UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
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In re:

MRA PELICAN POINTE APARTMENTS, LLC,

Debtor.
_____/

Case No. 11-32457-BKC-RBR

Chapter 11

FANNIE MAE'S OBJECTION TO DISCLOSURE STATEMENT FOR SECOND AMENDED PLAN OF REORGANIZATION PROPOSED BY MRA PELICAN POINTE APARTMENTS, LLC [ECF 171]

Secured Creditor, Fannie Mae ("Fannie Mae"), through counsel and pursuant to 11 U.S.C. § 1125(b) files this *Objection to Disclosure Statement for Second Amended Plan of Reorganization Proposed by MRA Pelican Pointe Apartments, LLC*, as follows:

A. Relevant Background

1. On August 8, 2011 (the "Petition Date"), MRA Pelican Pointe Apartments, LLC (the "Debtor") filed its voluntary Chapter 11 petition.

2. On August 19, 2011, Fannie Mae filed its *Expedited Motion for Relief from Stay (the "Stay Relief Motion")* [ECF 31]. In the interest of brevity the *Stay Relief Motion* is fully incorporated herein.

3. On September 9, 2011, the Debtor filed its *Plan of Reorganization (the "Plan")* [ECF 65].

4. On September 27, 2011, Fannie Mae filed its *Expedited Motion to Dismiss Case, or Alternatively, for Further Relief from the Automatic Stay to Allow Foreclosure Sale of the Property (the "Motion to Dismiss")* [ECF 89].[1]

5. On October 27, 2011, Debtor filed its *Amended Plan of Reorganization (the "Amended Plan")* [ECF 144] and *Disclosure Statement for Amended Plan (the "Amended Disclosure Statement")* [ECF 145] in an effort to difuse some of the allegations of bad faith on the part of the Debtor raised by Fannie Mae in the *Motion to Dismiss*.

6. On November 14, 2011, Fannie Mae filed its *Objection to Amended Disclosure Statement (the "Objection")* [ECF 166].

7. Debtor never filed a response to the *Objection*.

8. On November 15, 2011, Fannie Mae filed a complaint against the Debtor with this Court to determine the ownership of the funds that are being held by the Receiver, thereby initiating Adversary Proceeding No. 11-02797-RBR (the "*Adversary Proceeding*").

9. On November 16, 2011, Debtor filed its *Second Amended Plan of Reorganization (the "Second Amended Plan")* [ECF 170] and *Disclosure Statement for Second Amended Plan (the "Second Amended Disclosure Statement")* [ECF 171].

10. The *Second Amended Disclosure Statement* addresses only a few of the issues raised by Fannie Mae in the *Objection*.

[1] The Court heard the *Motion to Dismiss* and thereafter took the matter under advisement. Proposed orders are due on December 9, 2011. Accordingly, depending on how the Court rules on the *Motion to Dismiss*, the subject disclosure statement may be a nullity.

11. The Court has directed Fannie Mae to file this objection to the *Second Amended Disclosure Statement* on or before December 9, 2011.

B. Requirements of Bankruptcy Code Section 1125

12. Section 1125(b) of the Bankruptcy Code states as follows:

> An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as **containing adequate information**. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

11 U.S.C. § 1125(b) (emphasis added).

13. Section 1125(a)(1) of the Bankruptcy Code defines "adequate information" to mean:

> …information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of the holders of claims or interests of the relevant class to make an informed judgment about the plan....

11 U.S.C. § 1125(a)(1).

14. "Beyond the statutory guidelines described in § 1125(a)(1), the decision to approve or reject a disclosure statement is within the discretion of the bankruptcy court." *In re Howell*, 09-91538, 2011 WL 1332176, at * 2 (Bankr. N.D. Ga. Jan. 21, 2011) (citing *In re Aspen Limousine Service, Inc.*, 193 B.R. 325, 334 (D. Colo. 1996).

15. When determining whether the information provided in the disclosure statement is adequate the court should evaluate the information in light of the particular

circumstances of the case and the "need for a quick solicitation and confirmation." *Id*. (citing *In re El Comandante Management Co., LLC*, 359 B.R. 410, 414 (Bankr. D. Puerto Rico 2006)).

16. Relevant factors for evaluating the adequacy of a disclosure statement may include: (1) the events which led to the filing of a bankruptcy petition; (2) a description of the available assets and their value; (3) the anticipated future of the company; (4) the source of information stated in the disclosure statement; (5) a disclaimer; (6) the present condition of the debtor while in Chapter 11; (7) the scheduled claims; (8) the estimated return to creditors under a Chapter 7 liquidation; (9) the accounting method utilized to produce financial information and the name of the accountants responsible for such information; (10) the future management of the debtor; (11) the Chapter 11 plan or a summary thereof; (12) the estimated administrative expenses, including attorneys' and accountants' fees; (13) the collectability of accounts receivable; (14) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan; (15) information relevant to the risks posed to creditors under the plan; (16) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers; (17) litigation likely to arise in a nonbankruptcy context; (18) tax attributes of the debtor; and (19) the relationship of the debtor with affiliates. *Id*. (citing *In re Metrocraft Pub. Services, Inc.*, 39 B.R. 567, 567-68 (Bankr. N.D. Ga. 1984).

17. The proponent of the plan must provide information in a disclosure statement that would enable a hypothetical reasonable investor typical of holders of claims or interests

of the relevant class to make an informed judgment about the plan. *In re Valrico Square Ltd. P'ship*, 113 B.R. 794, 795 (Bankr. S.D. Fla. 1990) (Hyman, J.).

C. Objection to *Second Amended Disclosure Statement*

i. Inadequate Disclosure of Events Leading to Bankruptcy Filing

On July 23, 2010, Fannie Mae filed a foreclosure action in the State Court[2] to among other things, foreclose its mortgage on the Debtor's sole asset, a 300 unit multi-family housing development commonly known as "Whispering Isles Apartments" (the "Property"), Case No. CACE 10-030190 (the "State Court Action"). Thereafter, on October 18, 2010, the State Court entered its *Order Granting Leave to Amend Complaint* which deemed filed Fannie Mae's amended complaint, which complaint included two additional entities asserting interest in the Property.

