

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION**

IN RE:

CASE NUMBER:

HARVEST OAKS DRIVE ASSOCIATES, LLC,

10-03145-8-SWH

Debtor.

Chapter 11

**RESPONSE OF THE BANKRUPTCY ADMINISTRATOR
REGARDING DEBTOR'S THIRD AMENDED PLAN OF REORGANIZATION**

NOW COMES, the United States Bankruptcy Administrator for the Eastern District of North Carolina, by and through her undersigned counsel, to respectfully respond to the Debtor's Second Amended Plan of Reorganization ("Amended Plan"). The Bankruptcy Administrator supports the response in the following:

1. On July 20, 2010, the Debtor filed its initial Plan of Reorganization and Disclosure Statement. On September 8, 2010, the Bankruptcy Administrator filed a Statement in Response to the Debtor's Plan of Reorganization and Disclosure Statement, (Docket #105).
2. The Debtor has since filed a First Amended Plan of Reorganization and Disclosure Statement, (Docket entries #215 and #216). On June 30, 2011, the Bankruptcy Administrator filed a Statement in Response to the Debtor's First Amended Plan of Reorganization and Disclosure Statement, (Docket #239).
3. The Debtor has since filed a Second Amended Plan of Reorganization and Disclosure Statement, (Docket entries #268 and #269). The Bankruptcy Administrator did not file a Statement in Response.
4. The Debtor has since filed a Third Amended Plan of Reorganization ("Amended Plan") and Disclosure Statement, (Docket entries #323 and #322). To the extent not modified by the following herein, the Bankruptcy Administrator wishes to incorporate within this Amended Statement all recommendations, arguments and objections contained within the prior Statements.
5. The Debtor's Amended Plan of Reorganization addresses changes to the following Classes and/or claims:
6. **Class 1 – Administrative Costs:** The Debtor amends the prior Plan to state it is anticipated that Administrative Claims may be satisfied by a combination of estate and non-estate property.

6. **Class 2 - Ad Valorem Taxes:** The Debtor amends the prior Plan to state it is anticipated that Ad Valorem Taxes for 2011 may be satisfied by a combination of estate and non-estate property.
7. **Class 4 – Harvest Oaks Plaza, LLC (“Secured Lender”) Secured Claim:** On or about August 15, 2006, the Debtor executed a promissory note in the original principal amount of \$13,475,000.00 in favor of Column Financial, Inc. (“CFI”) (the “Note”). The Note provided for interest to accrue at a fixed rate of 6.13% per annum. The Note called for the Debtor to make monthly interest only payments from October 11, 2006 until September 11, 2009. Thereafter, the Debtor was to make monthly principal and interest payments of \$81,919.09 beginning October 11, 2009 and ending on August 11, 2016.

A final payment of all outstanding principal and interest was due September 11, 2016. In effect, beginning October 11, 2009, this loan was amortized over 30 years with a 7 year balloon. The Note provided for a pre-payment penalty based on a formula described in the Note if the Note was paid prior to the maturity date. It appears that the Note was assigned several times, and for the majority of this case was held by CSMC 2006-C5 Strickland, LLC. On October 12, 2011, the Debtor was informed that the Note was sold and all rights were assigned to Harvest Plaza, LLC. Hereinafter, CSMC and Harvest Plaza, LLC, shall be referred to as “Secured Lender”.

The Note also provided for several reserve accounts to be established, including reserves for property taxes and insurance, repairs, replacements and other reserve accounts as described in the loan documents. According to an objection to the use of cash collateral filed by Secured Lender, funds in the reserve accounts were used to pay certain property taxes for the 2009 tax year.

