IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
VIGNAHARA, LLC,	§	CASE NO. 16-32261-11
	§	(Chapter 11)
DEBTOR	§	

FIRST WESTERN SBLC, INC.'S OBJECTION TO CONFIRMATION OF DEBTOR'S SECOND AMENDED PLAN OF REORGANIZATION

Hearing set for March 6, 2017 at 9:00 a.m.

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TO THE HONORABLE BARBARA J. HOUSER, CHIEF UNITED STATES BANKRUPTCY JUDGE:

First Western SBLC, Inc. ("First Western"), a secured creditor in the above-referenced chapter 11 bankruptcy case, files this objection to the *Debtor's Second Amended Plan of Reorganization* (Dkt. No. 93, Ex. 1) and any amendment or supplement thereto filed by Vignahara, LLC as follows. For ease of reference, all capitalized terms not otherwise defined in this objection will have the definitions given in the Plan, and all citations in this objection to sections and page numbers refer to the particular section or page number of the Plan unless otherwise stated.

A. Limit on First Western's claim amount: the Plan does not satisfy section 1129(a)(1) of the Bankruptcy Code.

1. In one section, the Plan proposes to limit First Western's secured claim to a maximum amount of $2,473,064.29. (Sec. 1.46.) In another section, the Plan states as follows concerning First Western's Secured Claim:

> The amount of the First Western Secured Claim shall be $2,473,064.29, as of August 12, 2016, and shall continue to accrue interest at the rate specified in the Loan Documents. Any additional fees and costs incurred during this case must be approved by the Court with notice to the Debtor such not to include the default rate of interest or penalties.

(Sec. 5.1.)

2. The amount of First Western's secured claim was $2,473,064.29 as of August 12, 2016. However, that amount has increased since that date due to continued accrual of interest and additional reasonable fees, costs, and charges provided for under the Loan Documents and Texas law, even after applying all adequate protection payments received during the pendency of this bankruptcy case. First Western is entitled to have those additional amounts added to its

secured claim under section 506(b) of the Bankruptcy Code, up to the amount that would make its total secured claim amount equal to the value of its collateral. The Plan does not satisfy section 1129(a)(1) of the Bankruptcy Code because the limitation contained in section 1.46 of the Plan limiting First Western's secured claim to $2,473,064.29 violates section 506(b) of the Bankruptcy Code.

B. Non-debtor injunction: the Plan does not satisfy sections 1129(a)(1) and (3) of the Bankruptcy Code.

3. The Plan includes a blanket post-confirmation injunction that would prohibit First Western from enforcing the personal guaranties given by Binal Patel, Jagdishbhai Patel, Pooja Patel, and Gunvantiben Patel to the extent that any of those individuals are employed by the Debtor. (Sec. 1.53 and 7.7.) According to the Debtor's Fourth Amended Disclosure Statement (Dkt. No. 93, the "Discl. Stmt."), (a) Pooja Patel and Gunvantiben Patel are employees of the Debtor with no managerial roles, are not members of the Debtor, and will not be employed by the Debtor after confirmation (Discl. Stmt. at pp. 4-5 and 19-20); (b) Jagdishbhai Patel is the majority owner of the Debtor but provides only "managerial assistance" (Discl. Stmt. at pp. 4 and 19; Stmt of Fin. Affairs No. 28 [Dkt. No. 27]); and (c) Binal Patel is the minority owner of the Debtor and is responsible for the day to day management of the Hotel (Discl. Stmt. at pp. 4 and 19; Stmt of Fin. Affairs No. 28 [Dkt. No. 27]).