Simultaneously with the filing of the original complaint, Fannie Mae filed its Motion for the Appointment of a Receiver along with supporting affidavits. On August 27, 2010, the State Court entered its *Order Granting in Part and Denying in Part Plaintiff Fannie Mae's Motion for Appointment of a Receiver (the "Rents Sequestration Order")*, providing for among other things, the sequestration of all rents generated from the Property.

On March 4, 2011, Fannie Mae filed its *Motion for Final Judgment of Foreclosure as to Real Property, Personal Property and Rents/Leases (the "Final Judgment Motion")*. Then, on March 23, 2011, Fannie Mae filed its *Emergency Motion for Appointment of a Receiver*

[2] Unless specifically defined herein, all capitalized terms shall have the same meaning as ascribed in the *Second Amended Disclosure Statement*.

(the "Emergency Motion"), as a result of the (1) continued deterioration and wasting of the property and (2) the Debtor's manager's deliberate course of action to cover-up the deplorable state of the property. After taking evidence on the *Emergency Motion*, on May 16, 2011, the State Court entered its *Order Granting Plaintiff Fannie Mae's Motion for the Appointment of a Receiver (the "Receiver Order")*, specifically finding that "[t]he Borrower is not maintaining the Property nor accurately reporting its condition to Fannie Mae, and the appointment of a receiver is necessary and appropriate." *Receiver Order*, p. 2. And pursuant to the *Receiver Order*, the State Court appointed the Receiver of the Property and since that date, Smith has continued in her position as receiver of the Property under the *Receiver Order* and the *Modified Order*.

The hearing on the *Final Judgment Motion* was scheduled for August 11, 2011 at 10:30 a.m. and if necessary, the matter was scheduled for trial on August 26, 2011. On August 10, 2011, the Debtor filed its bankruptcy petition.[3]

Section III of the *Second Amended Disclosure Statement* is deficient because it fails to contain any of this information. It is not appropriate for the Debtor to simply refer creditors to the State Court Action and not inform creditors of the important and compelling reasons as to why the Receiver was appointed by the State Court, especially in light of the fact that the *Second Amended Plan* provides for the Property to be turned right back over to the Debtor and its manager, Samuel Weiss (or why the Property will not continue to be maintained in disrepair once old management is put back into possession of the Property).

[3] The entry of the *Final Judgment* against the Property is discussed in section iv, *infra*.

Section II of the *Second Amended Disclosure Statement* is similarly deficient because it simply directs creditors, "to the reports attached to the Receiver's Affidavit [ECF No. 22]," for an explanation as to why the units are uninhabitable, instead of simply informing creditors that the units are uninhabitable because they have been severely damaged by mold and have other life/safety issues and have been in this terrible condition since prior to the Receiver taking control of the Property. *Second Amended Disclosure Statement*, at p. 8.

ii. Inadequate Disclosure of Future Management of Debtor

The *Second Amended Disclosure Statement* provides that Mr. Weiss will be the Debtor's manager but does not describe what his duties will be, nor does it describe any experience that Mr. Weiss has that will enable him to be the Debtor's manager. The *Second Amended Disclosure Statement* also fails to tell creditors how much time Mr. Weiss plans to spend at the Property, in South Florida, or even the United States during seven (7) years provided for by the *Amended Plan*.

The *Second Amended Disclosure Statement* should also state that the last time Mr. Weiss personally inspected the Property was approximately 18 months ago. It should also inform creditors that prior to the Receiver's appointment, the Debtor did not maintain a separate segregated bank account for tenant deposits in accordance with Florida law, which prohibits landlords from commingling tenant deposits with other funds and requiring tenant deposits be kept in separate bank accounts. The *Second Amended Disclosure Statement* should also state that prior to the Receiver's appointment, the Debtor, with the knowledge of Mr. Weiss, missed payroll tax payments for 12 pay periods in calendar year 2009 because it

was not generating sufficient revenue to pay all of the necessary expenses, and that the funds that should have been paid to the Internal Revenue Service, were instead used to pay operating expenses.

Moreover, the *Second Amended Disclosure Statement* fails to identify who will comprise the New Management of the Debtor and simply states that the Debtor "intends to hire Michael Phelan of Michael Moecker & Associates, Inc. as the Chief Restructuring Manager," but does not give any details as to the proposed compensation of Mr. Phelan, his responsibilities and the amount of time he will be spending at the Property. *Second Amended Disclosure Statement*, at p. 20; *See In re Adana Mortg. Bankers, Inc.*, 14 B.R. 29, 31 (Bankr. N.D. Ga. 1981) (denying approval of disclosure statement that did not disclose the identity or experience of the proposed management of the debtor's business).

iii. Inadequate Disclosure of Source of New Value Payments

The *Second Amended Disclosure Statement* states:

> [A] third party insider will provide the Debtor with: a) the First New Value Payment consisting of $9.700,000.00, and b) the Second New Value Payment consisting of $200,000.00, which the Debtor may utilize to fund any Plan Shortfall, Operational Shortfall, or other monetary shortfall under the Plan. Six (6) months after the Effective Date, a third party insider will provide the Debtor with the Third New Value Payment consisting of $200,000,00, which the Debtor may utilize to fund any Plan Shortfall, Operational Shortfall, or other monetary shortfall under the Plan. Equity is prepared to raise additional funds necessary to pay any additional shortfalls under the Plan. Also, on or before the Effective Date, a third party insider shall provide the Debtor with the Settlement Funds in the amount of $30,000.00, which shall be distributed to Fannie Mae on the Effective Date as set forth in section 5.01 of the Plan.

Second Amended Disclosure Statement, at p. 27.