The Note is secured by essentially all of the Debtor’s assets including the shopping center located at 9650 Strickland Road, Raleigh, North Carolina and 8801 Lead Mine Road, Raleigh, North Carolina, rents received from the shopping centers, security deposits, the Tenant Improvements and Leasing Commissions Reserve account, Tax and Insurance Impound account, the Lease Termination Payment Reserve account, and the Replacement Reserve account. These security interests are evidenced by a Deed of Trust, Security Agreement and Financing Statement, effective as of August 15, 2006, and recorded August 16, 2006, in the Wake County Registry of Deeds, Book 12118, Pages 19-94; an Assignment of Leases and Rents, effective as of August 15, 2006, and recorded August 16, 2006, in the Wake County Registry of Deeds, Book 12118, Pages 95-106; a modification of the Deed of Trust, effective as of September 28, 2006, and recorded October 6, 2006, in the Wake County Registry of Deeds, Book 12206, Pages 2458-2469; and UCC Financing Statements recorded with the North Carolina Secretary of State and the Wake County Registry of Deeds. The Note, Deed of Trust as modified, Assignment and other loan documents were subsequently assigned to Wells Fargo, N.A., as trustee for the registered Holders

of Credit Suisse First Boston Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2006-C5, recorded on October 1, 2007 in the Wake County Registry, Book 12774, Pages 1901-1903; and then assigned to CSMC 2006-C5 Strickland Road, LLC, recorded on February 24, 2010 in the Wake County Registry, Book 13859, Pages 2007-2012. The preceding shall be collectively referred to as the "Loan Documents."

Secured Lender filed Claim Number 3 in the amount of \$16,743,992.78. The Debtor objected to the claim, and pursuant to an Order dated January 14, 2011, the Debtor's objection was allowed to the extent Secured Lender sought to recover interest at the default rate from August 2006 through August 11, 2009, and denied to the extent that Secured Lender sought to recover at the default rate from August 11, 2009 through April 21, 2010. The Debtor estimates that on the petition date, Secured Lender had a secured claim in the amount of \$14,909,208.22, which includes \$230,246.31 in taxes that Secured Lender paid on behalf of the Debtor for the 2010 property taxes.

Since the Petition Date, the Debtor has been making monthly adequate protection payments to Secured Lender based on the Debtor's monthly cash collateral budgets. The total of these payments through October 1, 2011 are \$702,906.04.

Pursuant to the Joint Pre-Trial Order dated August 4, 2011, the Parties agreed that a Confirmation Hearing should be scheduled after the Court determined the value of the Debtor's real property. The Debtor has asserted that the value of the real property is at least that of the Secured Lender's claim, such that there is not a deficiency. The Debtor estimates the Secured Lender's claim will be approximately \$14,001,691.17 as of November 1, 2011. Secured Lender has asserted that the value of the real property is approximately \$11,770,000.00 as of August 8, 2011, based upon the appraisal Mr. Chris R. Morris. If the Court were to adopt Secured Lender's appraisal, the Debtor estimates Secured Lender would have a deficiency of \$2,301,691.17 as of November 1, 2011. If a deficiency is found to exist, the Debtor asserts that it may treat this deficiency in one of two alternatives: (i) the deficiency may be grouped with the secured claim in this class; or (ii) the deficiency may be separately grouped in Class 5 below.

Other changes to Class 4 of the Debtor's Plan are shown in bold below:

The Debtor's obligation to Secured Lender shall remain secured by the same collateral as existed prior to the Petition Date. The following terms shall apply to the obligation:

- a. The obligation shall be treated as a secured obligation in an amount equal to **be determined by the Court. For feasibility purposes, the Debtor has estimated the Secured Lender shall have a secured claim in the amount of \$14,001,691.17 in the Alternative A \$11,700,000.00 and in Alternative B as shown on Exhibit D to the Disclosure Statement.**

b. From and after the Effective Date, interest shall accrue on the obligation at 4.75% per annum.

c. Secured Lender shall retain its lien(s) with the priority thereof, as existed on the Petition Date pursuant to § 1129(b)(2)(A)(i)(I) of the Bankruptcy Code, until its claim is paid as described herein.

d. The Debtor and Secured Lender shall enter into a lock box cash management agreement whereby all rents and security deposits received after the Effective Date shall be deposited into designated accounts maintained by Secured Lender for disbursement as described herein.

