debtor are not warranted or represented to be complete and historically accurate.

The Plan filed in connection with this Disclosure Statement is an integral part of the Disclosure Statement and each Creditor is urged to review the Plan prior to casting its vote.

All information herein is set forth as required pursuant to 11 U.S.C. §1125 and is not to be construed as a representation of management or Debtor or to be used as an admission in any litigation.

**C. Explanation of the Chapter 11 Case and the Plan Confirmation Process:**

The Plan sets forth the means for satisfying Claims against a Debtor under Chapter 11 of the Bankruptcy Code. Chapter 11 does not require that each holder of a Claim against a Debtor vote in favor of a Plan in order for a Bankruptcy Court to confirm a Plan. A Plan must be accepted, however, by the holders of at least one impaired Class without considering claims of

an “insider” within the meaning of the Bankruptcy Code. A holder of an impaired Claim, as defined in 11 U.S.C. §1124, or Equity Security is entitled to vote to accept or reject the Plan if such Claim or Equity Security has been allowed under §502 of the Bankruptcy Code. In order for an impaired Class of Creditors or Class of Equity Security Holders to be deemed to have accepted a plan, a majority number of holders of Claims and two-thirds in dollar amount of the total Allowed Claims or Equity Securities actually voting in the Class must vote in favor of the Plan.

Even if all Classes of Claims and Equity Securities accept Debtor’s Plan, the Court may not confirm it under certain circumstances. Section 1129 of the Bankruptcy Code sets forth the requirements for confirmation. Among other things, that section requires that the Plan be in the best interest of Creditors and Equity Security Holders and that the value to be distributed to Creditors and Equity Security Holders be not less than the value those parties would receive if Debtor were liquidated under Chapter 7 of the Bankruptcy Code.

The Bankruptcy Court may confirm the Plan even though less than all of the Classes of impaired Claims or Equity Securities accept it, so long as one Class of impaired Claims or Equity Securities (excluding insider Claims) accepts the Plan. Confirmation of the Plan over the objection of one or more Classes or Claims or Equity Securities is generally referred to as *Cramdown*. The circumstances under which the Court may confirm Debtor’s Plan over the objection of a Class of Claims or Equity Securities are set forth in §1129(b) of the Bankruptcy Code (the “Cramdown Provisions”). The Plan may be confirmed under the Cramdown Provisions, if, in addition to satisfying the usual requirements of §1129 of the Bankruptcy Code, it (i) does not discriminate unfairly, and (ii) is fair and equitable with respect to each Class of

Claims or Equity Securities that is impaired under, and has not accepted, the Plan. 11 U.S.C. §1129(b).

For purposes of seeking confirmation under the Cramdown Provisions, should that alternative be necessary, Debtor reserves the right to modify or vary the treatment of any Class, as provided in the Plan. Confirmation of Debtor's Plan is binding upon Debtor, all Creditors, all Equity Security Holders and all other parties in interest, regardless of whether or not they have accepted the Plan.

**D. Procedure for Filing Proof of Claim and Proof of Interest:**

The Bar Date for filing a Proof of Claim or Proof of Interest was November 3, 2008. If a Creditor is listed in Debtor's bankruptcy schedules as holding non-contingent, liquidated and undisputed Claims in an amount certain, that Creditor was not required to file a Proof of Claim and may therefore have elected not to file such a Proof of Claim. Debtor's bankruptcy schedules are on file at the Bankruptcy Court and are available for inspection during regular business hours.

**II. VOTING INSTRUCTIONS**

The Plan divides the Claims of Creditors and Equity Holders into five (5) classes or sub-classes. Only classes of Creditors and Equity Holders with claims or interests impaired under the Plan are entitled to vote on a plan. Generally, and subject to the specific provisions of the Bankruptcy Code, this includes creditors and equity holders whose claims or interests, under a plan, may be modified in terms of principal, interest, length of time for payment, or a combination of the above. Each holder of a Claim in a class that is not impaired under the Plan is conclusively presumed to have accepted the Plan, and solicitation of the acceptances from the holders of such claims is not required and will not be undertaken.

**A. Unimpaired Classes:**

Claims in Class 1 are not impaired under the Plan. Pursuant to Section 1126(f) of the Bankruptcy Code, Claim holders within Class 1 are conclusively presumed to have accepted the Plan, and therefore are not entitled to vote to accept or reject the Plan.

**B. Impaired Classes:**

**i. Impaired Voting Classes.** Claims in Classes 1.1, 1.2, 1.3 and 2 are impaired under the Plan, and therefore, holders of Claims in such classes are entitled to vote to accept or reject the Plan.

**ii. Impaired Non-Voting Class.** Class 3 is deemed to have rejected the Plan by virtue of Section 1126(g) of the Bankruptcy Code and is not entitled to vote to accept or reject the Plan.

After carefully reviewing the Plan, this Disclosure Statement and its exhibits, each holder of a Claim or Equity Security, other than holders of Class 3 interests, which has been impaired under the Plan, may vote on acceptance or rejection by completing, dating and signing the ballot, which will be mailed to them after the Court approves this Disclosure Statement, and returning it to the Clerk of the Bankruptcy Court at the following address:

CLERK OF THE COURT  
UNITED STATES BANKRUPTCY COURT  
299 E. BROWARD BLVD., ROOM 112  
FT. LAUDERDALE, FL 33301

In order to be counted, ballots must be received by the Bankruptcy Clerk no later than 5:00 p.m. Eastern Time on \_\_\_\_\_, 2009.

PLEASE VOTE EVERY BALLOT YOU RECEIVE. Completed ballots for holders of all Claims and Equity Securities should be returned and **MUST BE RECEIVED BY THE**

DEADLINE SET FORTH IN THE ORDER SETTING CONFIRMATION HEARINGS AND OTHER DEADLINES. If you have Claims or Equity Securities Interests in more than one Class under the Plan, you will receive multiple ballots.

IF A BALLOT IS DAMAGED OR LOST, OR IF YOU HAVE ANY QUESTIONS CONCERNING VOTING PROCEDURES, CALL:

Scott A. Underwood  
Messana Stern, P.A.  
954-712-7400

### **III. HISTORY OF DEBTOR**

#### **A. General Information:**

The Debtor, Waterbrook Peninsula, LLC, a Florida limited liability company, is the developer, owner, and operator of a residential development, “Peninsula on the Intracoastal,” located at 2649 North Federal Highway, Boynton Beach, Florida 33435 (the “Project”). The Project is partitioned into three sections: one section contains a condominium building comprised of forty (40) condominium units; the second section contains ten (10) coach style homes; and the third section has not yet been developed. The Project’s initial plans anticipated the construction of twenty (20) townhomes on the undeveloped portion of the project. Debtor’s primary business is the construction of the Project and execution of purchase and sale agreements for the sale of condominium or townhouse units in the Project.

#### **B. Management of Debtor**

Debtor’s managers are Thomas N. Yianilos (“Yianilos”) and L. William Rudnick (“Rudnick”). Neither Yianilos nor Rudnick are compensated in their capacity as Debtor’s managers.

Rudnick holds a Bachelor of Science Degree from the University of Wisconsin. He has been involved in the real estate and construction industry since 1957. Yianilos received his Bachelor of Science Degree in Building Construction from the University of Florida in 1981. Yianilos has been a state licensed General Contractor since the fall of 1981. Together, Yianilos and Rudnick are both members of the Gold Coast Builder's Association and have extensive construction and development experience, including projects in Deerfield Beach, Boca Raton, Parkland, Coral Ridge, Delray and Fort Lauderdale.

Debtor does not contemplate that Yianilos or Rudnick will receive any compensation from Debtor during the post-confirmation period, as a result of services rendered or as a result of their position in and with Debtor as set forth herein.

**C. Pre-Petition Events Leading up to Chapter 11 Filing**

Debtor's primary prepetition financing was provided by National City Bank ("NCB"), which holds a land acquisition note and a construction note (collectively referred to as the "NCB Note"). Debtor and NCB have stipulated that as of the Petition Date, the outstanding indebtedness under the NCB Note was \$25,736,908.91. The NCB Note is secured by a first position mortgage on the Project (the "NCB Mortgage," collectively with the NCB Note shall be referred to as the "NCB Loan"). The NCB Loan documents were executed on September 19, 2005. As of the Petition Date, NCB had alleged a default under the NCB Loan and after Waterbrook was unable to work out a solution with NCB, NCB commenced a foreclosure action against Waterbrook in Palm Beach County, Florida.

In addition to the NCB Loan, Waterbrook obtained secured financing from Peninsula Lenders, LLC ("Lenders"). Waterbrook executed a promissory note in favor of Lenders in the initial amount of \$3,000,000 on September 19, 2005 ("Original Lenders Note"). Subsequently,



Waterbrook executed a promissory note in favor of Lenders in the amount of \$500,000 in connection with a future advance (“Future Advance Note”) (collectively, the Original Lenders Note and the Future Advance Note shall be referred to as the “Lenders Note”). Lenders also possess a subordinate mortgage on the Project (the “Lenders Mortgage”).