But the source of the First New Value Payment must be disclosed as does the identity

of this "third party" and whether it is the same "third party" that is going to fund the First New Value Payment and Second New Value Payment, that is also going to fund the Third New Value Payment, or if there are going to be more than one "third party" to purportedly fund any of the New Value Payments and/or provide the Settlement Funds. *In re Davis*, 262 B.R. 791, 799 (Bankr. D. Ariz. 2001) (recognizing that the source and nature of the proposed new value must be disclosed so that a determination can be made whether it is truly from a "new source"); *In re SunCruz Casinos*, LLC, 298 B.R. 833, 842 (Bankr. S.D. Fla. 2003) (new value must come from an outside source); *In re Bolton*, 188 B.R. 913, 918 (Bankr. D. Vt. 1995) ("[d]ebtor's proffer of future payments from an uncertain source cannot satisfy the "new value" exception to the absolute priority rule").

The *Second Amended Disclosure Statement* should also state the particular and precise relationship between the Debtor and the "third party insider" and/or "third party insiders" that are purportedly funding the First New Value Payment and Second New Value Payment and whether the funds are going to be loaned to Mr. Weiss or some other arrangement(s) being made, and also disclose the terms and details of the repayment of any such loans and/or other arrangement(s).

The *Second Amended Disclosure Statement* is misleading because the "Third New Value Payment" is not a truly a "new value" contribution because:

> [T]he new contribution must be in money or money's worth, meaning that what the creditors are to receive in exchange for the equity in the reorganized debtor must have a present realizable value. It cannot merely be a promise to do something in the future, such as a promise to manage the reorganized debtor or guaranty a loan to the reorganized debtor.

In re SM 104 Ltd., 160 B.R. 202, 226 (Bankr. S.D. Fla. 1993).

In this case, the "Third New Value Payment" of $200,000.00, that is not to be provided to the Debtor until six (6) months after the Effective Date, is not a valid new value contribution and should therefore not be labeled as such. *In re Duval Manor Associates*, 191 B.R. 622, 635 (Bankr. E.D. Pa. 1996) (contribution of new value must be a necessary, substantial present contribution, taking place at or before the effective date of the plan").

As such, this "Third Party New Value Payment" appears to merely be a promise by an undisclosed "third party" insider in exchange for Mr. Weiss retaining his equity in the Debtor. The Debtor must disclose whether this unidentified "third party insider" is providing any guarantee of payment, whether the $200,000 is going to be escrowed and if so, where and by whom, and whether the $200,000.00 even exists.

The new value must be reasonably equivalent to what the contributor receives in exchange for the new value contributed under a plan. *In re Miami Ctr. Associates, Ltd.*, 144 B.R. 937, 942 (Bankr. S.D. Fla. 1992). The *Second Amended Disclosure Statement* makes no mention of the value of the equity that Mr. Weiss is supposed to be receiving under the *Second Amended Plan*. In fact, the *Second Amended Disclosure Statement* fails to inform creditors exactly who post-confirmation equity will be, rather leaving creditors to guess who Mr. Weiss's designee may be. Likewise, the *Second Amended Disclosure Statement*, other than suggesting that the equity will be held in escrow until Fannie Mae is paid in full, fails to provide any details of the escrow arrangement including the name of the escrow agent, the terms of the escrow arrangement, or what happens to the equity interests if Fannie Mae is not

paid in compliance with the terms of the *Second Amended Plan* or even whether equity has the power to exercise its equity interests while the interests are maintained in escrow.

Finally, the bald statement that, "[e]quity is prepared to raise additional funds necessary to pay any additional shortfalls under the Plan," without any further elaboration or detail whatsoever, is simply insufficient.

iv. Non-disclosure of Fannie Mae's Unsecured Claim

On October 20, 2011, the State Court entered an *Amended Uniform Final Judgment of Mortgage Foreclosure Nunc Pro Tunc to September 21, 2011 (the "Foreclosure Judgment")*, a copy of which is attached hereto as Exhibit "A". The *Foreclosure Judgment* is in the amount of $15,028,908.61.

Despite being entered nearly a month before the filing of the *Second Amended Disclosure Statement*, Debtor fails to even mention or otherwise reference the *Foreclosure Judgment* in the *Second Amended Disclosure Statement*. Fannie Mae maintains that the *Foreclosure Judgment* should not only be attached as an exhibit to the *Second Amended Disclosure Statement*, but that the Debtor should expressly discuss the *Foreclosure Judgment* in Section III of the *Second Amended Disclosure Statement*.

The *Second Amended Disclosure Statement* does not mention that since Section 506(a) of the Bankruptcy Code provides that an allowed claim of a creditor secured by a lien on the debtor's property is secured to the extent of the value of the creditor's interest in the estate's interest in the property, and an unsecured deficiency claim for the balance, Fannie Mae can assert such an unsecured claim for $3,028,908.61 (representing the difference

between the amount of the *Foreclosure Judgment* and the $12,000,000 value of the Property).

The *Second Amended Disclosure Statement* does not disclose that the Debtor has improperly forced Fannie Mae's to make the Section 1111(b) election by classifying its entire claim as secured in Class 1 of the *Second Amended Plan*. *In re 266 Washington Associates*, 141 B.R. 275, 285 (Bankr. E.D.N.Y. 1992) *aff'd sub nom*. *In re Washington Associates*, 147 B.R. 827 (E.D.N.Y. 1992) (citing *In re Meadow Glen, Ltd*., 87 B.R. 421, 426–27 (Bankr. W.D. Tex. 1988). The *Washington Associates* rationale is worth noting:

> Apparently recognizing that it cannot classify Citibank's unsecured deficiency claim and the other unsecured claims in separate unsecured creditor classes, the Debtor in the Amended Plan bunches the entire Citibank claim and would force Citibank to accept treatment as a fully secured creditor. While this proposed treatment may at first appear magnanimous on the Debtor's part it is, in fact, in direct violation of 11 U.S.C. §§ 506(a) and 1111(b). The practical effect of such classification is to vitiate Citibank's rights of suffrage as an unsecured creditor.
>
> As pointed out above, Section 506(a) entitles a secured creditor to an unsecured claim to the extent the claim is undersecured. Section 1111(b) expressly gives a class of secured creditors the right to elect whether their claims should be treated as fully secured or as secured claims to the extent of the value of the collateral and as unsecured claims for the deficiency. As the plain words of Section 1111(b) suggest, the choice of whether a secured claim will be treated as fully secured or split into secured and unsecured components belongs entirely to the creditor. The choices available to a secured creditor under Section 1111(b) surely include a statutory option to employ an unsecured deficiency claim to have a significant voice in, and if its claim is large enough, dominate the unsecured class so that it can avoid the genre of tactical classification of claim schemes being used in this case to silence Citibank.

