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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re:	Chapter 11
Farwest Pump Company,	Case No. 4:17-bk-11112-BMW
Debtor.	**FIRST STIPULATED NON-ADVERSE MODIFICATION TO SECOND AMENDED PLAN OF REORGANIZATION DATED JUNE 12, 2018- CLASS 6 SECURED CLAIM OF DAVID LEONARD**

Pursuant to 11 U.S.C. § 1127(a), debtor and debtor in possession Farwest Pump Company ("**Debtor"**) hereby gives notice of the following non-adverse modification to Debtor's Second Amended Plan of Reorganization, dated June 12, 2018 ("**Debtor's Plan**"). The Debtor seeks a determination of (a) compliance with the disclosure requirements under 11 U.S.C. § 1125 of the Bankruptcy Code and (b) appropriateness of the modification. Debtors' Plan is modified as follows:

Section 4.06 Class 6- Secured Claims of David Leonard.

(a) Description. Class 6 consists of the allowed claims of attorney David Leonard that are secured by an assignment of up to $400,000 proceeds from the Debtor's Claims against Secura Insurance Company under crime insurance policies issued to the Debtor. David Leonard filed a secured proof of claim seeking payment of $392,062.94

(b) Treatment. Class 6 is impaired by this Plan. ~~The Debtor will seek to avoid David Leonard's security interest in the insurance proceeds under 11 U.S.C. § 544. If successfully avoided, the holder to the allowed Class 6 claim will be treated as a general unsecured creditor. If not avoided, then holder of the allowed Class 6 Claim will be paid solely from its collateral without any recourse against the Debtor or Reorganized Debtor.~~ David Leonard will be paid 50% of all proceeds from insurance until he has been paid up to $200,000. This is expected to consist of:

- 50% of the $49,185 currently held by the Debtor (David Leonard's share would be $24,592.50)
- 50% of the $247,415 insurance claim currently being prepared by the Debtor (David Leonard's share would be $123,707.50)
- 50% of all other insurance proceeds as soon as they are received by the Debtor, up to aggregate total payment of insurance proceeds to David Leonard of $200,000 (If the above two are both paid first, then this third bullet would apply to the next $103,400 of insurance proceeds, of which David Leonard would receive 50% or $51,700).

- David Leonard will be granted an allowed general unsecured claim for $243,762.94 to be paid pursuant to the Plan. (Note: there is "overlap" of $51,700 of David Leonard's claim that could be paid as a secured claim from insurance proceeds, as an unsecured claim, or a combination of both, whichever happens first. The unsecured claim will be reduced by up to $51,700 if paid first from the insurance proceeds, or the insurance payout will be reduced if this is first paid from the unsecured pool).

David Leonard would have the right to review and provide comments on all insurance claims prior to claims being filed with the insurer until the $200k cap is reached.

To the extent this plan treatment is a settlement of a potential avoidance actions under 11 U.S.C. §§ 544, or 549 that requires notice under Rule 9019, the Debtor will serve notice of this Non-adverse Modification as required by Rule 9019 Fed. R. Bankr. P.

The decision of whether to approve or reject a proposed compromise is addressed to the sound discretion of the Court and is to be determined by the particular circumstances of each case. *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson,* 839 F.2d 610, 620 (9th Cir. 1988); *In re Walsh Constr., Inc*., 669 F.2d 1325, 1328 (9th Cir. 1982).

It is well-established that "[c]ompromises are 'a normal part of the process of reorganization.'" *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424 (1968) (citing *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 130 (1939)). The function of compromise is to avoid litigation, which by its nature involves delay and expense. See *In re General Store of Beverly Hills*, 11 B.R. 541 (9th Cir. BAP 1981); see also *In re A & C Properties*, supra at 1384.

Finally, in reviewing a proposed settlement, the Court must be mindful of the fact that the law favors compromise, *In re A & C Properties*, supra at 1381 *In re Blair*, 538 F.2d 849, 851 (9th Cir. 1976); see also *In re America West Airlines, Inc., 214 B.R. 382, 386 (Bankr. D. Ariz. 1997)* (holding that "the law favors compromise"), and that the bankruptcy court is uniquely situated to evaluate whether a compromise is in the best interest of the bankruptcy estate. *In re Walsh Constr., Inc*., supra at 1328.

The Supreme Court has held that compromises and settlements in bankruptcy should be approved if they are "fair and equitable*." Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, supra, 390 U.S. at 424. See also *In re Schmitt*, 215 B.R. 417, 420 (9th Cir. BAP 1997) (holding that the bankruptcy court's decision to approve a settlement should not be overturned as an abuse of discretion unless it leads to a result that is "neither in the best interests of the estate nor fair and equitable for the creditors.").