Yianilos and Rudnick are guarantors on the NCB Loan and Lenders Note.

The month following Debtor’s execution of the NCB Loan and the Original Lenders Note in 2005, Hurricane Wilma visited significant damage to South Florida, where the Project is located. This damage, as well as rising fuel costs, resulted in a steep increase in construction costs. The NCB Loan and Original Lenders Note were insufficient to construct the entire Project. Debtor promptly notified NCB and Lenders of this challenge.

To compensate for the additional construction expenses, Debtor raised the sale price of the project units. Despite Debtor’s initial success in raising additional funds through its sales efforts, due to the drastic downturn in the real estate market, Debtor was unable to acquire the necessary funds to cover the construction costs.

**D. Post Petition Events:**

Debtor commenced this Chapter 11 bankruptcy case on June 25, 2008 (D.E. #1).<sup>1</sup> Debtor’s Plan is being filed in compliance with the deadlines established by the Bankruptcy Code. Attached hereto as Composite Exhibit “A” are the summary pages of Debtor’s operating reports for the Post-Petition period for which operating reports have come due, *i.e.*, June, 2008 through August, 2009 (hereinafter “Post-Petition Operating Reports”).

---

<sup>1</sup> Debtor’s counsel will furnish any creditor upon written request a copy of any document filed in Court and specifically referenced herein.

**(i) DIP Financing for Insurance**

From the first days of this case, Debtor began discussing financing to complete the Project with NCB. However, an agreement for the entire financing of the Project was not immediately achievable, yet an immediate need for insurance presented itself. Thus, on July 3, 2008, Debtor filed a Verified Emergency Application of Debtor-In-Possession for Entry of an Interim Order Authorizing it to Borrow up to \$37,000 in order to pay its Pre-Petition and Post-Petition Insurance Premium on July 3, 2008 (the "Insurance Motion") (D.E. #16). After notice and hearing, on July 7, 2008, the Court entered an Interim Order granting the Verified Emergency Application of Debtor-In-Possession for Entry of an Interim Order Authorizing it to Borrow up to \$37,000 in order to Pay its Pre-Petition and Post-Petition Insurance Premium (the "Interim Order") (D.E. #21). According to the Interim Order, among other things, Debtor was authorized to borrow up to \$37,000.00 from NCB in order to pay its Pre-Petition and Post-Petition insurance premiums. The Interim Order was entered without prejudice to Debtor to seek future borrowing from NCB or another lender. Moreover, the Insurance Motion and Interim Order contemplated additional protections for the Insurance Motion's financing through a subsequent more comprehensive motion, which is detailed in the following section.

**(ii) Original DIP Financing**

On August 6, 2008, Debtor filed its Emergency Verified Application of Debtor-in-Possession for Entry of an Interim and Final Order (i) Authorizing Secured and Super Priority Post-Petition Financing Pursuant to 11 U.S.C. §§ 364 & 507(h), and (ii) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(C), and (iii) Granting Other Related Relief (D.E. #58) (the "DIP Motion"). Debtor filed the DIP Motion because it did not have sufficient available sources of working capital and financing to carry on the development and construction

of the Project without further post-petition financing (the “DIP Financing”). The DIP Financing was obtained to assist Debtor in realizing the maximum value of the Project for Debtor’s creditors.

On September 22, 2008, the Bankruptcy Court entered its Amended Final Order Authorizing Secured and Super-Priority Post-Petition Financing (D.E. #88) (the “DIP Financing Order”) approving the DIP Motion. Pursuant to the DIP Financing Order, Debtor was authorized, among other things, to grant NCB, pursuant to Bankruptcy Code §§364(c) and (d), first priority pre-petition and post-petition liens and security interests in (a) all of the assets of the Debtor owned by the Debtor pre-petition (“Pre-Petition Assets”), as well as in the Collateral as defined in the NCB Loan (the “Existing Collateral” and in the post-petition assets of the Debtor (the “Post-petition Collateral”), to secure the Debtor’s secured obligations under the NCB Loan, and (b) an allowed super-priority administrative expense claim for the entire amount of the Debtor’s obligations under the NCB Loan, with priority as provided in Bankruptcy Code §364(d) over every other lien or security interest in the Pre-Petition Assets, Existing Collateral and the Post-petition Collateral (collectively the “Collateral”). The DIP Financing Order also provided that Debtor will not assert any claim whatsoever that the Debtor may have against NCB under Bankruptcy Code §506(c) for any costs and expenses incurred in connection with the preservation, protection, enhancement of, or realization by NCB upon the Collateral.

Attached as Exhibit 1 to the DIP Financing Order was a construction budget (the “Budget”) that contemplated, among other things, construction of additional improvements on the Project “just shy of Debtor obtaining a Certificate of Occupancy for the [Project].” (“CO Ready Status”)

The Budget and terms of the DIP Financing Order originally expired on November 30, 2008. By Order dated December 3, 2008, the Court extended the DIP Financing Order through and including December 30, 2008 (D.E. #151).

Furthermore, pursuant to the plan, the DIP financing will be terminated, NCB will have no further obligation to advance any additional funds under the agreement that provided the DIP financing pursuant to the DIP Financing Order, and any undisbursed funds deposited with Midwest belongs solely to NCB.

**(iii) Vercon Construction Management, Inc.**

In conjunction with obtaining the DIP Financing, Debtor entered into a revised construction agreement (“Post-Petition Construction Agreement”) with its pre-petition general contractor, Vercon Construction Management, Inc. (the “Former GC”). Pursuant to the Post-Petition Construction Agreement, the Former GC was obligated to construct the improvements upon the Project to CO Ready Status on or before November 30, 2008. Unfortunately, the Former GC was unable to complete the construction to CO Ready Status on either November 30, 2008 or the extended date of December 30, 2008. More problematic for Debtor, the Former GC was unable to stabilize the Project. Specifically, the Former GC did not complete installation of the structural glass, enclosure of the building envelope, installation of air conditioning units, and engaging electrical power. In fact, as of January, 2009 construction on the project halted. The Former GC forever and finally informed Debtor that it was not willing to finish the Project for the remaining balance of the Budget. As such, Debtor filed a Notice of Filing Regarding Notice of Default and Termination (D.E. # 176), which terminated its contract with the Former GC.

The Former GC asserted an administrative claim against Debtor’s estate. In related matters, subcontractor Vila & Son Landscaping, Inc. (“Vila”), asserted an administrative

claim against Debtors estate and CDL Earthmoving and Paving, Inc. (“CDL”), a civil engineering subcontractor, commenced a lawsuit against Debtor and Former GC. In order to resolve these matters Debtor, Former GC, Vila, and CDL (“Settlement Parties”) participated in a judicial settlement conference held on August 20, 2009.

At the settlement conference the Settlement Parties reached an agreement which was memorialized on August 20, 2009. Debtor filed a motion to approve the agreement with the Settlement Parties on August 28, 2009 (the “Contractor Settlement”). (D.E. #384). On September 28, 2009, this Court granted the motion and approved the Contractor Settlement. (D.E. #420). The key terms of the Contractor Settlement include Debtors payment of cash to Former GC in the amount of \$90,103, to Vila in the amount of \$83,545, and to CDL in the amount of \$75,000, along with various intraparty releases, in full satisfaction of their administrative claims.

**(iv) Extension of DIP Financing**

In an effort to stabilize the Project (and in so doing bring this case toward an exit from bankruptcy), Debtor and NCB agreed to alter the scope of work and subcategories of the Budget to bring the Project to a base level to protect the Project, i.e. enclose the building envelop, turn on electricity, account for and confirm the validity of certain protective advances made by NCB since the expiration of the DIP Financing Order, and otherwise generally maintain the condition of the Project. Yianilos, who is a licensed and insured contractor in accordance with the laws and regulations of the State of Florida, Palm Beach County and the City of Boynton Beach, is qualified, and, in fact, has substituted as the general contractor on this project.

Debtor requested and received the above extension of DIP Financing at a hearing on March 19, 2009, authorizing NCB to continue to fund the already authorized DIP Financing

under a revised budget that was attached to Debtor's Emergency Motion to (1) Extend DIP Financing Order and (2) Authorize the Use of Cash Collateral to Obtain the Base Level Necessary to Protect the Project and Prepare for Bankruptcy Sale (the "DIP Financing Extension Motion"). (D.E. # 240). Pursuant to the DIP Financing Extension Motion and the Bankruptcy Court's order (D.E. # 258), the originally authorized DIP funding does not increase, but rather the subcategories in the Budget are altered to permit continuing construction solely to stabilize the Project and preserve it for a sale. The portion of the DIP Financing Extension Motion concerning use of cash collateral was entered thereafter (D.E. # 284).