4. This Court, in *In re Seatco, Inc.*, 257 B.R. 469, 477 (Bankr. N.D. Tex. 2001), set the standard for the propriety of a temporary injunction looking to the two-factor test from *Feld v. Zale Corp. (In re Zale Corp.),* 62 F.3d 746, 761 (5th Cir. 1995), and the traditional injunction factors, which, in order for an injunction to be proper, must all be met by the Plan. *Seatco*, 257 B.R. at 476-77. The two-factor *Zale* test requires that (1) the debtor and the non-debtor to

benefit from the injunction "enjoy such an identity of interest that the suit against the non-debtor is essentially a suit against the debtor," and (2) that "the third-party action will have an adverse impact on the debtor's ability to accomplish reorganization." *Id.* A subsequent case in this District approving a *Seatco* like injunction is *In re Bernhard Steiner Pianos, USA, Inc.*, 292 B.R. 109, 116 (Bankr. N. D. Tex. 2002) (Hale, J.). In both *Seatco* and *Bernhard Steiner*, the non-debtor guarantor was essentially one and the same as the debtor and the success of the debtor was contingent upon the continued participation and efforts of the non-debtor guarantor. *Seatco*, 257 B.R. at 476; *Bernhard Steiner*, 292 B.R. at 117. By contrast, in *In re Couture Hotel Corp.*, 536 B.R. 712 (Bankr. N.D. Tex. 2015), this Court held that even where the non-debtor guarantors held managerial positions, managed accounting functions that were important to the debtor's operations, and were stockholders of the debtor, those connections to the debtor were not sufficient to meet the shared identify of interest for the first factor of the *Zale* test. *Couture Hotel*, 536 at 751-52.

5. Pooja Patel and Gunvantiben Patel do not meet the *Zale* identity of interest standard because they are not equity owners, have no managerial roles, are merely employees of the Debtor, and will not even be employed by the Debtor after confirmation. Jagdishbhai Patel does not meet the *Zale* identity of interest standard because he provides only limited managerial assistance. Binal Patel does not meet the *Zale* identity of interest standard because she is only a minority owner of the Debtor and there is no reason the Debtor's business would be contingent upon her personal participation and efforts in the day to day management of the Hotel as opposed to another qualified individual serving in that position. Consequently, the post-confirmation injunction is not authorized by the Bankruptcy Code or applicable law and would violate sections 1129(a)(1) and (3) of the Bankruptcy Code.

C. Breach of Red Roof Inn Franchise Agreement: the Plan does not satisfy section 1129(a)(3) of the Bankruptcy Code.

6. The Debtor proposes to complete the renovations to the Hotel required by the Red Roof Inn franchise agreement over a period of eighteen months after confirmation. (Discl. Stmt. at p. 13). However, the Red Roof Inn franchise agreement requires all of the renovations to be completed by November 6, 2017, just *eight* months after the confirmation hearing.[1] A chapter 11 plan that is premised upon violating applicable state law after confirmation cannot meet the confirmation requirement of section 1129(a)(3) of the Bankruptcy Code. *In re Flor*, 166 B.R. 512, 515-16 (Bankr. D. Conn. 1994). That same problem makes the Plan is unfeasible, as explained below.

D. Employees working for free: the Plan does not satisfy section 1129(a)(3) of the Bankruptcy Code.

7. The Debtor proposes to implement the Plan in part by having its two most senior employees work for free: Jagdishbhai Patel will render management assistance for no compensation (Discl. Stmt. at pp. 4 and 20); and Binal Patel will be responsible for the day to day management of the Hotel but will not receive a salary until cash flow permits (Discl. Stmt. at pp. 4 and 19-20).

8. The Fair Labor Standards Act and the Texas Labor Code both require that all employees must be paid at least the minimum wage. 29 U.S.C. § 206(a)(1);[2] Tex. Labor Code § 62.051. An employer cannot evade that requirement even if an employee voluntarily agrees to

[1] Order Approving Debtor's Execution of Franchise and Related Agreements with Red Roof Franchising, LLC (Dkt. No. 77) at p. 10 (Sec. 5.1.1 requires all renovations to be completed prior to the "Opening Date") and p. 51 (Opening Date deadline of Nov. 6, 2017).

[2] Although certain executives are exempt from the minimum wage requirements, 29 U.S.C. § 213(a)(1), they still cannot work for free. To qualify as an exempt executive, an individual must be paid a minimum of $455.00 per week. 29 CFR § 541.600(a).

work for free. Both statutes require an employer to pay for all work that is "suffered" or "permitted." 29 CFR § 785.6; Tex. Labor Code § 61.001(7). If work is performed, the employer must compensate the employee for his or her work regardless of any agreement to the contrary. *See* 29 CFR § 785.11 (even if the employer does not request the work and the employee does the work voluntarily, the employee's time is still "work time" and must be paid by the employer). The Debtor's proposal to have Jagdishbhai Patel and Binal Patel work for free would violate the Fair Labor Standards Act and the Texas Labor Code, which precludes confirmation under section 1129(a)(3) of the Bankruptcy Code.