Id.

The *Second Amended Disclosure Statement* should provide that it is Fannie Mae's

position that the Debtor has impermissibly made Fannie Mae's Section 1111(b) election in an improper attempt at preventing Fannie Mae's unsecured deficiency claim from dominating the Class 6 class of unsecured claims under the *Second Amended Plan* and preventing Fannie Mae from blocking confirmation with its rejection of the *Second Amended Plan*.

v. Inadequate Disclosure of Condition of Property

The *Second Amended Disclosure Statement* does not disclose the condition of the Property at the time that the Receiver took control of the Property or the current condition of the Property.

While Fannie Mae agrees that creditors should at least be referred to the *Receiver's Affidavit* filed on August 15, 2011 [ECF 22] and instructed to contact Debtor's counsel in order to be able to obtain a copy of the affidavit, which describes the condition of the Property on or about May 17, 2011 when the Receiver took control of the Property from the Debtor, the *Second Amended Disclosure Statement* should nevertheless state that Property had the following issues at that time the Receiver took control:

a. Bee infestation in one of the laundry rooms;

b. Sewage back up problems due to tree roots;

c. Exterior lighting not working;

d. Exterior grounds not maintained adequately;

e. Trash throughout Property; and

f. Vacant units were in deplorable condition including mold, no appliances and filled with trash.

The *Second Amended Disclosure Statement* should also refer to the fact that the Receiver authorized the retention of Calvin, Giordano & Associates ("CGA") to conduct an assessment of the Property due to the visible fungal growth (mold) in many of the units at the Property. The *Second Amended Disclosure Statement* should also refer to the July 7, 2011 Report of the Indoor Mold Assessment of Selected Units at Whispering Isles issued by CSA (the "CSA Report"), which concluded that 14 of the 20 units contained significantly elevated concentration levels of indoor fungal spores ("mold"), making those units uninhabitable. The *Second Amended Disclosure Statement* should specifically discuss: (i) what, if any, actions, are going to be taken to remedy the serious mold issues in the 14 units; (ii) when any such action will be taken; (iii) when the 14 units will be inhabitable and available for rent; and (iv) the amount of money it will cost to make these 14 units inhabitable.

vi. Inadequate Disclosure of Propriety of Proposed Interest Rate on Fannie Mae's Class 1 Claim and Penalization of Fannie Mae for Initiating the Adversary Proceeding

The treatment of the Class 1 Claim of Fannie Mae under the *Second Amended Plan* is summarized as follows:

> (1) Cash payment of **$970,000.00** to pay down principal (Court rules against Fannie Mae in *Adversary Proceeding*); or
>
> (2) Cash payment in the amount of **$970,000.00** less the funds held by the Receiver that may be turned over to Fannie Mae as is requested in *Adversary Proceeding*, to pay down principal (Court rules in favor of Fannie Mae in *Adversary Proceeding*); and
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> (3) Additional **$360,000.00** cash payment towards pay down of principal, provided Fannie Mae does not obtain any of the funds being held by the Receiver as requested in *Adversary Proceeding* (Court rules against Fannie Mae in *Adversary Proceeding*); or

> (4) No additional **$360,000.00** cash payment if Fannie Mae obtains the Funds held by the Receiver (Court rules in favor of Fannie Mae in *Adversary Proceeding*; and
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> (5) Additional **$30,000.00** pay down principal from Settlement Funds regardless of outcome of *Adversary Proceeding*; and
>
> (6) beginning one month after the Effective Date, monthly payments, with an interest rate of **4%**, or as otherwise determined by the Court, on the principal balance of the loan, **amortized over thirty (30) years, for a period of seven (7) years, with a balloon payment at the end of the seventh (7th) year** in an amount that provides Fannie Mae with the total amount of its Allowed Fannie Mae Secured Claim; provided that, for the first three (3) years, the monthly payments shall constitute interest only, and for the remaining four (4) years, the monthly payments shall constitute principal and interest
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> (7) fifteen (15) days after the anniversary of the Effective Date, and each year thereafter until the total amount of the Allowed Fannie Mae Secured Claim has been paid, **annual payments of any profit earned by the Debtor** after the Debtor pays for operating expenses, reasonable capital expenditures, debt service, taxes, and any other obligation set forth in the Plan, which amount shall be applied to the principal balance of the loan.

Second Amended Disclosure Statement, at p. 11.

There is no explanation of the propriety of the proposed interest rate of 4.0% amortized over thirty (30) years, for a period of seven (7) years, with a balloon payment at the end of the seventh (7th) year or why it should be considered the appropriate rate given Fannie Mae's related risk. Similarly, there is no explanation as to why it is reasonable for the Debtor to pay Fannie Mae's secured claim on an interest-only basis for the first three (3) years, with the remaining four (4) years, the monthly payments shall constitute principal and interest.

Fannie Mae believes that the Debtor will be relying on the case of *SPCP Group, LLC v. Cypress Creek Assisted Living Residence, Inc.*, 434 B.R. 650, 652 (M.D. Fla. 2010) (affirming

Judge Williamson's order confirming plan via cram down) to support of the Debtor's proposed treatment of Fannie Mae under the *Second Amended Plan*. But the proposed treatment of Fannie Mae does not fall in line with that case, where the bankruptcy court approved an interest rate of 2 percent above the prime rate with the balloon payment in six (6) years amortized over twenty (20) years. The prime rate today is 3.25% and therefore the Debtor would have to propose the rate of 5.25% with a balloon payment in six (6) years amortized over twenty (20) years to comply with the *Cypress Creek* case. And in fact, the *Second Amended Plan* reduced the proposed interest rate to 4% from 4.5% as set forth in the *Plan*. The *Second Amended Disclosure Statement* fails to discuss why the rate of 5.25% is not being proposed and why there was a reduction of the interest rate from 4.5% originally proposed in the *Plan* to 4.0% proposed in the *Amended Plan*.