More specifically, according to the Ninth Circuit, a court should review the following factors in considering whether to approve a proposed settlement:

- The probability of success in the litigation;
- The difficulties, if any, to be encountered in the matter of collection;
- The complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and
- The paramount interest of the creditors and a proper deference to their reasonable views under the circumstances.

In re Woodson, supra at 620 (quoting *In re A&C Properties*, supra at 1381).

Consideration of these factors does not require the Court to decide questions of law or fact raised in the controversy to be settled, or to determine that the compromise presented in the best possible outcome. Rather, the Court need only canvass the issues to determine whether the settlement falls "below the lowest point in the zone of reasonableness." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). Accordingly, if the

Court finds that the compromise is reasonable, it should be approved. See *In re Planned Protective Services, Inc.*, 130 B.R. 94, 99 n. 7 (Bankr. C.D. Cal. 1991).

Further, in considering a proposed compromise and settlement "the bankruptcy judge may give weight to the opinions of the trustee, the parties and their attorneys." *In re A&C Properties*, supra at 1385. In weighing the opinions of Debtor, the opposing party, and their attorneys, the Court should consider the principals' belief that all of the factors bearing upon the appropriateness of the Settlement have been explored and that the compromise is fair, equitable, and the wisest course. *In re Blair*, supra at 851. Moreover, the Court may consider the competency and experience of counsel who support the compromise. *In re Texaco, Inc*., 84 B.R. 893, 902 (Bankr. S.D.N.Y. 1988); see also *In re Walsh Constr., Inc*., supra at 1328.

The Settlement and the Agreement meet the requirements of *In re Woodson*, supra, and *In re A&C Properties*, supra. The Parties submit that the Settlement and the Agreement are in the best interests of the creditors and this estate and should be approved by the Court as they, upon consummation: (1) it will immediately create unencumbered cash that can be used to pay unsecured and administrative claims; (2) the result of an avoidance action is highly uncertain, and surely would require significant time and expense to litigate. The Debtor first verbally assigned the insurance claims, and then executed a written absolute assignment dated as of January 1, 2017. David Leonard asserts that assignment, even an oral assignment, fully extinguishes the assignor's rights in the assigned insurance claims. *In re Anchorage Nautical Tours, Inc.*, 102 B.R. 741 (9th Cir. BAP 1989). A pre-petition assignment results in the assigned asset never becoming property of the debtor's bankruptcy estate. *Id*. In *In re Anchorage Nautical Tours*, a ship-owner orally assigned insurance claims as payment for accrued maintenance services, but filed a

Chapter 11 petition before the insurance funds were paid out. Initially, the bankruptcy court ruled that the assignee failed to obtain needed documentation and therefore the proceeds remained property of the estate. The BAP reversed, holding that "when a purchaser of a policy assigns the proceeds elsewhere, the assignee owns the proceeds as opposed to the bankruptcy estate of the policy owner; the broad concepts of estate property and its proceeds under section 541 do not bring in to the estate property that the debtor would not own if solvent."

David Leonard further asserts he complied with the requirements to perfect any security interest in the insurance claims. David Leonard asserts that security interests in insurance are not governed by UCC Article 9 (See ARS § 47:9109(D)(8); *In re Anchorage Nautical Tours, Inc.*, 102 B.R. at 744). Instead, under the common law, transfers of interests in insurance policies/claims are perfected either automatically or through notice to the insurer. Id.; but see *Bad Policy for Good Policies: Article 9's Insurance Exclusion*, Andrew Verstein, 2011. While David Leonard only notified the insurance company post-petition, thereby arguably violating the Automatic Stay or engaging in a transfer that is avoidable under 11 U.S.C. § 549, neither party has found controlling Arizona law governing perfection of an assignment. Successfully avoiding David Leonard's interest in insurance proceeds would require an adversary proceeding, discovery, likely summary judgment proceedings, that will take time and money, with an uncertain result. The Non-adverse Modification, on the other hand, reduces the potential secured claim, and unsecured claim without any delay or litigation expense.

Case authorities support the proposition that service of a modified plan on affected creditors constitutes adequate disclosure. *In re American Solar King Corp.*, 90 B.R. 808 (Bankr.W.D. Tex. 1988). In the *American Solar* case, the court held that where a plan modification does not materially and adversely impact parties who previously voted for the plan, preparation of a new disclosure statement was not necessary.

DATED this 31st day of July, 2018.

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APPROVED AS TO FORM AND CONTENT:

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