On June 30, 2009, a further Order Granting Motion to Obtain Credit and Use Cash Collateral was entered on the docket (D.E. # 352). This additional financing ensured the Debtor's ability to have the Project in a proper state for transfer to NCB.

**(v) Customer Deposits**

Prior to the Petition Date, Debtor entered into several contracts for the purchase of units at the Project. Pursuant to the purchase and sale contracts for the units, the customers made certain deposits which were held in escrow. Certain of these funds may have been disbursed towards construction and improvement on the Project. During the pendency of the bankruptcy case, several contract parties have asserted various claims and sought various forms of relief before this Court. Specifically, certain contract purchasers have sought (i) stay relief, (ii) to compel assumption or rejection of the purchase contracts, or (iii) a class action judgment in Adversary Proceeding # 08-01506-JKO (the "Class Action").

Debtor has reached settlement with all customers who purchased units at the Project through either: (i) a settlement of the Class Action pursuant to which members of the Class receive 80% of the remaining escrow deposit and Debtor receives 20% of the remaining escrow

deposit plus accrued interest, or (ii) a settlement agreement with the individual customers outside of the class settlement whereby the customer receives 80% of the remaining escrow deposit and Debtor receives 20% of the remaining escrow deposit plus accrued interest. On March 31, 2009, an Amended Order granting Final Approval of the Class Action Settlement was entered on the docket. (D.E. #272)

Through its settlements with the customer deposit holders, Debtor has eliminated more than \$2 million in unsecured claims, including priority unsecured customer deposit claims, and recovered approximately \$345,000 for the estate (the "Settlement Proceeds"). The Settlement Proceeds are held in a DIP account and are currently encumbered by a first position lien of NCB.

**(vi) Abandoned Sale of the Project**

Debtor sought to sell the Project through the Plan and its Emergency Motion for Entry of an Order (i) Authorizing Sale of Real Estate Free and Clear of Interests; (ii) Approve Stalking Horse Contract; (iii) Approving Form of Purchase and Sale Agreement; (iv) Approving Bidding Procedures; (v) Scheduling Hearing to Consider Approval of Proposed Sale; and (vi) Approving Form and Manner of Notice Thereof (the "Sale Motion"). The Sale Motion and the Plan sought to maximize Debtor's primary and most significant asset, the Project, through competitive bidding and auction sale process. In addition to the Project, Debtor seeks to sell virtually all its personal property, to the extent it is currently located on the Project,<sup>2</sup> and related intangible property. The full description of property to be sold (the "Acquired Assets") is provided in the Plan and annexes thereto.

In connection with its sale efforts, Debtor sought to employ Fisher Auction Co., Inc. and Lamar Fisher (the "Auctioneer"). In connection with the auction sale, the Auctioneer proposed

---

<sup>2</sup> Debtor's personal property located at the Project is of inconsequential value to the Plan.

to charge a buyer's premium equal to 6% of the Final Successful Bid. The Auctioneer would have donated to the estate, 1% of the Final Successful Bid if the successful bidder utilizes a cooperating broker and 2% of the Final Successful Bid if the successful bidder does not utilize a cooperating broker<sup>3</sup>.

NCB did not favor the sale at an enhanced proposed stalking-horse sales price of \$8,000,000 and after several Judicial Settlement Conferences<sup>4</sup>, the Debtor settled with NCB and the Court denied the Sale Motion (D.E. #353).

**(vii) Return of Impact Fees**

On August 13, 2009 Debtor requested the City of Boynton Beach to cancel its building permits pertaining to the portion of the project it did not build, i.e., the 20 townhomes. Subsequently, on August 24, 2009 the building permits were cancelled by the City of Boynton Beach. On August 26, 2009 Debtor applied to Palm Beach County for an impact refund of \$130,000. Palm Beach County summarily rejected the request on August 28, 2009. Debtor filed an appeal with Palm Beach County on September 17, 2009 and will attempt to recover the impact fees under the Bankruptcy Code's fraudulent transfer provisions if the County does not return the impact fees. To the extent Debtor is successful in recovering the impact fees, NCB will release any liens it has upon such funds pursuant to the Plan Funding Commitment.

**(viii) Exclusive Period to File Plan**

In accordance with Section 1121 of the Bankruptcy Code, Debtor is given the exclusive right to file a plan for 120 days following the Petition Date and 60 additional days to solicit

---

<sup>3</sup> In accord with NCB's objection to the sale/auction process, the Debtor's Notice of withdrawal of the auctioneer application was filed on June 16, 2009 (D.E. # 335). This was done in favor of NCB's Plan Funding Commitment discussed herein.

<sup>4</sup> Debtor expresses its sincere gratitude to Chief U.S. Bankruptcy Judge Paul G. Hyman, Jr., who presided over the Judicial Settlement Conference and through his patience and wisdom, assisted the parties in reaching some accord.



acceptances of that plan by the Classes (“Exclusivity Period”). On October 22, 2008, Debtor filed a motion to extend the Exclusivity Period for ninety days (“First Exclusivity Motion”) (D.E. #94). On November 12, 2008, the Bankruptcy Court granted the First Exclusivity Motion and extended the Exclusivity Period through and including January 21, 2009 (D.E. #127).

On January 21, 2009, Debtor filed a motion to further extend the Exclusivity Period for thirty days (“Second Exclusivity Motion”) (D.E. #167). On February 18, 2009, the Bankruptcy Court granted the Second Exclusivity Motion and continued exclusivity to February 20, 2009 (D.E. #192).

On February 20, 2009, Debtor filed a third motion to further extend the Exclusivity Period for thirty days (“Third Exclusivity Motion”) (D.E. #196). On March 19, 2009, the Bankruptcy Court orally granted the Third Exclusivity Motion and continued exclusivity to March 23, 2009. The original Plan was filed within the Exclusivity Period. Thereafter, the Bankruptcy Court August 20, 2009 (D.E. #318), and again extended the exclusive solicitation period through and including through November 18, 2009 (D.E. #389).

**(viii) *Otero Mills* type injunction**

On or about February 25, 2009, the Debtor filed an adversary proceeding against Peninsula Lenders, LLC, Stateside Capital Corp. and 3061 Lenders seeking a temporary injunction against the defendants from proceeding against Rudnick and Yianilos, adv case no. 09-1213. The Debtor’s theory was premised on the facts that the Debtor had replaced its Former GC and had taken over the general contracting function. After a hearing held on February 26, 2009, where no evidence was presented, the Court entered a preliminary injunction and set an evidentiary hearing. Thereafter the parties participated in a Judicial Settlement Conference and agreed to extend the injunction through and including August 1, 2009 (D.E. #322).

**(ix) Retention of Debtor's Professionals**

Throughout the Bankruptcy Case, Debtor, as a limited liability company, relied upon the assistance of professionals to assist it with the bankruptcy process, including the filing of the bankruptcy petition and bankruptcy schedules, following additional accounting requirements incumbent upon a debtor in bankruptcy, filing monthly Debtor-in-Possession Operating Reports, negotiating with creditors, developing an exit strategy, negotiating with condominium unit purchasers, and formulating a plan.

On June 27, 2008, Debtor obtained interim approval to hire Thomas M. Messana and the law firm of Messana Stern, P.A. ("MS") as its general bankruptcy counsel<sup>5</sup>. On July 22, 2008, the Bankruptcy Court approved the employment of MS on a final basis.

MS, who is entitled to an administrative claim for services performed. As of September 30, 2009, MS has incurred total legal fees and expenses in the amount of \$612,896.27. As of September 30, 2009, MS has been paid legal fees and reimbursement of costs of \$465,973.84. MS will assert an administrative claim in the amount of \$144,922.43, plus fees and expenses incurred from October 1, 2009, to the Confirmation Hearing.

The Debtor employed Alan Barbee and the accounting firm of Rachlin, LLP<sup>6</sup> as forensic accountants to investigate its Former GC (D.E. #316). The agreed fee is to be no greater than \$10,000.

**(X) Non-Debtor Guarantor Transfer**

Upon information and belief, Debtor believes that NCB and non-debtor creditors have reached a settlement agreement pursuant to which such non-debtor guarantors will pay NCB

---

<sup>5</sup> The law firm of Messana, Weinstein & Stern, P.A. changed its name to Messana Stern, P.A. (D.E. # 337).

<sup>6</sup> The accounting firm of Rachlin, LLP changed its name to MarcumRachlin, a division of Marcum, LLP.

\$100,000. Some form of satisfactory settlement with the non-debtor guarantor's is a precondition of NCB's obligations under plan including the NCB Plan Funding Commitment and the \$50,000 Creditor Give-up.

#### **IV. SUMMARY OF DEBTOR'S ASSETS AND LIABILITIES**

The assets and the liabilities of Debtor as of the filing of the Voluntary Petition herein are substantially as set forth in Bankruptcy Schedules A, B, D, E, and F.