E. Fair and equitable treatment for cram-down: the Plan does not satisfy section 1129(a)(8) or 1129(b)(1) of the Bankruptcy Code.

9. First Western is a secured creditor and is the only creditor in Class 1. (Sec. 5.1.) First Western has voted to reject the Plan, so the Plan does not satisfy 1129(a)(8) of the Bankruptcy Code. Therefore, the only possible path to confirm the Plan requires the Debtor satisfy the "fair and equitable" standard for First Western's secured claim for cram-down under sections 1129(b)(1) and (b)(2)(A) of the Bankruptcy Code. The Plan fails that standard for two reasons.

1. The Plan proposes to strip First Western's lien on funds held in a reserve account.

10. First, The Plan proposes to transfer the First Western Reserve, which consists of $47,250.15 in funds currently held by First Western and subject to First Western's lien,[3] to Harris County to satisfy part of the Debtor's prepetition tax liability. (Sec. 5.1.) Under section 1129(b)(2)(A)(i) of the Bankruptcy Code, when a debtor proposes to transfer a secured creditor's

[3] First Western's loan and security documents expressly state that the First Western Reserve is subject to First Western's lien, and First Western's lien is perfected by its possession and control of the funds. Tex. Bus. & Com. Code §§ 9.312(b)(1) and (3), 9.313(a), and 9.314(b).

collateral to another entity, the secured creditor must retain its lien in that collateral. The Debtor's proposal to transfer the First Western Reserve funds to Harris County would strip off First Western's lien in violation of 1129(b)(2)(A)(i).

11. To comply with section 1129(b)(2)(A), a chapter 11 plan must satisfy one of three clauses for treatment of a dissenting secured creditor's claim:

> (i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. § 1129(b)(2)(A).

12. Under clause (i), the property is retained by the debtor or transferred to another entity, and the creditor retains its lien and receives deferred cash payments Under clause (ii), the property is sold free and clear of the lien, subject to section 363(k), and the creditor receives a lien on the proceeds of the sale. Under clause (iii), the secured creditor receives the "indubitable equivalent" of its claim. *Id.* In *RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* 566 U.S. 639, 132 S. Ct. 2065 (2012), the Supreme Court held that the specific terms of clauses (i) and (ii) are exclusive and cannot be supplemented by the residual "indubitable equivalent" terms of clause (iii). 132 S. Ct. at 2072.

13. Here, the Debtor's proposed treatment of First Western's secured claim falls within clause (i), calling for First Western's collateral (the First Western Reserve) to be transferred to another entity (Harris County). However, the Debtor has not complied with the requirements of clause (i) because the Plan does not provide for First Western to retain its lien on the First Western Reserve. *RadLAX* prohibits the Debtor from falling back on the residual "indubitable equivalent" terms of clause (iii) as a substitute for complying with the specific requirements of clause (i).

14. The Seventh Circuit Court of Appeals applied the same logic adopted by the Supreme Court in *RadLAX* to clause (i) of section 1129(b)(2)(A) in *In re River East Plaza, LLC*, 669 F.3d 826 (7th Cir. 2012). In *River East*, Judge Posner cited the Seventh Circuit's opinion in *River Road Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642 (7th Cir. 2011), for the proposition that debtor could not retain the secured creditor's collateral (thereby triggering clause (i)) and avoid the requirement that the secured creditor retain its lien by falling back on the indubitable equivalence standard of clause (iii) by giving the secured creditor different collateral. *River East*, 669 F.3d at 829. The *River Road* opinion that Judge Posner cited to support that proposition was affirmed a short time later by the Supreme Court under a different name in *RadLAX*. In *River East*, Judge Posner recognized that the Supreme Court might reverse *River Road*, so he went on to rule in the alternative that the debtor's proposed treatment would fail under the indubitable equivalence standard of clause (iii) because the new collateral the debtor proposed to give the secured creditor (treasury bills) had a different risk profile from the existing collateral (real estate) even though the treasury bills might ultimately be worth more than the real estate. *River East*, 66 F.3d at 832.