All accounts maintained by Secured Lender shall be held in FDIC insured accounts in the name of the Debtor and shall not be co-mingled with any other funds. The Debtor shall instruct all tenants to make their rent checks payable to Secured Lender in the manner indicated by Secured Lender. Each month, Secured Lender shall make the following disbursements from the lock box account for the management and operation of the Shopping Centers as follows:

i. First, Secured Lender shall deposit the sum equal to 1/12 of the amount necessary for the property taxes and property insurance into a Tax and Insurance Impound account in such amount to ensure timely payment of these bills. Secured Lender shall be responsible for making timely disbursements from these accounts to the appropriate recipient for property taxes and insurance coverage, or to the Debtor to pay such obligations.

ii. Second, payment to Secured Lender in the amounts outlined below in paragraphs (f) and (g) for debt service payments to Secured Lender.

iii. Third, **and if applicable, the payments due to Secured Lender pursuant to Class 5.**

iv. Third, a minimum payment to the Debtor equal to \$16,000 for Management and Operations of the shopping centers.

v. Fourth, the amount necessary to fund the unsecured creditor payment when such payment is due.

vi. All remaining rental proceeds after the distributions above are made shall be held in a separate interest bearing escrow account known as the Management & Upfit Account maintained by Secured Lender on behalf of the Debtor.

vii. All disbursements by Secured Lender from the lockbox shall be made on the first day of the month.

viii. The lockbox arrangement will commence on the later of (i) thirty (30) days following the Effective Date of the Plan; or (ii) the date upon which Secured Lender establishes the accounts for the lockbox and notice has been provided to all tenants concerning the instructions for making payments to the lockbox. Between the Effective Date of the Plan and the commencement of the lockbox arrangement, the Debtor will continue making cashflow payments according to an approved budget in the same manner as it is presently making under the existing cash collateral orders.

e. Secured Lender shall provide copies of the bank statement(s) for each account maintained by Secured Lender on behalf of the Debtor upon request within a timely manner.

f. Payments to Secured Lender. Payments to Secured Lender during the time in which the lockbox arrangement is in place shall be as follows:

i. For the first **eighteen (18)** months of the lockbox arrangement, Secured Lender shall receive interest only payments from the Debtor.

ii. Beginning on the **nineteenth (19th)** month of the lockbox arrangement, the Debtor shall make **sixty-six (66)** monthly payments of principal and interest to Secured Lender calculated utilizing the outstanding principal balance at a 30 year amortization schedule, with one final payment of all outstanding principal and interest due on the **66th** month ("Amortized Payment Amount").

g. Management and Upfit Account. Funds in this account shall be permitted to be used for the following purposes and shall be disbursed by Secured Lender to the extent of available funds:

i. For use by the Debtor to pay quarterly fees.

ii. For use by the Debtor to pay Administrative Claims not to exceed \$150,000.00.

iii. Such funds may be used to supplement the amount paid to the Debtor for management and operations costs when the monthly rent received is insufficient to result in a payment to the Debtor of at least **\$16,000.00** to use towards management and operating costs.

iv. To pay upfit costs for new tenants upon receipt of a written lease which requires reimbursement or payment by the landlord of upfit costs and presentation of an invoice for such upfit work.

v. To fund payment of taxes not escrowed.

vi. Any other expenses to which Secured Lender and the Debtor agree to pay.

h. All prepayment penalties shall be eliminated and the Debtor shall be entitled to pay all or any portion of the Secured Lender claim prior to the maturity date established in this Plan without penalty.

i. All covenants, reporting requirements, or other such similar terms in the Loan Documents not expressly set forth herein shall be eliminated.