Debtor's primary assets are the Acquired Assets. In addition, Debtor has available cash and Escrow Deposit settlement proceeds in the approximate amount of \$345,000, all of which is encumbered by a first position lien of NCB. Also, the Debtor has a right to a refund of approximately \$130,000 for the impact fees it paid on account of the portion of the project it did not build, i.e., the 20 townhomes. This asset is currently contested and subject to appeal.

Debtor has done a preliminary analysis of potential fraudulent transfer and preference avoidance actions pursuant to Bankruptcy Code Sections 544, 546, 547, 548, 549, 550 (the "Avoidance Actions"). Debtor's initial analysis leads Debtor to believe that such actions may not be sufficiently collectible to justify the expense of more extensive analysis and the costs of litigation.

Debtor has settled its claims against the Former GC for accounting, breach of contract and fraudulent transfer, and Former GC's administrative expense claims as part of the Contractor Settlement as described infra.

Debtor believes it may possess claims against NCB arising from lender liability, breach of contract, failure to perform, and impairment of collateral. Under the Plan, NCB will be released from these claims. If Debtor were to recover upon the claims against NCB, due to NCB's large deficiency claim, the majority of any such recover would be redistributed to NCB.

Due to that reality, the NCB Plan Funding Commitment and the expense and uncertainty of litigation, Debtor believes the release of NCB is appropriate.

Debtor also asserts claims against Lenders arising from lender liability, interference with Debtor's exclusivity period, interference with credit relationship, interference with contract relationship, and fraud in the inducement. Debtor does not currently intend to pursue its claims against Lenders due to costs and risks of litigation, as well as the fact that Lenders is Debtor's second largest creditor. Absent payment to NCB and Lenders, any recovery from Lenders would result in little recovery for Debtor's other unsecured creditors.

Debtor had contracts for the purchase of condominium units and related escrow deposits that possessed significant value. As detailed above, Debtor has liquidated that value through the settlements regarding the Escrow Deposits.

Debtor's only other executory contract as of the Petition Date was with the Former GC. Pursuant to the Plan, the contract with the Former GC will be deemed rejected.

In addition to Debtor's liabilities, as set forth in Section III(C) of this Disclosure Statement, administrative claims have been lodged by its Former GC, as set forth above, CDL Earthmoving and Paving, Inc, in the amount of \$93,772.64 and Vila and Son Landscaping Corp. in the amount of \$97,288.10. The Debtor has filed a motion to settle the CDL claim and objects to the Former GC and Vila and Son claim. (An evidentiary hearing on the Vila and Son administrative claim is set for August 31, 2009.) The Debtor has sought and received an administrative claims bar deadline of July 15, 2009.

Additionally, Debtor believes it has approximately \$204,000 in unsecured debt, approximately \$100,000 in outstanding real estate taxes, and approximately \$250,000 in claims asserted by creditors possessing mechanics or materialmen's liens upon the Project.

**V. SUMMARY OF PLAN**

**THE DESCRIPTION OF THE PLAN AS CONTAINED IN THIS DISCLOSURE STATEMENT SUMMARIZES ONLY CERTAIN PROVISIONS OF THE PLAN AND IS NOT, NOR IS IT INTENDED TO BE, A COMPLETE DESCRIPTION OF THE PLAN. THIS SUMMARY IS NOT INTENDED TO SUBSTITUTE FOR A READING OF THE PLAN OR THE REMAINDER OF THIS DISCLOSURE STATEMENT IN THEIR ENTIRETY. THE PLAN IS A LEGALLY BINDING DOCUMENT AND CREDITORS MAY WISH TO CONSULT WITH THEIR OWN ATTORNEYS, IF ANY, TO UNDERSTAND THE PLAN MORE FULLY.**

**THE TERMS OF THE PLAN WILL GOVERN THE RIGHTS OF THE PARTIES, AND PARTIES WITH IMPAIRED CLAIMS ARE THEREFORE URGED TO READ THE PLAN OF REORGANIZATION IN ITS ENTIRETY.**

The Plan filed herein, a copy of which is attached hereto, divides creditors into six (6) Classes and Sub-Classes as follows:

- Class 1.1* Secured Claim of NCB. Impaired--entitled to vote.
- Class 1.2* Secured Claims of Peninsula Lender, LLC. Impaired--entitled to vote.
- Class 1.3* Other Secured Claims. Impaired--entitled to vote.
- Class 2* Unsecured Claims. Impaired--entitled to vote.
- Class 3* Interests in Debtor. Impaired--Deemed to have rejected the Plan.

**VII. MEANS OF IMPLEMENTATION AND FEASIBILITY OF THE PLAN**

A plan proponent must demonstrate as a condition of confirmation that each impaired Class of Creditors will receive at least as much as it would receive in a Chapter 7 liquidation proceeding. Further, a plan proponent must also demonstrate that the Plan is “feasible”.

**A. Future Operation of Debtor's Business.** At this time Debtor is not developing any properties on an ongoing basis other than the Project. Debtor believes the Project will be at stabilization, including obtaining electricity status prior to the transfer of the Acquired Assets. Debtor does not have any salaried employees. Debtor's operations are managed Yianilos and Rudnick. The Post-Confirmation Debtor will continue Debtor's duties and responsibilities pursuant to the Plan.

**B. Sale/Transfer of Assets.** On the Effective Date, Debtor shall convey and transfer to NCB or its designee all of the Acquired Assets, free and clear of all Encumbrances, except for the allowed claims of Wiper Corporation as a holder of the Palm Beach County tax lien certificate and the rights thereunder, numbered 2008-19993, in the amount of \$148,267.98 and the Palm Beach City Tax Collector which shall remain a lien on the Acquired Assets, by signing and delivering to the Asset Purchaser such deeds, bills of sale, assignments and other conveyance documents as required pursuant to the Conveyance Documents, the Plan and the Confirmation Order.

**C. Source of Funding for Plan.** NCB shall provide or make available to Debtor (i) Proceeds of the Class Action Settlement regarding Escrow Deposits, on which NCB possesses a valid, first position lien, (ii) proceeds from Debtor's Refund of the Impact Fees, but only to the extent Debtor successfully recovers such fees, and (iii) the Creditor Give-up (collectively the "Plan Funding Commitment"). NCB's contribution, through its release of liens upon Debtor's Cash Collateral, does not obligate NCB to fund any shortfall that exists as a result of Debtor's inability to recover any portion of the impact fee refund.

Further, in conjunction with confirmation of the Plan, Debtor may make demand for payment of preferences or fraudulent transfers.

**D. The Effective Date.** The closing of the transactions required and contemplated under the Plan shall take place on the Effective Date at a location in Miami-Dade County, Broward County or Palm Beach County, Florida. The Effective Date is the business day on which Debtor closes upon the sale of the Acquired Assets pursuant to this Plan, unless such sale is consummated prior to entry of the Confirmation Order, in which event, the Effective Date shall be ten (10) days after the Confirmation Order becomes a Final Order.

**E. Substantial Consummation.** The Plan shall be deemed substantially consummated immediately on the completion of all material actions required to be undertaken at the Effective Date.

**F. Notice of Effective Date.** Promptly after occurrence of the Effective Date, Debtor shall file with the clerk of the Bankruptcy Court a notice that the Plan has become effective; provided, however, that the failure to file such notice shall not affect the effectiveness of the Plan or the rights or substances obligations of any entity hereunder.

**G. Final Decree.** After the Effective Date, Debtor may move for a final decree closing the case and requesting such other orders as may be necessary and appropriate.

**H. Debtor's Conditions to Effective Date.** The occurrence of the Effective Date shall be subject to the satisfaction or waiver by Debtor of each of the following conditions:

- (i) All deliveries required to be made on the Effective Date have been made or waived by the party for whose benefit such delivery is intended.
- (ii) The Confirmation Order shall be entered by the Bankruptcy Court and shall be effective and not stayed.
- (iii) Each of the conditions to the obligations of Debtor under the Purchase and Sale Agreement shall have been satisfied or waived in writing.

**I. Waiver of Federal Rule of Civil Procedure 62(a).** Debtor will request that the Confirmation Order include (i) a finding that Fed. R. Civ. P. 62(a) shall not apply to the Confirmation Order; and (ii) authorization for the consummation of the Plan and the transactions contemplated by the Plan immediately after entry of the Confirmation Order

**J. Disbursing Agent.** Debtor shall act as Disbursing Agent. Its fees for acting as Disbursing Agent shall not exceed \$5,000. The Disbursing Agent shall disburse all of Debtor's cash in accordance with the terms of the Plan and the Bankruptcy Code. Disbursing Agent shall also pay all post-confirmation U.S. Trustee's fees pursuant to 28 U.S.C. § 1930 to the extent required by law.