The *Second Amended Disclosure Statement* does not even disclose the existence of the *Adversary Proceeding* in Section III or discuss how the outcome of the Adversary Proceeding may affect the Debtor's efforts to confirm its *Second Amended Plan*. Moreover, the *Second Amended Disclosure Statement* should also clarify that if Fannie Mae is successful in the *Adversary Proceeding*, Fannie Mae will be penalized by the Debtor in the amount of $360,000.00 and also explain the reason for penalizing Fannie Mae in this manner for simply bringing the *Adversary Proceeding*.

vii. Inadequate Disclosure that Based on Debtor's Own Projections, Operating Shortfalls Will Completely Use Up Second New Value Payment and Third New Value Payment Within 12 Months After Confirmation

The feasibility requirement for confirmation is found in 11 U.S.C. § 1129(a)(11), which

requires a finding that confirmation "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor." *In re Crosscreek Apartments, Ltd*., 213 B.R. 521, 539 (Bankr. E.D. Tenn. 1997). The purpose of this section of the Code is to "prevent confirmation of visionary schemes which promise creditors more under a proposed plan than that which the debtor can possibly attain after confirmation." *Id*. (citing *Berkeley Fed. Bank & Trust v. Sea Garden Motel and Apartments (In re Sea Garden Motel and Apartments*), 195 B.R. 294, 304 (D. N.J. 1996) (quoting *In re Trail's End Lodge, Inc.*, 54 B.R. 898, 903–04 (Bankr. D. Vt. 1985)).

To establish feasibility, a proponent must demonstrate that its plan has a reasonable prospect of success and is workable. *See In re Grandfather Mountain Ltd. Partnership*, 207 B.R. 475, 485 (Bankr. M.D. N.C. 1996). The test of whether a debtor "can accomplish what the plan proposes is a practical one and, although more is required than mere hopes and desires, success need not be certain or guaranteed." *Id.*

A critical issue for the Court to analyze when assessing the feasibility of a plan which provides for the debtor's continued operation is whether the debtor can generate "sufficient cash flow to fund and maintain both its operations and obligations under the plan." *In re Trevarrow Lanes, Inc.*, 183 B.R. 475, 482 (Bankr. E.D. Mich. 1995) (quoting *In re SM 104 Ltd*., 160 B.R. 202, 234 (Bankr.S.D.Fla.1993)). "Specifically, a plan proponent must show that its projections of future earnings and expenses are derived from realistic and reasonable assumptions and that it has the ability to make the proposed payments." *In re Rivers End Apartments, Ltd*., 167 B.R. 470, 476 (Bankr. S.D. Ohio 1994).

The projections attached as Exhibit D to the *Second Amended Disclosure Statement* show "Budgeted Monthly Collections" for the first three months after confirmation in the amount of $119,780.00 and total monthly payables (including the $44,333.00 payment to Fannie Mae) of $164,113.00. Simple arithmetic reveals that by the end of the twelfth month, the operating shortfalls will total $399.799.00.[4]

The *Second Amended Disclosure Statement* completely fails to explain or even address what will happen when the $400,000.00 of the Second New Value Payment and Third New Value Payment are completely used up and no longer available to fund the ongoing operating shortfalls subsequent to January 2013. But at that point, the Reorganized Debtor will be unable to make all of the plan payments and pay all of the operating expenses. Simply stating that, "[e]quity is prepared to raise additional funds necessary to pay any additional shortfalls under the Plan," without any details whatsoever, is insufficient. *Second Amended Disclosure Statement*, at p. 27. If the truth of the matter is that the Debtor will be unable to make the plan payments and pay its operating expenses subsequent to January 2013, the *Second Amended Disclosure Statement* should state this simple and undeniable fact.

viii. Inadequate Disclosure of the Adversary Proceeding

The *Second Amended Disclosure Statement* fails to acknowledge Fannie Mae filed the *Adversary Proceeding*, claiming that the funds held by the Receiver for which the Debtor

[4] The total of -$40,293 (months 1-3), -$38,433 (month 4). -$36,573 (month 5), -$34,712 (month 6), -$32,851 (month 7), -$30,991 (month 8), -$29,131 (month 9), -$27,270 (month 10), -$25,410 (month 11), -$23,549 (month 12), equals -$399,799.

wishes to use to fund the Plan are the Property of Fannie Mae.

ix. Inadequate Disclosure of Release Provisions

The *Second Amended Disclosure Statement* fails to disclose the Fannie Mae is suing Mr. Weiss personally, on account of his personal guaranty of the Debtor's obligations to Fannie Mae.

Notwithstanding that Bankruptcy Code Section 524(e) provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt," Sections I(1) and (2) of the *Disclosure Statement* appear to provide for a release of Mr. Weiss' personal obligations to Fannie Mae and to enjoin Fannie Mae from continuing its pending action against Mr. Weiss. Section I(3) of the *Disclosure Statement* provided for a release of all Claims against the Released Parties. The *Plan's* definition of "Released Parties" includes the "Debtor and each of its respective current and former directors, officers, employees, representatives, members, affiliates…." *Plan*, at p. 9. Mr. Weiss clearly fits into this definition.

The *Second Amended Disclosure Statement* must either: (a) confirm and clarify whether the *Plan* seeks to release and discharge Mr. Weiss' debt to Fannie Mae and enjoin Fannie Mae from continuing its pending action against Mr. Weiss; or (b) explain why any such release is necessary and appropriate in this case.