j. All reserve accounts, excluding the Tax and Insurance Impound account or unless provided for in this treatment, shall be eliminated. The balance of any funds in such reserve accounts, including the Tenant Improvements and Leasing Commissions Reserve account, the Lease Termination Payment Reserve account, and the Replacement Reserve account, and all other reserve accounts, shall be transferred to the lockbox account, unless previously applied against the outstanding amount of the allowed claim.

k. The Tax and Insurance Impound account shall be maintained as an escrow account by Secured Lender and shall be used solely to fund payments for the property taxes and insurance premiums.

l. Security Deposits. All Security deposits shall be held in a separate Security Deposit Escrow Account and shall be held in escrow by Secured Lender in an account so designated on behalf of the Debtor, pending termination of the lease. Upon the termination of any lease when a tenant is entitled to have a security deposit refunded, Secured Lender shall timely remit such security deposit to the tenant upon receiving notice from the Debtor that a reimbursement is due. In the event that a security deposit is forfeited, the forfeited security deposit shall be treated as rent and used in accordance with the lockbox arrangement set forth above.

m. Reporting Requirements. Throughout the period of repayment described herein, the Debtor shall be required to comply with the following Financial Reporting Covenants:

i. The Debtor shall provide Secured Lender with a copy of each new lease or renewal of an existing lease within fifteen days of the execution by all parties of such document.

ii. The Debtor shall provide Secured Lender with notice of any tenant who has terminated their lease.

iii. Secured Lender shall designate an email address to which the Debtor shall email all of the Financial Reporting Covenants described herein.

m. Event of Default. Throughout the period of repayment as set forth herein, the following shall constitute an Event of Default:

i. The failure by the Debtor to maintain the shopping center property, normal wear and tear expected.

ii. The failure to make the payments to Secured Lender as described herein **and Class 5** by the due date.

iii. The failure to comply with any Reporting Requirements by the due date.

iv. The failure to turn over any rents to Secured Lender for deposit in the lockbox account which are paid by any tenant to the Debtor.

n. Remedies Upon Default. In the event of a post-confirmation default which remains uncured for 15 days following written notice from Secured Lender, Secured Lender shall be entitled to exercise all state law rights to foreclose on its collateral or request the appointment of a receiver which previously existed in the pre-petition Loan Documents.

8. **Class 5 – Harvest Oaks Plaza, LLC (“Secured Lender”) Deficiency Claim:** Debtor added this class to provide for the deficiency claim of Secured Lender, if any is found to exist. This class will be unimpaired.

Pursuant to Joint Pre-Trial Order dated August 4, 2011, the Parties agreed that a Confirmation Hearing should be scheduled after the Court determined the value of the Debtor’s real property. The Debtor has asserted that the value of the real property is at least that of the Secured Lender’s claim, such that there is not a deficiency. The Debtor estimates the Secured Lender’s claim will be approximately \$14,001,691.17 as of November 1, 2011. Secured Lender has asserted that the value of the real property is approximately \$11,770,000.00 as of August 8, 2011, based upon the appraisal Mr. Chris R. Morris.

The obligation shall be treated as an unsecured obligation in an amount equal to the value determined by the Court. For feasibility purposes, the Debtor has

estimated that Secured Lender shall have a deficiency claim in the amount of \$2,301,691.17 as shown on Exhibit D to the Disclosure Statement as Alternative B. From and after the Effective Date, interest shall accrue on the obligation at 3.25% per annum. Payments to Secured Lender during the time in which the lockbox arrangement is in place (as described in Class 4) shall be as follows:

a. For the first **eighteen (18)** months of the lockbox arrangement, Secured Lender shall receive interest only payments from the Debtor.

b. Beginning on the **eighteenth (18th)** month of the lockbox arrangement, the Debtor shall make **sixty-six (66)** monthly payments of principal and interest to Secured Lender calculated utilizing the outstanding principal balance at a 30 year amortization schedule, with one final payment of all outstanding principal and interest due on the **66th** month ("Amortized Payment Amount").