**K. Post Confirmation Debtor.** Upon the Effective Date, all of Debtor's pre-confirmation Property shall vest in the Post-Confirmation Debtor, subject to the same liens, interests, and encumbrances as existed pre-confirmation. Wherever the Plan refers to Debtor's authority, responsibilities, rights, powers or limitations on or after the Effective Date, such reference shall be deemed to be a reference to the Post-Confirmation Debtor. The Post-Confirmation Debtor shall have the same authority, responsibilities, rights, powers or limitations to discharge the duties of Debtor pursuant to the Plan. The Post-Confirmation Debtor shall be managed by Yianilos and Rudnick. Yianilos and Rudnick will not receive compensation for their role as managers of the Post-Confirmation Debtor.

The Post-Confirmation Debtor may retain Professionals, without the need for approval by the Bankruptcy Court, to assist the Post-Confirmation Debtor with its duties and responsibilities under the Plan (the "Post-Confirmation Professionals"). Debtor may retain its pre-confirmation counsel as a Post-Confirmation Professional.



Upon the transfer of Debtor's cash to the Disbursing Agent, the Disbursing Agent shall set aside \$35,000 for the retention and payment of Post-Confirmation Professionals and compensation for the Disbursing Agent (the "Set Aside"). Payment to the Post-Confirmation Professionals and the Disbursing Agent shall only be made upon application to this Court pursuant to the procedures set forth herein (the "Application Procedures"). Not more than every 30 days, the Post-Confirmation Professionals and Disbursing Agent may submit an application with the Bankruptcy Court for compensation of reasonable fees and expenses in assisting Debtor with implementing the Plan. Such applications shall be served upon the Post-Confirmation Debtor, NCB, and any other party that specifically requests notice of such fee applications. Any party may object to the application for compensation of the Post-Confirmation Professionals and the Disbursing Agent within 10 days of service of an application pursuant to these Application Procedures. If a party in interest timely objects, the Post-Confirmation Debtor shall file a notice of contested matter with the Bankruptcy Court and request a hearing to resolve the objection. If no party timely objects to any application pursuant to the Application Procedures, the Disbursing Agent may distribute cash sufficient to pay the Post-Confirmation Professional or Disbursing Agent's application, without need for further action or approval of the Bankruptcy Court.

**L. Bond.** Neither the Disbursing Agent nor Post-Confirmation Debtor shall be required to post a bond.

**M. Classification and Treatment of Claims.** Section 1122(a) of the Bankruptcy Code provides that a Plan may place a Claim or Equity Security in a particular Class only if that Claim or Equity Security is substantially similar to the other Claims or Equity Securities in such Class. Classification is a method of recognizing differences in the rights of Creditors and Equity Securities, which call for a difference in treatment of their respective Claims.

The Plan establishes five (5) Classes of Claims and one (1) Class of Equity Holders. If the Court confirms the Plan the Class into which a Claim or Equity Security falls will determine the treatment of such Claim or Equity Interest. The Classes of Claims and Equity Securities as established in the Plan are summarized below. Administrative Expense Claims and Priority Tax Claims are not classified pursuant to §1123(a)(1) of the Bankruptcy Code.

An Administrative Claim is defined in the Plan as a claim constituting a cost or expense of administration of Debtor's Chapter 11 case under Section 503(b) of the Bankruptcy Code and that is entitled to priority under Section 507(a) of the Bankruptcy Code, including, without limitation, any actual and necessary expenses of preserving the estate, and all fees and charges assessed against the bankruptcy estate under Chapter 123 of Title 28, United States Code.

All requests for payment of Administrative Claims were to be filed with the Bankruptcy Court no later than July 15, 2009. All applications for payment of Professional Fee Claims shall be filed with the Bankruptcy Court and served upon Debtor at least ten (10) days before the Confirmation Hearing or by such earlier deadline as may apply to such Administrative Claim pursuant to an earlier order of the Bankruptcy Court. Except as provided herein, any Administrative Claim or Professional Fee Claim for which an application or request for payment is not filed within such time period shall be discharged and forever barred.

**N. Unclassified Claims:**

**i. Treatment of Administrative Claims, including Professional Fee Claims.**

Allowed Administrative Claims and Professional Fee Claims incurred through the Effective Date shall be paid by Debtor on or before the later of ten (10) days after the Effective Date or the Allowance Date, except as such administrative or professional claimants agree to another

treatment. Debtor estimates that there will be approximately \$580,000 in Administrative and Professional Fee Claims payable on the Effective Date.

**ii. U. S. Trustee Fees.** After the Effective Date and until Debtor's chapter 11 case is closed, Debtor or the Disbursing Agent shall pay all fees incurred under 28 U.S.C. § 1930(a)(6) as such fees become due and owing.

**O. Classified Claims.** For purposes of the Plan there shall be six (6) Classes of Claims and Equity Holders as follows:

**i. Treatment of Class 1.1 Secured Claim of NCB.** Allowed Secured Claims in Class 1.1 shall be completely and fully satisfied by the following treatment:

a. NCB shall be deemed to have an Allowed Secured Claim in the amount of \$9,268,694.19 secured by the Acquired Assets, not subject to objection, disallowance or subordination. In full and complete satisfaction of the NCB's Secured Claim, and subject to the terms and conditions provided for in the Purchase and Sale Agreement, NCB shall receive the Acquired Assets, free and clear of all Encumbrances.

b. NCB shall be deemed to have an Allowed General Unsecured Claim in the amount of \$17,504,611 (the "NCB Deficiency Claim").

c. If Class 1.2 and Class 2 vote to accept the Plan and Class 1.2 does not file an objection to the Plan or objection to administrative claims, NCB shall subordinate the right to receive any distribution under Class 2 of the Plan on account of the NCB Deficiency Claim to all the other Class 2 claimants.

**d. ON THE EFFECTIVE DATE, IN CONSIDERATION OF THE AGREEMENT OF NCB TO MAKE THE NCB PLAN FUNDING COMMITMENT AND ITS OTHER OBLIGATIONS AND COMMITMENTS PURSUANT TO THE PLAN, NCB**

AND EACH OF ITS DIRECTORS, EMPLOYEES, OFFICERS, PREDECESSORS, SUCCESSORS, ASSIGNS, AGENTS, ATTORNEYS, REPRESENTATIVES, SURETIES AND INSURERS SHALL BE RELEASED AND DISCHARGED OF ANY AND ALL CLAIMS, LIABILITIES, CAUSES OF ACTION, DEBTS, DAMAGES, OBLIGATIONS, COSTS, AND DEMANDS OF WHATEVER CHARACTER, NATURE, TYPE, OR DESCRIPTION, WHETHER KNOWN OR UNKNOWN, SUSPECTED OR UNSUSPECTED, WHICH, ANY PARTY IN INTEREST, INCLUDING DEBTOR AND ALL CREDITORS, INCLUDING VILA & SON LANDSCAPING, INC., VERCON CONSTRUCTION MANAGEMENT, INC., AND CDL EARTHMOVING AND PAVING, INC., MAY HAVE HAD, OR MAY NOW HAVE THAT RELATE IN ANY WAY TO DEBTOR, DEBTOR'S BANKRUPTCY CASE, THE CLASS 1.1 CLAIM, THE NCB ALLOWED SECURED CLAIM OR THE NCB DEFICIENCY CLAIM AND THE PROPERTY, EXCEPT FOR OBLIGATIONS EXPRESSLY CONTAINED IN THE PLAN.

e. ON THE EFFECTIVE DATE, THE DIP FINANCING BY NCB IS TERMINATED, NCB HAS NO FURTHER OBLIGATION TO ADVANCE ANY ADDITIONAL FUNDS UNDER THE AGREEMENT THAT PROVIDED DIP FINANCING PURSUANT TO THE DIP FINANCING ORDER, AND ANY UNDISPURSED FUNDS DEPOSITED WITH MIDWEST BELONG SOLELY TO NCB.

ii. Treatment of Class 1.2 Secured Claim of Peninsula Lenders, LLC.

Allowed Secured Claims in Class 1.2 shall be completely and fully satisfied by the following treatment:

a. The Class 1.2 Allowed Secured Claim shall be satisfied in full with the proceeds of the sale of the Acquired Assets to the extent the Net Sale Proceeds exceeds the aggregate of the Allowed Secured Claim of Class 1.1.

b. **Deficiency Claim.** The Allowed Class 1.2 Secured Claim shall have a deficiency claim to the extent the value of the collateral securing its Allowed Secured Claim is less than the amount of its Allowed Secured Claim. If Class 1.2 Allowed Secured Claim has a deficiency claim, it shall be treated under the Plan in Class 2.

**iii. Treatment of Class 1.3 All Other Secured Claims Against Debtor.**

Allowed Secured Claims in Class 1.3 shall be completely and fully satisfied by the following treatment:

a. Each Class 1.3 Allowed Secured Claim shall be deemed to be classified in a separate subclass of Class 1.3. Each Class 1.3 Allowed Secured Claim shall be satisfied in full with the proceeds of the sale of the Acquired Assets to the extent the Net Sale Proceeds exceeds the aggregate of the Allowed Secured Claims of Class 1.1 and 1.2. Each Class 1.3 Allowed Secured Claim shall be paid in order of priority under otherwise applicable law. Should the Net Sale Proceeds exceed the aggregate of the Allowed Secured Claims of Class 1.1 and 1.2, on or before confirmation, Debtor will file a schedule of proposed distribution and priority of holders of Class 1.3 Allowed Secured Claims.

b. **Deficiency Claim.** Each holder of an Allowed Class 1.3 Other Secured Claim shall have a deficiency claim to the extent the value of the collateral securing its Allowed Secured Claim is less than the amount of its Allowed Secured Claim. If the holder of a Class 1.3 Allowed Secured Claim has a deficiency claim, it shall be treated under the Plan in Class 2.