15. A bankruptcy court in the Seventh Circuit likewise followed the Seventh Circuit's opinion in *River Road* (which the Supreme Court later affirmed as *RadLAX*) to deny confirmation of a plan that proposed for the debtor to retain all of the secured creditor's collateral without allowing the secured creditor to retain a lien on all of the collateral. *In re Olde Prairie Block Owner, LLC*, 464 B.R. 337 (Bankr. N.D. Ill. 2011). In *Olde Prairie*, the secured creditor held liens on two parcels of real estate and a parking lease. *Olde Prairie*, 464 B.R. at 340-41. The debtor's plan called for the debtor to retain both parcels of real estate and the parking lease (thereby triggering clause (i) of section 1129(b)(2)(A)) but to strip off the lien on one parcel of real estate (the Lakeside parcel), make a cash payment to the secured creditor equal to the value of the Lakeside parcel, and allow the secured creditor to retain its liens on the other parcel and the parking lease to secure the remainder of its secured claim. *Id.* The court denied confirmation, holding that the debtor could not retain the Lakeside parcel and avoid the requirement that the secured creditor retain its lien on that property by falling back on the indubitable equivalence standard of clause (iii) and paying the secured creditor cash equal to the value of the Lakeside parcel. *Id.* at 342.

16. This Court's ruling in *In re Couture Hotel Corp.*, 536 B.R. 712 (Bankr. N.D. Tex. 2015), does not provide a basis to confirm the Debtor's proposed Plan under the indubitable equivalence standard of clause (iii) of section 1129(b)(2)(A). First, it does not appear that the objecting secured creditor in *Couture Hotel* raised the *RadLAX* problem presented here. *RadLAX* is not mentioned anywhere in the *Couture Hotel* opinion. Although the plan in *Couture Hotel* proposed to allow the debtor to transfer the objecting secured creditor's cash collateral to other entities to fund plan payments, the opinion does not mention any argument being presented about clause (i) of section 1129(b)(2)(A) controlling the plan's proposed treatment of that claim to the

exclusion of clause (iii). Second, in *Couture Hotel* this Court emphasized the fact that the objecting secured creditor's other collateral had a substantial equity cushion to adequately protect the objecting secured creditor's interests. 536 B.R. at 748-49. The importance of a substantial equity cushion is highlighted by contrasting *Couture Hotel* with *In re Geijsel*, 480 B.R. 238, 270-71 (Bankr. N.D. Tex. 2012), in which Judge Jones rejected substantially identical plan terms due to the lack of an equity cushion in the objecting secured creditor's collateral. In the instant case, the Debtor acknowledges that there is no equity cushion in First Western's collateral. (Discl. Stmt. at p. 29.)

17. The Debtor's proposed treatment of the First Western Reserve would fail even under the indubitable equivalence standard of clause (iii) of section 1129(b)(2)(A). The Plan does not propose to give First Western any substitute collateral for the First Western Reserve. To the extent the Debtor contends that First Western would benefit by reducing the amount of a senior lien on the Hotel property by using the First Western Reserve to pay off the Harris County property tax claim, the argument would fail. As Judge Posner explained in his alternative reasoning in *River East*, substituted collateral cannot be the indubitable equivalent if it has a different risk profile from the original collateral, even if the substituted collateral might ultimately be more valuable that the original collateral. *River East*, 66 F.3d at 832. The funds held by First Western in the First Western Reserve obviously have a different risk profile than the Hotel property. Value fluctuations and the time and expense to liquidate the Hotel property are vastly different than for money held in a bank account. In *B.W. Alpha, Inc. v. First City Nat'l Bank (In re B.W. Alpha, Inc.)*, 100 B.R. 831, 833 (N.D. Tex. 1988), the district court ruled that real estate cannot be the indubitable equivalent of cash, at least where there is less than a 10%

equity cushion in the real estate. As mentioned above, the Debtor acknowledges that there is no equity cushion in First Western's collateral. (Discl. Stmt. at p. 29.)