In the event that the Debtor seeks to release and discharge Mr. Weiss' debt to Fannie Mae and enjoin Fannie Mae from continuing its pending action against Mr. Weiss, the Disclosure Statement cannot be approved because Fannie Mae objects to any such release,

discharge and injunction. Fannie Mae points to the case of *In re M.J.H. Leasing, Inc*., 328 B.R. 363 (Bankr. D. Mass. 2005), where the disclosure statement provided for the issuance of release in favor of principals of debtor-corporations in order to prevent the principals from being held liable on their guarantees of corporate indebtedness. The court in that case did not approve the disclosure statement where the creditor's claims against the debtor's principals, while resting on same set of facts as its claims against debtor, were independent claims arising from their guarantee, recovery on which by creditor would not deplete estate, where the creditor affected by the release did not support it and the debtors' ability to make 100% payout contemplated in plan was in doubt. *Id.* This case is no different.

WHEREFORE, Fannie Mae respectfully requests the Court to enter an order denying approval of the *Disclosure Statement for Second Amended Plan of Reorganization Proposed by MRA Pelican Pointe Apartments, LLC* and providing for such other relief deemed appropriate under the circumstances.

Respectfully submitted on this 9th day of December, 2011.

/s/ Mark S. Roher
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CASE NO.: 11-32457-BKC-RBR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via CM/ECF to all parties registered to receive electronic noticing in this case on the 9th day of December, 2011.

/s/ Mark S. Roher
Mark S. Roher

G:\Clients\Fannie Mae\Whispering Isles - MRA Pelican\MRA Pelican Pointe Bankruptcy Case\Pleadings\objection to second amended disclosure statementv2.docx

IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: CACE 10-030190

FANNIE MAE,

Plaintiff,

v.

MRA PELICAN POINTE APARTMENTS, a foreign limited liability company; FLOORS BY DESIGN, INC., a Florida profit corporation; SHOP CARPET, CORP., a Florida profit corporation; CITY OF POMPANO BEACH, a municipal corporation of the State of Florida; A CUT ABOVE A LAWN AND TREE SERVICE, INC., a Florida profit corporation; HAYDEN ELECTRIC, INC., a Florida profit corporation; and CARPET REPLACEMENT SYSTEMS, INC., a Florida profit corporation,

Defendants.
_____/

AMENDED UNIFORM FINAL JUDGMENT OF MORTGAGE FORECLOSURE *NUNC PRO TUNC* TO SEPTEMBER 21, 2011

THIS action was tried before the Court. On the evidence presented

IT IS ADJUDGED that:

1. Plaintiff, **FANNIE MAE, 1422 Dallas Parkway, Suite 1000, Dallas, TX 75254-2916**, is due:

EXHIBIT "A"

Description	Amount
Principal	$ 11,677,000.00
Interest from April 1, 2010 to September 21, 2011 (*per diem* $1,949.41)	$ 1,050,732.07
Default Interest from June 26, 2010 to September 21, 2011 (*per diem* $1,297.44)	$ 587,741.22
Late Fees	$ 38,765.03
Yield Maintenance	$ 1,368,593.42
Monitor's Fees	$ 6,134.49
Property Needs Assessment	$ 2,500.00
BOVs (2 @ $500.00 each)Environmental Site Assessment	$ 1,000.00
Insurance Premiums	$ 178,297.48
Taxes Advanced	$ 322,086.31
Attorneys' Fees:	
Findings as to reasonable number of hours 609.70	
Findings as to reasonable hourly rate: $317.42	
Attorneys' fee total	$ 193,533.70
Funds Applied by Fannie Mae	($ 405,762.34)
Court costs, now taxed:	
Certified Copies	$ 37.00
Overnight Delivery	$ 266.81
Process Service Fees	$ 595.00
Title Search	$ 275.00
Recording Fees	$ 238.50
Filing Fee	$ 2,469.50
Photocopies	$ 2,217.10
Court Reporter/Transcript	$ 927.55
Court Dockets	$ 15.00

Other Professionals	$	95.00
Mileage Reimbursement	$	79.57
Courier Services	$	942.15
Postage	$	4.27
Parking	$	20.00
Online Research	$	104.78
TOTAL	**$**	**15,028,908.61**

(the "Total Debt") that shall bear interest at the rate of 6% per year from September 21, 2011.

2. Plaintiff holds a lien for the Total Debt superior to all claims or estates of defendant(s), on the following described property in Broward County Florida:

SEE ATTACHED EXHIBIT "A" FOR LEGAL DESCRIPTION

3. If the Total Debt with interest at the rate described in paragraph 1 and all costs accrued subsequent to this judgment are not paid, the clerk of this court shall sell the property at public sale on DECEMBER 6, 2011 to the highest bidder for cash, except as prescribed in paragraph 4, in accordance with section 45.031, Florida Statutes, using the following method: by electronic sale beginning at 10:00 am on the prescribed date at www.broward.realforeclose.com.

4. Plaintiff shall advance all subsequent costs of this action and shall be reimbursed for them by the clerk if plaintiff is not the purchaser of the property for sale, provided, however, that the purchaser of the property for sale shall be responsible for the documentary stamps payable on the certificate of title. If plaintiff is the purchaser, the clerk shall credit plaintiff's bid with the Total Debt with interest and costs accruing subsequent to this judgment, or such part of it, as is necessary to pay the bid in full.

5. On filing the certificate of title the clerk shall distribute the proceeds of the sale, so far as they are sufficient, by paying: first, all of plaintiff's costs; second, documentary stamps affixed to the certificate; third, plaintiff's attorneys' fees; fourth, the total sum due to plaintiff, less the items paid, plus interest at the rate prescribed in paragraph 1 from this date to the date of the sale; and by retaining any remaining amount pending the further order of this court.

6. On filing the certificate of sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed of all estate or claim in the property, except as to claims or rights under

chapter 718 or chapter 720, Florida Statutes, if any. Upon the filing of the certificate of title, the person named on the certificate of title shall be let into possession of the property.

7. Jurisdiction of this action is retained to enter further orders that are proper including, without limitation, a deficiency judgment.

IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THE FINAL JUDGMENT.

IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.