**iv. Treatment of Class 2 Unsecured Claims.** Allowed Unsecured Claims in Class 2 shall be completely and fully satisfied by the following treatment:

a. Each holder of an Allowed Class 2 Unsecured Claim shall receive a pro rata distribution pursuant to the priorities set forth in the Bankruptcy Code.

**v. Treatment of Class 3 Interests in Debtor.** Allowed Class 3 Interests shall receive no distribution under the Plan and shall retain no property whatsoever under the Plan.

**vi. Impaired Classes to Vote.** Each impaired Class of Creditors with Claims against Debtor's estate will be entitled to vote separately to accept or reject the Plan.

**vii. Acceptance by Class of Creditors.** A Class of Claims will have accepted the Plan if the Plan is accepted by at least two-thirds ( $\frac{2}{3}$ ) in amount of allowed Claims, and more than one-half ( $\frac{1}{2}$ ) in number of Allowed Claims of such Class that have accepted or rejected the Plan.

**P. Discharge of Debtor.** The rights afforded in the Plan and the treatment of all Claims and Interests shall be in exchange for and in complete satisfaction, discharge, and release of all Claims of any nature whatsoever against any of the Property, including the Acquired Assets. As this plan is one of liquidation, Debtor shall not be discharged under Section 1141 of the Bankruptcy Code.

**Q. Retention of Prepetition Actions.** Notwithstanding confirmation, Debtor, its successors, heirs, or assigns, shall be able to continue to pursue any and all fraudulent transfer and preference actions commenced prior to confirmation of the Plan..

**R. Cramdown.** In the event that any impaired Class fails to accept the Plan in accordance with 11 U.S.C. §1129(a) of the Bankruptcy Code, Debtor will request the Bankruptcy Court to confirm the Plan in accordance with 11 U.S.C. §1129(b) of the Bankruptcy Code. This contemplates an evidentiary hearing by which creditors would be required to accept the Plan if it is determined to be fair and equitable and it is accepted by at least one impaired class. The determination of what is fair and equitable varies depending on the classification of each creditor's claim. Generally, treatment of unsecured creditors is fair and equitable if such creditors receive a greater distribution under the Plan than they would receive under Chapter 7.

**S. Unclaimed or Undistributable Funds.** To the extent any funds are unclaimed or undistributable pursuant to the Plan, Bankruptcy Code Section 347, Bankruptcy Rule 3011, or Local Bankruptcy Rule 3011-1, the Disbursing Agent may distribute such funds to the Bankruptcy Bar Foundation for the Southern District of Florida.

**VIII. GENERAL PROVISIONS GOVERNING DISTRIBUTIONS BY DEBTOR  
PRIOR TO EFFECTIVE DATE**

**A. Place and Manner of Payments or Distributions.** Debtor shall make Distributions to the holders of Allowed Claims on the Effective Date or Allowance Date via delivery by either (i) mail to the Claimant at the address of such Claimant as listed in the Schedules of Assets and Liabilities, or listed on any proof of claim filed by the Claimant, or (ii) by mail to such other address or by wire transfer to the destination that such Claimant shall have specified for payment purposes in a written notice to Debtor.

**B. Undeliverable Distributions.** If a Distribution to any Claimant is returned as undeliverable, Debtor shall use reasonable efforts to determine such Claimant's current address,

and no further Distributions shall be made to such Claimant unless and until Debtor is notified of such Claimant's current address.

**C. Treatment of Unclaimed or Undeliverable Distributions.** If any Claimant entitled to Distributions from Debtor cannot be located prior to the Effective Date or Allowance Date or has its Distribution returned to Debtor, then such Distribution shall be transferred to Debtor and, in the case of Cash, held in an interest-bearing account or fund maintained by Debtor for purposes of holding such distributions. Debtor will distribute such distributions six months after the Effective Date to Allowed Claims pursuant to this Plan.

**D. Tax I.D. Number Required.** In lieu of backup withholding, Debtor may suspend distribution to any Claimant that has not provided its Federal Tax Identification Number or Social Security Number, as the case may be. Any such distributions that remain suspended as of the Effective Date or Allowance Date shall be transferred to Debtor and held in an interest-bearing account or fund maintained by Debtor pending receipt by Debtor of such information.

**IX. INJUNCTION AGAINST ENFORCEMENT OF PRECONFIRMATION DEBT**

Except as expressly provided herein, at all times on and after the Effective Date, all Persons who have been, are, or may be holders of Claims against or Interests in Debtor arising prior to the Effective Date, shall be enjoined from taking any of the following actions against or affecting the Property, including the Acquired Assets:

- (a) commencing, conducting or continuing in any manner, directly or indirectly any suit, action, or other proceeding of any kind arising before the Confirmation Date against Debtor, Debtor's estate, or the Property, including the Acquired Assets (including, without limitation, all suits, actions, and proceedings that are pending as of the Effective Date, shall be deemed to be withdrawn or dismissed with prejudice), including any suit, action or other proceeding which might affect the use or enjoyment of any portion of the Acquired Assets;



- (b) enforcing, levying, attaching, collecting, or otherwise recovering by any manner or means whether directly or indirectly any judgment, award, decree, or order against Debtor, Debtor's estate, or the Property, including the Acquired Assets, relating to any obligation which arose prior to the Effective Date;
- (c) creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any Lien or Encumbrance against Debtor, Debtor's estate, or the Property, including the Acquired Assets;
- (d) asserting any right of subrogation, or recoupment of any kind, directly or indirectly against any obligation due Debtor, Debtor's estate, or the Property, including the Acquired Assets; and
- (e) proceeding in any manner in any place whatsoever that does not conform to or comply with the provisions of the Plan.

#### **X. EFFECT OF CONFIRMATION**

Except as otherwise provided in the Plan or the order confirming the Plan, the confirmation of the Plan vests all of the property of the estate in Debtor free and clear of all Claims, liens and encumbrances arising prior to the Confirmation Date unless specifically provided for in the Plan. The provisions of the Plan, if confirmed, shall bind Debtor, all Creditors, Equity Holders, and any entity acquiring property under the Plan, whether or not the Claim or Interest of such Creditor, Equity Holder, or entity is impaired under the Plan and whether or not such Creditor, Equity Holder, or entity has accepted the Plan.

#### **XI. BEST INTEREST OF CREDITORS AND FEASIBILITY STANDARD**

Under Section 1129(a)(7) of the Code, the Court must find that either all members of an impaired class of Claims or interests have accepted the Plan or that the Plan will provide a creditor who has not accepted the Plan with a recovery of property of a value, as of the effective date of the Plan, that is not less than the amount such holder would recover if Debtor were liquidated under Chapter 7 of the Code. This requirement is called the "Best Interest of Creditors Test". Debtor believes that the best interest of creditors test is satisfied because the Plan will

provide a distribution to unsecured creditors whereas in a Chapter 7 liquidation creditors would be entitled only to amounts left over after payments of more senior claims. Debtor believes that in a Chapter 7 liquidation, general unsecured creditors would not receive any distribution whatsoever.

## **XII. OBJECTIONS TO CLAIMS**

The Deadline to object to claims shall be 40 days prior to the confirmation hearing or some other date as established by Bankruptcy Court Order. A Claimant whose Claim has been objected to in accordance with Section 11.1 of the Plan, must file with the Court and serve upon the parties identified in Section 14.1 a response to such claim objection within 30 days after service of any objection to its Claim. Failure to file such a response within the 30-day time period shall be cause for the Bankruptcy Court to enter a default judgment against the non-responding Claimant and to thereby grant the relief requested in the Claim objection. Debtor may request the Bankruptcy Court to estimate any Claim for purposes of voting on this Plan or Allowance pursuant to Section 502(c) of the Bankruptcy Code.

Distributions made by Debtor under the Plan shall be made only to the holders of Allowed Claims. Until a Disputed Claim becomes an Allowed Claim, the holder of that Disputed Claim shall not receive the consideration otherwise provided to such Claimant under the Plan.

Debtor shall deposit the Distributions reserved for the holders of Disputed Claims in a reserve fund called the Disputed Claims Reserve. Debtor shall hold the Disputed Claims Reserve in trust for the benefit of the holders of Allowed Claims whose Distributions are unclaimed and the holders of Disputed Claims pending determination of their entitlement thereto under the terms of the Plan. When a Disputed Claim becomes an Allowed Claim, Debtor shall

release and deliver the Distributions reserved for such Allowed Claims from the Disputed Claims Reserve, together with any earned interest attributable to such Distribution.