2. The Plan proposes to replace the Hotel's furniture, which is subject to First Western's lien, with new furniture that would not be subject to First Western's lien.

18. Second, the Plan proposes to replace the Hotel's existing furniture, which is subject to First Western's lien, with new furniture that the Debtor will lease from B. Patel and J. Patel. (Sec. 7.1.) The Plan is silent as to what will happen to the existing furniture. First Western's loan and security documents expressly (a) require that the Debtor have good and indefeasible title to all furniture in the Hotel free and clear of any liens, encumbrances, security interests or adverse claims and (b) grant First Western a first priority security interest in all furniture in the Hotel. The Debtor's proposed treatment of First Western's lien on the Hotel furniture does not come within subsections (i) or (ii) of section 1129(b)(2)(A), leaving subsection (iii) as the only possible option to meet the "fair and equitable" standard for cram-down confirmation on this point.

19. Under section 1129(b)(2)(A)(iii), a secured creditor must realize the "indubitable equivalent" of its secured claim. The plan proponent has burden of proof of indubitable equivalence by a clear and convincing standard. *B.W. Alpha, Inc. v. First City Nat'l Bank (In re B.W. Alpha, Inc.),* 100 B.R. 831, 833 (N.D. Tex. 1988). The two elements for the indubitable equivalence standard are (a) whether the proposed treatment of the secured creditor is "completely compensatory" and (b) the likelihood that the secured creditor will be paid. *Brite v. Sun Country Dev., Inc. (In re Sun Country Dev., Inc.),* 764 F.2d 406, 409 (5th Cir. 1985); *B.W. Alpha,* 100 B.R. at 833; *see also, In re Couture Hotel Corp.,* 536 B.R. 712, 748-49 (Bankr. N.D. Tex. 2015) (finding indubitable equivalence where secured creditor's collateral had a substantial

equity cushion and projections showed debtor would accumulate at least $2.5 million in cash by the end of the plan).

20. The Debtor's proposal concerning the Hotel furniture is not fully compensatory, but rather is virtually non-compensatory. The existing furniture has significant value in place in the Hotel because it allows the Hotel to be operated as a going concern, but it will have virtually no value when it is removed from the Hotel. The new furniture will not offer any compensation to First Western because the Debtor will not own it and First Western will not have a lien on it. If the Plan were confirmed and then First Western later foreclosed on the Hotel, First Western would get only an empty hotel with no going concern value at all. Separating the furniture from the Hotel would reduce the value of the Hotel and virtually destroy the value of the furniture. The second element of the indubitable equivalence standard – the likelihood that First Western will be paid – is also missing here because the Plan is not feasible, as explained below.

F. Feasibility: the Plan does not satisfy section 1129(a)(11) of the Bankruptcy Code.

21. The feasibility test set forth in section 1129(a)(11) requires the Court to determine whether the proposed plan has a reasonable likelihood of success. *In re Couture Hotel Corp.*, 536 B.R. 712, 736 (Bankr. N.D. Tex. 2015). To meet that burden, the debtor must present proof through *reasonable* projections that there will be sufficient cash flow to fund the plan. *Id.* at 736-37. "Such projections *cannot be speculative, conjectural, or unrealistic.*" *Id.* at 737 (emphasis added).

1. The Debtor's projections do not have an adequate buffer.

22. Courts "should be wary of a plan in which virtually all of the income goes to paying off the plan without a sufficient buffer to weather economic storms." *In re Geijsel*, 480 B.R. 238, 257 (Bankr. N.D. Tex. 2012) (Jones, J.) (internal quotation marks and footnote

omitted). Here, the Debtor's projections show virtually no buffer in the first two years, projecting only $39,411 of cash flow in year 1and *negative* cash flow of $1,832 in year 2. (Discl. Stmt. Ex. 4 at pp. 5 and 7. The combined projected cash flow for years 1 and 2 ($37,579) are only 1.6% of the combined projected gross revenues for those years ($2,281,162). As explained below, the differences between the Debtor's projections in the original Debtor's Disclosure Statement filed last November (Dkt. No. 67) and its current projections are more than that 1.6% buffer. Also as explained below, the projections the Debtor made when it purchased the Hotel in 2013 were off by far more than 1.6%. The Debtor's projections do not have enough buffer for the Debtor to survive its own track record of unreliable projections, let alone an economic storm.