8. Additions, Modifications or Changes to Standard Form.

9. Any additions, modifications or changes to the provisions above may only be set forth in this paragraph.

a. No further order of Court is required to issue certificate of title in the event an assignment of bid is filed.
b. The Court finds that Plaintiff holds a lien further securing the payment of the Total Debt which is superior to any claim or estate of the Defendant with respect to the Personal Property described in **Exhibit "B"** attached and incorporated by reference.
c. The Court finds that Plaintiff has a proper security interest in the Leases and Rents derived from the Real Property (collectively, the "Rents") and the Court finds that the Plaintiff holds a lien further securing the payment of the Total Debt which is superior to any claim or estate of the Defendant with respect to the Rents. The Court hereby orders that all Rents, hereinafter received, shall be disbursed in accordance with the Modified Order Granting Plaintiff Fannie Mae's Motion for the Appointment of a Receiver, entered July 18, 2011, pending issuance of a Certificate of Title or further order of the Court. Within five (5) days of entry of the Certificate of Sale, the Receiver shall turn over any remaining Rents and other funds associated with the Real Property and Personal Property to Fannie Mae.[1]
d. The Personal Property will be sold with the Real Property in accordance with paragraph 3 above.

[1] This provision shall become effective upon the earlier of a further order of the Bankruptcy Court or dismissal of MRA Pelican's bankruptcy case.

ORDERED in Chambers at Ft. Lauderdale, Broward County, Florida, this _____ day of _____, 2011, *nunc pro tunc* to September 21, 2011.

RICHARD D. EADE

OCT 2 0 2011

HONORABLE RICHARD D. EADE
Circuit Court Judge

TRUE COPY

Copies furnished to:
All parties on the attached service list.

EXHIBIT A

Legal Description

All that certain lot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the City of Pompano Beach, County of Broward, State of Florida.

Parcel 1:

A portion of the NW 1/4 of the NE 1/4 of Section 23, Township 48 South, Range 42 East, Broward County, Florida; being more particularly described as follows:

Beginning at the Southwest corner of the NW 1/4 of the NE 1/4 of said Section 23; thence South 89°50'54" East, along the South line thereof, 496.10 feet to a point on the Westerly right of way of I-95; thence North 1°55'35" East, along said right-of-way thereof 460.38 feet; thence North 0°33'24" East, 590.62 feet to a point of curve; thence Northerly and Westerly along the arc of a circular curve to the left, having a radius of 149.11 feet, an arc distance of 108.71 feet; thence North 89°48'30" West, parallel with the North line of said Section 23, 310.88 feet (323.06 feet as measured); thence North 18°06'43" East, 21.02 feet to a point of a curve; thence Northerly and Westerly along the arc of a circular curve to the left having a radius of 260.00 feet, an arc distance of 81.32 feet; thence North 0°11'30" East, 70.0 feet to the Southerly right-of-way of Sample Road; thence North 89°48'30" West, 60.0 feet; thence South 0°11'30" West, 70.0 feet to a point of curve; thence Southerly and Westerly along the arc of a circular curve to the right, having a radius of 200.00 feet, an arc distance of 62.55 feet to a point of reverse curve; thence Southerly and Easterly long the arc of circular curve to the left having a radius of 292.45 feet, an arc distance of 19.21 feet; thence North 89°48'30" West, parallel with the North line of said Section 23, 109.24 feet; thence South 0°05'43" East, 1103.02 feet to the Point of Beginning; LESS portion thereof previously conveyed to State Road Department of Florida by Deed recorded in Broward County, Florida, in Official Records Book 4324, page 204, to wit;

A parcel of land in the NW 1/4 of NE 1/4 of Section 23, Township 48 South, Range 42 East, being more particularly described as follows:

Commence on the North boundary line of NW 1/4 of NE 1/4 of said Section 23, at a point 1153.62 feet South 88°40'14" West from the Northeast corner thereof; thence South 1°19'46" East 53 feet to the Point of Beginning, continue; thence South 1°19'46" East 70 feet to the beginning of a curve concave to the Northwesterly having a radius of 260 feet, run thence Southwesterly 42.20 feet along said curve through a central angle of 9°17'55" to a point; thence North 55°42'17" West 69.63 feet to a point on a curve concave to the Northwesterly having a radius of 200 feet; thence from a tangent bearing of North 0°55'25" West run Northwesterly 1.41 feet along said curve through a central angle of 0°24'11" to the end of curve; thence North 1°19'46" West 70 feet; thence North 88°40'14" East 60 feet to the Point of Beginning.

Parcel 2:

TOGETHER WITH

A parcel of land in the NW 1/4 of the NE 1/4 of Section 23, Township 48 South, Range 42 East, more particularly described as follows:

Commencing at the Northeast corner of said NW 1/4 of the NE 1/4; thence run (on assumed bearing) North 89°57'31" West,

[legal description continues on the following page]

953.62 feet along the North line of said NW 1/4 of the NE 1/4, to the Point of Beginning; thence run South 0°02'29" West 223 feet; thence run North 89°57'31" West 219.08 feet; thence run North 17°57'42" East 21.02 feet to the point of curvature of a curve to the left; thence run Northeasterly 81.32 feet along the arc of said curve to the left, having a radius of 260 feet, to a point of tangency; thence run North 0°02'29" East 123 feet to said North line of the NW 1/4 of the NE 1/4; thence run South 89°57'31" East 200 feet to the Point of Beginning. Excepting therefrom the North 53 feet thereof, said lands situate in Broward County, Florida, excepting therefrom the following described premises:

A parcel of land in the NW 1/4 of the NE 1/4 of Section 23, Township 48 South, Range 42 East being more particularly described as follows:

Commencing on the North boundary line of NW 1/4 of NE 1/4 of Section 23, Township 48 South, Range 42 East at a point 953.62 feet West from the Northeast corner thereof; thence South 01°19'46" East, 53.00 feet to the Point of Beginning; thence continue South 1°19'46" East, 112.64 feet to a point on a curve concave to the Southwesterly having a radius of 149.11 feet (149.11 feet calculated); thence from a tangent bearing of North 85°45'49" West run Northwesterly 18.83 feet along said curve, through a central angle of 7°14'04" (07°41'48" calculated) to the end of curve; thence South 89°40'14" West (South 88°40'14" West per F.D.O.T. Right-of-Way map) 184.58 feet to a point on a curve concave to the Northwesterly having a radius of 260 feet; thence from a tangent bearing of North 7°58'09" East run Northeasterly 42.20 feet along said curve through a central angle of 9°17'55" to the end of curve; thence North 1°19'46" West 70 feet; thence North 88°40'14" East, 199.96 feet to the Point of Beginning.