### **XIII. EXECUTORY CONTRACTS**

All Executory Contracts not otherwise assumed, assumed and assigned, or rejected pursuant to Section 365 of the Bankruptcy Code prior to the Effective Date shall be deemed rejected as of the Effective Date. Notwithstanding anything to the contrary set forth in the prior sentence, Debtor may designate any Executory Contract to be assumed or assumed and assigned on or before the Effective Date and such Executory Contract shall be assumed or assumed and assigned as of the Effective Date.

Entry of the Confirmation Order shall constitute the approval, pursuant to Sections 363(b), (f) and (m) and 365(a) and (f) of the Bankruptcy Code, of (i) the assumption or assumption and assignment of the Executory Contracts and (ii) the rejection of the remaining Executory Contracts.

Unless the Bankruptcy Court, the Bankruptcy Code or the Bankruptcy Rules establish an earlier deadline with regard to the rejection of particular Executory Contracts, any Claims arising out of the rejection of Executory Contracts must be filed with the Bankruptcy Court and served upon Debtor no later than thirty days after entry of the Confirmation Order. Any Claims not filed within such time will be forever barred and will not receive any distributions under the Plan. All Claims arising from the rejection of an Executory Contract shall be treated in Class 2.

### **XIV. EXEMPTION FROM TRANSFER TAXES**

Pursuant to Section 1146(a) of the Bankruptcy Code, the issuance, transfer, or exchange of any security under the Plan, or the making, delivery, or recording of an instrument of transfer in connection with (a) the sale of the Acquired Assets and (b) financing incurred in connection

with the Purchaser's acquisition of the Acquired Assets, shall not be taxed under any law imposing a stamp or similar tax, including but not limited to any documentary stamp taxes or intangible taxes, whether on any deed, leasehold, assignment, promissory note, security agreement or mortgage.

**XV. RETENTION OF JURISDICTION**

The Bankruptcy Court even after the case has been closed, shall have jurisdiction to the fullest extent of the law over all matters arising under, arising in, or relating to Debtor's chapter 11 cases, including proceedings to:

- (a) ensure that the Plan is carried out;
- (b) enter such orders as may be necessary or appropriate to implement, consummate, or enforce the provisions of the Plan and all contracts, instruments, releases, indentures and other agreements or documents created in connection with the Plan or the Disclosure Statement;
- (c) consider any modification of the Plan under Section 1127 of the Bankruptcy Code;
- (d) hear and determine all Claims, controversies, suits and disputes against Debtor to the extent permitted under 28 U.S.C. § 1334;
- (e) allow, disallow, determine, liquidate, classify, estimate, or establish the priority or secured or unsecured status of any Claim, including the resolution of any and all objections to the allowance or priority of Claims;
- (f) hear, determine, and adjudicate any litigation involving the Avoidance Actions or other claims or causes of action constituting Estate Property;
- (g) decide or resolve any motions, adversary proceedings, contested or litigated matters and any other matters and grant or deny any applications involving Debtor that may be pending on or commenced after the Effective Date;
- (h) resolve any cases, controversies, suits, or disputes that may arise in connection with the consummation, interpretation, or enforcement of the Plan, or any entity's obligations incurred in connection with the Plan, or any other agreements governing, instruments evidencing, or documents relating to any of the foregoing, including the interpretation or enforcement of any rights, remedies, or obligations under any of the foregoing;

- (i) hear and determine all controversies, suits, and disputes that may arise out of or in connection with the enforcement of any and all subordination and similar agreements among various creditors pursuant to Section 510 of the Bankruptcy Code;
- (j) hear and determine all requests for compensation and/or reimbursement of expenses that may be made for fees and expenses incurred before the Effective Date;
- (k) enforce any Final Order, the Confirmation Order, the final decree, and all injunctions contained in those orders;
- (l) enter an order concluding and terminating this case;
- (m) correct any defect, cure any omission, or reconcile any inconsistency in the Plan or the Confirmation Order;
- (n) determine all questions and disputes regarding title to the Estate Property and any other assets of Debtor;
- (o) classify the Claims of any Claim holders and the treatment of these Claims under the Plan, to re-examine Claims that may have been allowed for purposes of voting, and to determine objections that may be filed to any Claims;
- (p) take any action described in the Plan involving the post-confirmation Debtor;
- (q) enter a final decree in Debtor's case as contemplated by Bankruptcy Rule 3022;
- (r) enforce, by injunction or otherwise, the provisions set forth in the Plan, the Trust, the Confirmation Order, any final decree, and any Final Order that provides for the adjudication of any issue by the Bankruptcy Court; and
- (s) enter and implement such orders as are necessary or appropriate if the Confirmation Order is for any reason modified, stayed, reversed, revoked, or vacated.

If the Bankruptcy Court abstains or exercises discretion not to hear any matter within the scope of its jurisdiction, nothing in the Plan shall prohibit or limit the exercise of jurisdiction by any other tribunal of competent jurisdiction.

**XVI. TAX ANALYSIS**

**THE FOLLOWING DISCUSSION IS A SUMMARY OF CERTAIN MATERIAL FEDERAL INCOME TAX CONSEQUENCES OF THE PLAN TO HOLDERS OF CLAIMS AGAINST THE DEBTOR, BUT IS NOT A COMPLETE DISCUSSION OF ALL SUCH CONSEQUENCES. CERTAIN OF THE CONSEQUENCES DESCRIBED BELOW ARE SUBJECT TO SUBSTANTIAL UNCERTAINTY DUE TO THE UNSETTLED STATE OF THE TAX LAW GOVERNING BANKRUPTCY REORGANIZATIONS. NO RULINGS HAVE BEEN OR WILL BE REQUESTED FROM THE INTERNAL REVENUE SERVICE (THE "IRS") WITH RESPECT TO ANY OF THE TAX ASPECTS OF THE PLAN. FURTHER, THE TAX CONSEQUENCES OF THE PLAN TO THE HOLDERS OF CLAIMS AGAINST THE DEBTOR MAY VARY BASED UPON THE INDIVIDUAL CIRCUMSTANCES OF EACH HOLDER. IN ADDITION, THERE MAY BE STATE, LOCAL, FOREIGN AND OTHER TAX CONSEQUENCES OF THE PLAN APPLICABLE TO PARTICULAR HOLDERS OF CLAIMS OR INTERESTS, NONE OF WHICH ARE DISCUSSED BELOW. THEREFORE, THE FOLLOWING SUMMARY IS NOT A SUBSTITUTE FOR CAREFUL TAX PLANNING AND ADVICE BASED UPON THE INDIVIDUAL CIRCUMSTANCES OF EACH HOLDER OF A CLAIM, AND YOU ARE URGED TO CONSULT WITH YOUR OWN TAX ADVISORS CONCERNING THE INDIVIDUAL TAX CONSEQUENCES OF THE TRANSACTIONS CONTEMPLATED BY THE PLAN, INCLUDING STATE, LOCAL AND FOREIGN TAX CONSEQUENCES.**

A portion of the consideration received pursuant to the Plan in payment of a Claim may be allocated to unpaid interest, and the remainder of the consideration will be allocated to the

principal amount of the Claim. The tax consequences of the consideration allocable to the portion of a Claim related to interest differ from the tax consequences of the consideration allocable to the portion of a Claim related to principal.

Holders of claims will recognize ordinary income to the extent that any consideration received pursuant to the Plan is allocable to interest, and such income has not already been included in such Creditor's taxable income. The determination as to what portion of the consideration received will be allocated to interest is unclear, and may be affected by, among other things, rules in the Internal Revenue Code (the "Tax Code") relating to original issue discount and accrued market discount. Holders of claims should consult their own tax advisors as to the amount of any consideration received under the Plan that will be allocated to interest. If amounts allocable to interest are less than amounts previously included in the Creditor's taxable income, the difference will result in a loss. Any amount not allocable to interest will be allocated to the principal amount of the Claim paid pursuant to the Plan, and will be treated as discussed herein.

Creditors receiving Cash generally will recognize gain or loss on the exchange equal to the difference between its basis in the Claim and the amount of Cash received that is not allocable to interest. The character of any recognized gain or loss will depend upon the status of the Creditor, the nature of the Claim in its hands and the holding period of such Claim. If a Creditor has treated a Claim as wholly or partially worthless and been allowed a bad debt deduction, the Creditor will include the amount of Cash received in income to the extent such Cash exceeds the Creditor's remaining tax basis in the Claim.

Creditors may be entitled to installment sales treatment or other deferral with respect to the distribution they receive subsequent to the Effective Date. Creditors may already have

claimed partial bad debt deductions with respect to their claims. The IRS may take the position that holders of Allowed claims cannot claim an otherwise allowable further loss in the year in which their Claim is allowed because they could receive further distributions. Thus, a Creditor could be prevented from recognizing a loss until the time when its Claim has been liquidated and distributions have been completed. If a Creditor is permitted to recognize a loss in the year of the Effective Date by treating the transaction as a “closed transaction” at such time, it may recognize income on any subsequent distribution.