2. The Debtor's projections are totally unrealistic and the Plan is not feasible.

23. In evaluating the feasibility of a chapter 11 plan, courts court should ascertain the "root cause" of the bankruptcy and determine (1) whether it was the debtor's fault, and (2) whether it is gone or likely to be gone soon. *Geijsel*, 480 B.R. at 259. In the instant case, the Debtor does not propose to change anything from its failed pre-bankruptcy business, except to add even more financial obligations after confirmation.

24. The Debtor's Plan provides for the Debtor to operate the same Hotel it operated before bankruptcy (Discl. Stmt. at p. 18), with the same Red Roof Inn franchise it had before bankruptcy (*id.* at pp. 8, 10-11, and 13), with the same ownership and management it had before bankruptcy (*id.* at pp. 4 and 19-20), and with the same mortgage it had before bankruptcy (*id.* at p. 14). During the entire time the Debtor was in business before bankruptcy, it never generated enough income to cover all of its expenses (see detailed discussion below). Now the Debtor has several hundreds of thousands of dollars of additional obligations (see detailed discussion below) with the exact same business model, yet somehow the Debtor projects it can meet all of its

obligations with money to spare. The Debtor's projections are totally unrealistic and the Plan is nowhere close to being feasible.

3. The Debtor has a history of making unrealistic financial projections.

25. The Debtor's track record shows that its financial projections are completely unreliable. The Debtor provided First Western with financial projections when it obtained the loan to purchase the Hotel in 2013. Those projections showed net income of $292,073.00 in 2013, $568,976.26 in 2014, and $605,113.86 in 2015. Those projections were pure fantasy. In reality, the Debtor lost $46,062 in 2013, lost $205,921 in 2014, and as explained below never generated enough income to cover its expenses in 2015 and 2016. Also as explained below, the Debtor seriously underestimated payroll expenses in those projections and again in the agreed cash collateral order entered in this case.

26. In analyzing feasibility, "courts should be wary of debtors manipulating their projections by presenting a 'moving target,' that is, adjusting their projections or morphing them in a way that suggests gamesmanship." *Geijsel*, 480 B.R. 238, 258. Here, the projections attached as Exhibit 4 to the Discl. Stmt. differ significantly from the projections the Debtor filed with its original Debtor's Disclosure Statement (Dkt. No. 67) less than two months earlier. Following are several examples of the differences in the Debtor's two sets of projections:

Description	Original Discl. Stmt. (filed 11/21/16)	Current Discl. Stmt. (filed 01/11/17)
Net Annual Cash Flow, year 1	$1,423	$39,411
Net Annual Cash Flow, year 2	$110,074	($1,832)
Net Annual Cash Flow, year 3	$169,358	$72,759
Net Annual Cash Flow, year 4	$190,187	$79,842
Net Annual Cash Flow, year 5	$218,766	$106,276
Payroll, Payroll Taxes, and Security, years. 1-5	$267,426 - $308,501	$232,974 - $286,600
Bad Debt Expense, years 1-5	none	$25,804 - $31,936
Breakfast Expense, years 1-5	$55,768 - $63,773	$44,614 - $51,018

Computer and Internet Expenses, years 1-5	none	$6,000 every year
Furniture Rental, years 1-5	none	$12,000 - $48,000
Insurance Expense, years 1-5	$18,000 each year	$53,342 each year

