

1 BRETT A. AXELROD, ESQ.
Nevada Bar No. 5859
2 MICAELA RUSTIA MOORE, ESQ.
Nevada Bar No. 9676
3 **FOX ROTHSCHILD LLP**
3800 Howard Hughes Parkway, Suite 500
4 Las Vegas, Nevada 89169
Telephone: (702) 262-6899
5 Facsimile: (702) 597-5503
Email: baxelrod@foxrothschild.com
6 mmoore@foxrothschild.com
7 *[Proposed] Counsel for Debtor*

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8 **UNITED STATES BANKRUPTCY COURT**
9 **DISTRICT OF NEVADA**

10 In re
11 AMERICAN WEST
DEVELOPMENT, INC., a Nevada
12 corporation,
13
14 Debtor.
15
16
17
18
19

Case No. BK-S-12-12349-MKN
Chapter 11
**MOTION FOR INTERIM AND FINAL
ORDERS PURSUANT TO 11 U.S.C. §§ 361,
362 AND 363 AND FED. R. BANKR. P.
4001(b) AND 4001(d): (I) AUTHORIZING
DEBTOR TO USE CASH COLLATERAL
AND PROVIDE ADEQUATE
PROTECTION PURSUANT TO
AGREEMENT WITH PRE-PETITION
LENDERS; (II) GRANTING RELATED
RELIEF; AND (III) SCHEDULING FINAL
HEARING**
Hearing Date: OST REQUEST PENDING
Hearing Time: OST REQUEST PENDING

20 American West Development, Inc. (“Debtor”), debtor and debtor in possession in the
21 above-captioned chapter 11 case (the “Chapter 11 Case”), respectfully submits this motion
22 (the “Motion”) for entry of an interim order (the “Interim Order”) and final order (the “Final Order”)
23 pursuant to sections 361, 362 and 363 of title 11 of the United States Code, §§ 101 *et. seq.*
24 (the “Bankruptcy Code”), Rules 4001(b) and 4001(d) of the Federal Rules of Bankruptcy Procedure
25 (the “Bankruptcy Rules”), and Rules 4001(b) and 4001(c) of the Local Rules for the U.S. Bankruptcy
26 Court, District of Nevada (“Local Rules”): (i) authorizing and approving, among other things,
27 (a) Debtor to use the cash collateral of the Pre-Petition Lenders (defined below), (b) Debtor to provide
28 adequate protection to the Pre-Petition Lenders, (c) the form and manner of service of this Motion; and

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3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 262-6899

(ii) scheduling interim and final hearings with respect to the relief requested herein. The proposed Interim Order is attached to this Motion as **Exhibit “1.”**

Debtor seeks authorization for the use of cash collateral in order to provide funding and liquidity for the ongoing operation of Debtor’s business and to fund the expenses of the Chapter 11 Case. Debtor has negotiated an agreement with the Pre-Petition Lenders (defined below) regarding the use of cash collateral (the “Cash Collateral Agreement”), a copy of which is attached as **Exhibit “B”** to the Omnibus Declaration of Robert M. Evans (the “Omnibus Declaration”), filed in support of Debtor’s First Day Motions on March 1, 2012 (the “Petition Date”).¹ Debtor is seeking to use cash collateral pursuant to a Cash Budget, a copy of which (pertaining to the first 13-week period following the Petition Date) is attached to the Cash Collateral Agreement as **Exhibit “A”** thereto (the “Initial Cash Budget”).

In compliance with Bankruptcy Rules 4001(b)(1)(B) and 4001(d)(1)(B) and Local Rules 4001(b) and 4001(c), Debtor provides the following additional information regarding the proposed Cash Collateral Agreement:²

<p>CITATION TO CASH COLLATERAL AGREEMENT/ INTERIM ORDER³</p>	<p>MATERIAL PROVISIONS OF CASH COLLATERAL AGREEMENT⁴</p>
<p>Cash Collateral</p>	<p><u>Entity with Interest in Cash Collateral:</u> The “<u>Pre-Petition Lenders,</u>”</p>

¹ Capitalized terms used, but not defined, herein shall have the meaning ascribed to such terms in the Cash Collateral Agreement.

² The following is a summary of the Cash Collateral Agreement and the proposed Interim Order. Nothing in this summary alters or amends the terms of the Cash Collateral Agreement or the proposed Interim Order, and to the extent of any conflict between this summary and the Cash Collateral Agreement or the Interim Order, the Cash Collateral Agreement or the Interim Order (as applicable) shall control.

³ The proposed Interim Order is attached to this Motion as **Exhibit “1.”**

⁴ All provisions listed below as being contained in the Cash Collateral Agreement and/or the proposed Interim Order are proposed to remain in effect if interim approval is granted, but final relief is denied, as provided under Bankruptcy Rule 4001(b)(2) unless otherwise noted.