In making distributions pursuant to the Plan, the Plan Administrator will comply with all withholding and reporting requirements imposed by federal, state or local taxing authorities. All distributions pursuant to the Plan will be subject to all applicable withholding and reporting requirements.

## **XVII. GENERAL PROVISIONS**

**A. Notices.** Whenever the Plan requires notice to be given to Debtor, such notice shall be given to the following parties at their respective addresses unless a prior notice of change of address has been served indicating a new address:

### **Debtor or Post-Confirmation Debtor:**

**Messana Stern, P.A.**  
Attn: Thomas M. Messana, Esq.  
P.O. Box 2485  
Fort Lauderdale, Florida 33303 -2485  
Facsimile : (954) 712-7401  
E-mail: [tmessana@MWS-law.com](mailto:tmessana@MWS-law.com)

### **Disbursing Agent**

Thomas N. Yianilos

**B. Dates.** The provisions of Bankruptcy Rule 9006 shall govern the calculation of any dates or deadlines referenced in the Plan.



C. **Further Action.** Nothing contained in the Plan shall prevent Debtor from taking such actions as may be necessary to consummate the Plan, even though such actions may not specifically be provided for within the Plan.

D. **Attachments.** All attachments to the Plan are incorporated herein by reference and are intended to be an integral part of this document as though fully set forth in the Plan. All exhibits to the Plan and Final PSA shall be filed with the Bankruptcy Court no later than ten days before the Confirmation Date.

E. **Plan Amendments.** Before the Confirmation Date, Debtor may modify, amend or withdraw the Plan, without approval of the Bankruptcy Court. After the Confirmation Date, Debtor may, subject to Bankruptcy Court approval and so long as it does not materially or adversely affect the rights set forth in the Plan of creditors and other parties in interest, amend or modify the Plan to remedy any defect or omission or reconcile any inconsistencies in the Plan or in the Confirmation Order, in such manner that may be necessary to carry out the purposes and intent of the Plan.

F. **Exhibits.** Exhibits to the Amended Plan or the Disclosure Statement can be filed with the Court no later than 10 days prior to the confirmation hearing and will be available on the docket, at the clerk of the Bankruptcy Court, or upon request of Debtor's bankruptcy counsel.

G. **Binding Effect.** Upon occurrence of the Effective Date, the Plan shall be binding on, and inure to the benefit of, Debtor, the Purchaser, the Claim holders and Interest holders, and their respective successors and assigns, regardless of whether those parties voted to accept the Plan.

H. **Governing Law.** Except to the extent that the Bankruptcy Code or Bankruptcy Rules are applicable, the rights and obligations arising under the Plan shall be governed by, and

construed and enforced in accordance with, the laws of the State of Florida, without giving effect to any conflicts of law principles.

### **XVIII. RISK FACTORS**

In deciding whether to accept or reject Debtor's Plan, a creditor or other claimant should consider risk factors. Each creditor or other claimant should consult its own counsel and financial advisors regarding risk factors. There are a number of conditions to performance under the Plan, including: NCB must approve and make the Plan Funding Commitment. Also, each of the conditions of the Purchase and Sale Agreement must be satisfied, and an order must be entered by the Bankruptcy Court confirming this Plan must be entered. Debtor cannot guarantee that each of these conditions will be satisfied or waived. Debtor believes that the primary risk of this Plan is that the Plan will not be confirmed or that one or more conditions to the Effective Date of the Plan will not occur.

### **XIX. ALTERNATIVES TO CONFIRMATION**

If this Case were converted to Chapter 7 liquidation, Debtor believes there would be no funds available for distribution to Debtor's Unsecured Creditors. Under Chapter 7 liquidation, a bankruptcy trustee would be appointed to take possession and title of Debtor's Property. While the Chapter 7 trustee can obtain permission to operate a business for a short period of time while the business is being liquidated, continued operation of Debtor's Property during a reasonable marketing period would be unlikely. Rather, the Chapter 7 trustee would likely either (i) propose an auction sale as Debtor, seeking to auction all of the Acquired Assets or (ii) abandon the Acquired Assets to NCB, which would then seek to foreclose upon the Acquired Assets. As much as the Plan Funding Commitment is the most significant source of funds for distribution, unless the Chapter 7 trustee negotiated a better plan funding commitment from NCB, unsecured

creditors would receive no distribution. The appointment of a Chapter 7 trustee would further burden the estate and its creditors with additional administrative expenses above and beyond those administrative claims that have already been incurred.

A further alternative to confirmation would be stay relief for NCB. In that instance, NCB would likely obtain immediate stay relief and proceed to foreclose upon the Acquired Assets and its interest in the Escrow Deposit settlement proceeds. This would leave virtually no recovery for Debtor's estate and Creditors.

**XX. RECOMMENDATION**

Debtor believes that the Plan is in the best interest of all Creditors and provides a recovery, where there otherwise might be no recovery. Therefore, Debtor recommends Creditors vote to accept the Plan.

**XXI. DISCLAIMERS**

**THE STATEMENTS CONTAINED IN THIS DISCLOSURE STATEMENT ARE MADE AS OF THE DATE HEREOF, AND UNLESS ANOTHER TIME IS SPECIFIED HEREIN, NEITHER THE DELIVERY OF THIS DISCLOSURE STATEMENT NOR AN EXCHANGE OF RIGHTS MADE IN CONNECTION HEREWITH, SHALL UNDER ANY CIRCUMSTANCE, CREATE AN IMPLICATION THAT THERE HAS BEEN NO CHANGE IN THE FACTS SET FORTH HEREIN SINCE THE DATE HEREOF.**

**ANY BENEFITS OFFERED TO THE HOLDERS OF CLAIMS OR INTERESTS, IN ACCORDANCE WITH THE PLAN, WHICH MAY CONSTITUTE SECURITIES, HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION (THE "COMMISSION"), OR BY ANY RELEVANT GOVERNMENT AUTHORITY OF ANY STATE OF THE UNITED STATES. NEITHER**

**THE COMMISSION, NOR ANY SUCH STATE AUTHORITY, HAVE PASSED UPON THE ACCURACY OF THIS DISCLOSURE STATEMENT OR THE MERITS OF THE PLAN.**


**NO REPRESENTATIONS CONCERNING DEBTOR, THE VALUE OF ITS PROPERTY, OR THE VALUE OF ANY BENEFITS OFFERED TO HOLDERS OF CLAIMS OR INTERESTS IN CONNECTION WITH THE PLAN, ARE AUTHORIZED BY DEBTOR, OTHER THAN AS SET FORTH IN THIS DISCLOSURE STATEMENT. ANY REPRESENTATIONS OR INDUCEMENTS MADE TO SECURE ACCEPTANCES WHICH ARE CONTRARY TO THE INFORMATION CONTAINED IN THIS DISCLOSURE STATEMENT SHOULD NOT BE RELIED ON BY YOU IN ARRIVING AT ITS DECISION. ANY SUCH ADDITIONAL REPRESENTATIONS OR INDUCEMENTS SHOULD BE REPORTED TO COUNSEL FOR DEBTOR, THOMAS M. MESSANA, ESQ., MESSANA STERN, P.A., P.O. DRAWER 2485, FT. LAUDERDALE, FL 33303. THE INFORMATION CONTAINED HEREIN HAS NOT BEEN SUBJECTED TO A CERTIFIED AUDIT. WHILE DEBTOR'S REAL ESTATE HAS BEEN APPRAISED, OPINIONS OF VALUE MAY DIFFER AND CIRCUMSTANCES MAY CHANGE.**

**- - THIS SPACE INTENTIONALLY LEFT BLANK - -**

**THIS DISCLOSURE STATEMENT HAS NOT BEEN APPROVED BY THE BANKRUPTCY COURT. THE APPROVAL OF THE BANKRUPTCY COURT OF THIS DISCLOSURE STATEMENT DOES NOT CONSTITUTE AN ENDORSEMENT BY THE COURT OF THE PLAN, OR A GUARANTEE OF THE ACCURACY OR COMPLETENESS OF THE INFORMATION CONTAINED HEREIN.**

DATED: October 22, 2009.

Waterbrook Peninsula, LLC, Debtor and  
Debtor-in-Possession

By:   
Name: THOMAS N. YIPOULOS  
Its: MANAGER

Messana Stern, P.A.  
Attorneys for Debtor  
Thomas M. Messana  
Scott Underwood  
401 East Las Olas Blvd  
Suite 1400  
Fort Lauderdale, FL 33301  
Fax No.: (954) 712-7401  
Email: tmessana@MWS-law.com

By: /s/ Scott A. Underwood  
Thomas M. Messana  
Scott A. Underwood