4. Before bankruptcy, the Debtor never generated enough income to cover its expenses.

27. The Debtor was formed in 2013. (Discl. Stmt. at p. 4.) It lost $46,062 in 2013 and lost another $205,921 in 2014. (*Id.* at p. 5.) The Debtor claims that it had a "gain" of $13,805 in 2015, ignoring the fact that it failed to pay any part of the $99,590 owed for 2015 property taxes. (*Id.* at pp. 5 and 6.) The Debtor claims it had an even bigger "gain" of $45,707 in the first half of 2016 until the bankruptcy filing, ignoring the facts that (a) it had no money set aside for 2016 property taxes (*id.* at p. 14), (b) it owed $28,239 of franchise fees to Red Roof Inn before bankruptcy (*id.* at p. 18), despite the fact that the Red Roof Inn franchise is critical to the Debtor's business (*id.* at pp. 7 and 10), (c) it owed $10,168.82 for a water bill before bankruptcy (Proof of Claim No. 8-1), (d) it owed $35,504.50 for delinquent occupancy taxes before bankruptcy (Proof of Claim No. 1-1), and (e) it had accumulated approximately $25,000 of other unsecured debt before bankruptcy (Discl. Stmt. at p. 18).

5. Now the Debtor has several hundreds of thousands of dollars of additional debts.

28. If the Plan is confirmed, the Debtor will be saddled with more than $688,000 of additional debts over and above its regular ongoing expenses:

a. renovation costs of $350,000 to comply with Red Roof Inn's property improvement plan (Discl. Stmt. at p. 12);

b. more than $152,000 of increased secured debt owed to First Western (*id.* at pp. 5 and 17);

c. a judgment lien of $15,984.49 to Harris County/Houston Sports for delinquent occupancy taxes (*id.* at p. 17);

d. 2016 property taxes of $85,374 (*id.* at p. 17);

e. priority prepetition wage claims of $1,600 to insiders (*id.* at p. 17)

f. delinquent franchise fees of $28,239 to Red Roof Inn (*id.* at p. 18);

g. obligations totaling $5,468.69 for a ten percent dividend to other allowed unsecured prepetition claims (*id.* at p. 18); and

h. professional fees of more than $50,000 owed to Hiersche, Hayward, Drakeley & Urbach, P.C. and Reagan Stewart over and above their retainer balances (the $50,000 figure is based on professional fees through October 31, 2016, so the current amount is likely to be much higher) (*id.* at p. 18).

6. The Debtor's projections grossly underestimate post-confirmation expenses.

29. Following are several examples of expenses that are significantly underestimated in the Debtor's projections on pages 2 and 5 of Exhibit 4 to the Discl. Stmt. First Western reserves the right to show additional examples of underestimated expense projections at the confirmation hearing.

30. The Debtor's combined projections for Payroll Expense, Payroll Taxes, and Security Expense of $232,974 to $286,600 per year are grossly underestimated. One way to assess the reliability and soundness of a debtor's projections is to use the period of the bankruptcy case as a test-run to see if the debtor has been able to meet its financial projections. *Geijsel*, 480 B.R. 238, 258. In the instant case, the Debtor's most recent monthly operating report [Dkt. No. 101] shows payroll expenses (including payroll taxes) totaling $188,941.23 for

July through January 2017,[4] which would come out to $323,899.25 for a full year, with lower occupancy rates than the rates projected after confirmation (Discl. Stmt. pp. 10 and 14-15).

31. Another factor relevant to the reasonableness of a debtor's projections is a comparison of the debtor's cash collateral budget with its actual results during the bankruptcy case. *In re Couture Hotel Corp.*, 536 B.R. 712, 737 (Bankr. N.D. Tex. 2015). The Agreed Final Cash Collateral Order (Dkt. No. 40) entered in this case budgets $18,300 per month for the Debtor's payroll and payroll taxes, but the most recent monthly operating report (Dkt. No. 101) shows that the actual amounts significantly exceeded the budgeted amount every single month since the bankruptcy filing. The closest month was July 2016 in which the actual amounts were 15.2% ($2,783.49) over budget; the worst month was August 2016 in which the actual amounts were a whopping 84.2% ($15,409.51) over budget.

32. The Debtor's inability to project realistic payroll amounts carries all the way back to its acquisition of the Hotel. The Debtor's cash flow projections when it obtained the mortgage loan from First Western in 2013 showed payroll expenses, payroll taxes, management fees, and security expenses totaling $262,283.75 for the year 2015, yet the Debtor's 2015 federal income tax return shows actual payroll expenses, management fees, and security expenses totaling $344,840.