EXHIBIT B

PERSONAL PROPERTY DESCRIPTION

The Personal Property Description covers the following types (or items) of property:

1. **Improvements.** The buildings, structures, improvements, and alterations now constructed or at any time in the future constructed or placed upon the land described in Exhibit A attached hereto (the "Land"), including any future replacements and additions (the "Improvements");

2. **Fixtures.** All property which is so attached to the Land or the Improvements as to constitute a fixture under applicable law, including: machinery, equipment, engines, boilers, incinerators, installed building materials; systems and equipment for the purpose of supplying or distributing heating, cooling, electricity, gas, water, air, or light; antennas, cable, wiring and conduits used in connection with radio, television, security, fire prevention, or fire detection or otherwise used to carry electronic signals; telephone systems and equipment; elevators and related machinery and equipment; fire detection, prevention and extinguishing systems and apparatus; security and access control systems and apparatus; plumbing systems; water heaters, ranges, stoves, microwave ovens, refrigerators, dishwashers, garbage disposals, washers, dryers and other appliances; light fixtures, awnings, storm windows and storm doors; pictures, screens, blinds, shades, curtains and curtain rods; mirrors; cabinets, paneling, rugs and floor and wall coverings; fences, trees and plants; swimming pools; and exercise equipment (the "Fixtures");

3. **Personalty.** All equipment, inventory, general intangibles which are used now or in the future in connection with the ownership, management or operation of the Land or the Improvements or are located on the Land or in the Improvements, including furniture, furnishings, machinery, building materials, appliances, goods, supplies, tools, books, records (whether in written or electronic form), computer equipment (hardware and software) and other tangible personal property (other than Fixtures) which are used now or in the future in connection with the ownership, management or operation of the Land or the Improvements or are located on the Land or in the Improvements, and any operating agreements relating to the Land or the Improvements, and any surveys, plans and specifications and contracts for architectural, engineering and construction services relating to the Land or the Improvements and all other intangible property and rights relating to the operation of, or used in connection with, the Land or the Improvements, including all governmental permits relating to any activities on the Land (the "Personalty");

4. Other Rights. All current and future rights, including air rights, development rights, zoning rights and other similar rights or interests, easements, tenements, rights-of-way, strips and gores of land, streets, alleys, roads, sewer rights, waters, watercourses, and appurtenances related to or benefiting the Land or the Improvements, or both, and all rights-of-way, streets, alleys and roads which may have been or may in the future be vacated (the "Other Rights");

5. Insurance Proceeds. All proceeds paid or to be paid by any insurer of the Land, the Improvements, the Fixtures, the Personalty or any other part of the Collateral Property, whether or not Borrower obtained the insurance pursuant to Lender's requirement (the "Insurance Proceeds");

6. Awards. All awards, payments and other compensation made or to be made by any municipal, state or federal authority with respect to the Land, the Improvements, the Fixtures, the Personalty or any other part of the Collateral Property, including any awards or settlements resulting from condemnation proceedings or the total or partial taking of the Land, the Improvements, the Fixtures, the Personalty or any other part of the Collateral Property under the power of eminent domain or otherwise and including any conveyance in lieu thereof (the "Awards");

7. Contracts. All contracts, options and other agreements for the sale of the Land, the Improvements, the Fixtures, the Personalty or any other part of the Collateral Property entered into by Borrower now or in the future, including cash or securities deposited to secure performance by parties of their obligations (the "Contracts");

8. Other Proceeds. All proceeds from the conversion, voluntary or involuntary, of any of the above into cash or liquidated claims, and the right to collect such proceeds (the "Other Proceeds");

9. Rents. All rents (whether from residential or non-residential space), revenues and other income of the Land or the Improvements, including subsidy payments received from any sources (including, but not limited to payments under any Housing Assistance Payments Contract), including parking fees, laundry and vending machine income and fees and charges for food, health care and other services provided at the Collateral Property, whether now due, past due, or to become due, and deposits forfeited by tenants (the "Rents");

10. Leases. All present and future leases, subleases, licenses, concessions or grants or other possessory interests now or hereafter in force, whether oral or written, covering or affecting the Collateral Property, or any portion of the Collateral Property (including proprietary leases or occupancy agreements if Borrower is a cooperative housing corporation), and all modifications, extensions or renewals (the "Leases");

11. Other. All earnings, royalties, accounts receivable, issues and profits from the Land, the Improvements or any other part of the Collateral Property, and all undisbursed proceeds of the loan

secured by this Instrument and, if Borrower is a cooperative housing corporation, maintenance charges or assessments payable by shareholders or residents;

12. Imposition Deposits. Deposits held by the Lender to pay when due (1) any water and sewer charges which, if not paid, may result in a lien on all or any part of the Collateral Property, (2) the premiums for fire and other hazard insurance, rent loss insurance and such other insurance as Lender may require, (3) taxes, assessments, vault rentals and other charges, if any, general, special or otherwise, including all assessments for schools, public betterments and general or local improvements, which are levied, assessed or imposed by any public authority or quasi-public authority, and which, if not paid, will become a lien, on the Land or the Improvements, and (4) amounts for other charges and expenses which Lender at any time reasonably deems necessary to protect the Collateral Property, to prevent the imposition of liens on the Collateral Property, or otherwise to protect Lender's interests, all as reasonably estimated from time to time by Lender (the "Imposition Deposits");

13. Refunds or Rebates. All refunds or rebates of Impositions by any municipal, state or federal authority or insurance company (other than refunds applicable to periods before the real property tax year in which the Security Instrument is dated);

14. Tenant Security Deposits. All tenant security deposits which have not been forfeited by any tenant under any Lease; and

15. Names. All names under or by which any of the above Collateral Property may be operated or known, and all trademarks, trade names, and goodwill relating to any of the Collateral Property.

SERVICE LIST

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