9. **Class 6 – Tenant Leases:** The Debtor will assume these leases on the Effective Date to the extent such lease has not already expired according to its terms or has been expressly rejected or terminated.

Leases as of 10/19/2011:

Birkham Yoga
Café Asia
Capital City Cigars
Eastern Buffett
Frame Warehouse
Great Clips
Great Harvest Bread
Harvest Plaza Self Storage
J-Me
Kerr Drug
My Gym
Nina's Restorante
Neomonde
North Raleigh Ministries
Poppyseed Market
Salsa Fresh
Shoppes of Baileywick
Suzio's
UPS Store
Yarn Tree

10. **Class 8 – General Unsecured Claims:** Debtor's previous Plan included insiders with general unsecured and has separated them in this Amended Plan. Debtor has only included in this class the general unsecured claims, excluding any unsecured

claims of an insider as defined by § 101(31) of the Bankruptcy Code. The approximate total of non-insider general unsecured claims based on claims filed or scheduled, and projected deficiency claims, as of the date of the filing of this Plan is \$42,007.83.

The Debtor proposes this class to be paid in full, over a period of five (5) years, with quarterly payments, commencing eighteen (18) months after the Effective Date and continuing thereafter for a period of five years. This figure has been calculated at \$2,100.00 per quarter. The Debtor shall provide a promissory note to this Class in an amount equal to the amount to be paid to this Class.

10. **Class 9 – Subordinated Claims:** Debtor's previous Plan included insiders with general unsecured and has separated them in this Amended Plan. Debtor has only included in this class the general unsecured claims for insiders, as defined by § 101(31) of the Bankruptcy Code. The approximate total of general unsecured claims for insiders, based on claims filed or scheduled, and projected deficiency claims, as of the date of the filing of this Plan is \$2,569,352.85. The Debtor intends to file an objection to Claim Number 6 filed by Harvest Plaza Developers, LLC and asserts no amounts are due.

The Debtor shall not make payments to this Class until such time as the Class 8 General Unsecured Claims are paid in full. At such time the Debtor may pay these claims as agreed by between the parties.

11. **Means of Implementation and Execution of Plan V-K:** - The Debtor amended the prior Plan to add if administrative expenses have been paid, these funds shall be deposited in the management and Upfit Account.
12. **Means of Implementation and Execution of Plan V-N:** - The Debtor amended the prior Plan to add that Mr. Barbour shall be entitled to receive compensation for the later of (i) 18 months or (ii) until such time as Class 8 is paid in full.

The Debtor's Amended Plan generally meets the requirements of 11 U.S.C. §1122 as well as §1123(a)(1)-(4).

WHEREFORE, based upon the foregoing, the Bankruptcy Administrator objects to the approval of confirmation of the Amended Plan, as stated in her original and amended response, until such time as the conditions set forth under 11 U.S.C. §1129 are met at the Confirmation Hearing and such other and further relief as the court deems just and proper.

Respectfully submitted, this 8th day of November, 2011.

Marjorie K. Lynch
Bankruptcy Administrator

/s/ Parker M. Worth
Parker M. Worth
Staff Attorney

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CERTIFICATE OF SERVICE

I, Tanya L. Aycock, of 434 Fayetteville Street, Suite 620, Raleigh, North Carolina, 27601, certify:

That I am, and at all times hereinafter mentioned was, more than eighteen (18) years of age;

That on this day, I served copies of the foregoing document on the following:

Trawick H. Stubbs
Stubbs & Perdue
P.O. Box 1654
New Bern, N.C. 28563-1654

via CM/ECF

by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail.

I certify under penalty of perjury that the foregoing is true and correct.

Dated this 8th day of November, 2011.

/s/ Tanya Aycock
Tanya Aycock
Bankruptcy Analyst
Eastern District of North Carolina
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Raleigh, North Carolina 27601