33. The Debtor's proposal to reduce payroll expenses by eliminating three employees, Pooja Patel (front desk manager), Angie Patel (front desk clerk), and Gunvantiben Patel (laundry) further confirms that the Plan is not feasible. (Discl. Stmt. at pp. 4-5 and 20.) The Debtor's monthly operating reports (Dkt. Nos. 46, 50, 59, 66, 83, 98, and 101, all at p. 8) shows

[4] June 2016 is left out of this comparison because it was only a partial month and the monthly operating report shows zero for payroll taxes during that month.

that the Debtor has employed and paid all three of those employees throughout this bankruptcy case. The Debtor's revenue projections are founded on higher occupancy rates than it had during this bankruptcy case. (Discl. Stmt. at pp. 10 and 14-15.) It defies logic to think the Debtor will be able to operate the same Hotel with the same management at a higher occupancy rate with three less employees. The Debtor's proposal to reduce payroll by having Jagdishbhai Patel and Binal Patel work for free (*id.* at p. 20) is not feasible because, as explained above, that arrangement would violate federal and state labor laws.

34. The Debtor's projections for Franchise Fees are understated by approximately $15,000 per year due to failure to account for additional license fees charged by Red Roof Inn for customers who are members loyalty programs.[5]

35. The Debtor's projections for Repairs and Maintenance during the first year are understated by approximately $50,000 (and overstated by that same amount during the second year) due to spreading the estimated $150,000 Repair Costs required by the Red Roof franchise agreement over eighteen months (Discl. Stmt. at pp. 12 and 13) when the franchise agreement expressly requires all of the repairs to be completed before November 6, 2017.[6]

36. The Debtor has projected expenses of $350,000 for Renovation Costs ($150,000 for Repair Costs and $200,000 for Furniture Costs) to meet the requirements of Red Roof Inn's franchise agreement based upon a proposal from 4th Dimension Builders attached as Exhibit "3" to the Discl. Stmt., but that proposal does not cover all of the things required in the Red Roof Inn

[5] Order Approving Debtor's Execution of Franchise and Related Agreements with Red Roof Franchising, LLC (Dkt. No. 77) at p. 9 (Sec. 4.4 requires the Debtor to pay an additional fee of 4.0% of gross room revenues generated by the Preferred Members Program).

[6] Order Approving Debtor's Execution of Franchise and Related Agreements with Red Roof Franchising, LLC (Dkt. No. 77) at p. 10 (Sec. 5.1.1 requires all renovations to be completed prior to the "Opening Date") and p. 51 (Opening Date deadline of Nov. 6, 2017).

Property Improvement Plan attached as Exhibit "2" to the Discl. Stmt. The Debtor has a history of underestimating the renovation costs needed to comply with Red Roof Inn's stamdards. which caused the Debtor to lose the Red Roof Inn franchise in early 2016 and ultimately forced the Debtor to file this bankruptcy case. (Discl. Stmt. at p. 7).

37. The Debtor's projections for $20,000 per year for repairs and maintenance in addition to the Repair Costs required by the Red Roof Inn Property Improvement Plan are unreasonably low for a Hotel of this size and age.

38. The Debtor's projections do not include any amount to pay the fees and expenses of their bankruptcy attorneys or financial advisor who are owed more than $50,000 over and above their retainer balances (the $50,000 figure is based on professional fees through October 31, 2016, so the current amount is likely to be much higher) (Discl. Stmt. at p. 18).

39. If even a small part of the foregoing corrections are made to the Debtor's projections, they will show that Debtor's monthly and annual cash flows for at least the first four years are negative with no way for the Debtor to make up the shortfalls.

G. Confirmation of the Plan should be denied.

40. For all of the foregoing reasons, confirmation of the Plan should be denied.

WHEREFORE, PREMISES CONSIDERED, First Western requests that the Court enter an order denying confirmation of the Plan and granting First Western such other and further relief, at law or in equity, to which First Western may be justly entitled.

Respectfully submitted,

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By: */s/ Kenneth A. Hill*
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ATTORNEYS FOR FIRST
WESTERN SBLC, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served concurrently with filing by ECF upon all persons who have filed ECF appearances in this case, including counsel of record for the Debtor.

/s/ Kenneth A. Hill
Kenneth A. Hill

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