<p>1 CITATION TO 2 CASH 3 COLLATERAL 4 AGREEMENT/ 5 INTERIM ORDER³</p>	<p>MATERIAL PROVISIONS OF CASH COLLATERAL AGREEMENT⁴</p>
<p>4 Agreement, ¶ B. 5 Interim Order, p. 2</p>	<p>which consist of California Bank & Trust (as Administrative Agent and as Lead Arranger) (in such capacity and together with each successor administrative agent, the “<u>Administrative Agent</u>”), and the other “Lenders” (together with their successors and assigns) party to that certain Term Loan Credit Agreement dated as of December 31, 2009 among the Pre-Petition Lenders, certain borrowers (including Debtor) and certain guarantors (as amended from time to time, and including exhibits thereto, the “<u>Credit Agreement</u>”).</p>
<p>9 Cash Collateral 10 Agreement, ¶¶ 1-2. 11 Interim Order, ¶ D.</p>	<p>Purposes for Use of Cash Collateral: From the Petition Date through the Termination Date (as defined below), Debtor shall be permitted to use, and the Pre-Petition Lenders shall consent to the use of, the Pre-Petition Lenders’ Cash Collateral (as defined in Bankruptcy Code section 363(a)), including, without limitation, Cash Collateral that consists of proceeds of Collateral (as defined in the Credit Agreement) owned by Debtor. Debtor shall have no right to use the Pre-Petition Lenders’ Cash Collateral after the occurrence and during the continuance of any Event of Default (as defined below).</p> <p>Subject to the Cash Budget (as defined below), Debtor shall be authorized to use Cash Collateral for (i) funding expenses associated with operating Debtor’s businesses and properties, (ii) making adequate protection payments to the Pre-Petition Lenders, (iii) paying expenses incurred for the administration of the Chapter 11 Case, including paying compensation of professional fees and expenses, (iv) paying contractual obligations, consistent with the Final Order, and (v) repaying borrowings under any debtor-in-possession financing (“<u>DIP Financing</u>”).</p> <p>Under no circumstances shall any of the Pre-Petition Lenders’ Cash Collateral be used to pursue any action or joinder in any action, counter-claim, proceeding, application, motion, objection, defense or other contested matter, the purpose of which is to seek any order, determination or similar relief (including conducting formal or informal discovery in connection therewith) (a) challenging the legality, validity, amount, priority, perfection or enforceability (as the case may be) of any claim of the Pre-Petition Lenders against Debtor or any lien of the Pre-Petition Lenders against Debtor’s property (collectively, the “<u>Pre-Petition Lenders’ Claims</u>”); (b) invalidating, setting aside, avoiding or subordinating, in whole or in part, any of the Pre-Petition Lenders’ Claims; (c) seeking authority to use any of the Pre-Petition Lenders’ Cash Collateral without the Pre-Petition Lenders’ consent, other than as provided herein; or (d) challenging the legality, validity, amount, priority, perfection or enforceability (as the case may be) of any claim of the Pre-Petition Lenders against Borrowers under the Credit Agreement; provided, however, that</p>

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 3800 Howard Hughes Parkway, Suite 500
 Las Vegas, Nevada 89169
 (702) 262-6899

<p>1 CITATION TO 2 CASH 3 COLLATERAL 4 AGREEMENT/ 5 INTERIM ORDER³</p>	<p>MATERIAL PROVISIONS OF CASH COLLATERAL AGREEMENT⁴</p>
	<p>should a statutory committee be appointed under Bankruptcy Code section 1102, such committee may use, subject to the Cash Budget, up to \$25,000 of Pre-Petition Lenders’ Cash Collateral, solely to investigate the Pre-Petition Lenders’ Claims; and provided further, however, that any challenge regarding the Pre-Petition Lenders’ Claims asserted by such committee(s) must be commenced on or before the earlier to occur of (x) twenty (20) days after the appointment of such committee; or (y) sixty (60) days after the Petition Date.</p>
<p>9 Cash Collateral 10 Agreement, ¶ 3. 11 Interim Order, ¶ 2.</p>	<p>Cash Budget: All use of the Pre-Petition Lenders’ Cash Collateral shall be subject to compliance with, in addition to the Cash Collateral Agreement and the Interim Order, an approved budget that is reasonably acceptable in form and substance to the Pre-Petition Lenders (as amended or modified from time to time, the “<u>Cash Budget</u>”), which Cash Budget shall reflect Debtor’s (a) budgeted cash receipts (including as a result of the receipt of proceeds from any DIP Financing advances) for the three (3) calendar months or thirteen (13) calendar weeks following the Petition Date, and (b) anticipated disbursements (including payments required under the terms of any DIP Financing) for each of the three (3) calendar months or thirteen (13) calendar weeks following the Petition Date; provided, however, that compliance with the Cash Budget shall be deemed satisfied if the actual aggregate expenditures for every four-week period (i.e. post-petition weeks one through four, weeks five through eight, etc.) do not exceed by more than twenty-five percent (25%) the aggregate budgeted amount for such four-week period as set forth in the Cash Budget.</p> <p>To the extent that the full amount of the expenses budgeted for a particular four-week period under the Cash Budget is not disbursed during such four-week period, the unused balance shall be added to the amount of budgeted expenses for ensuing four-week periods and the Cash Budget shall be deemed to be amended (and approved) to reflect the same, such that Debtor may use such unused budgeted amounts in subsequent four-week periods in addition to originally budgeted amounts for such four-week periods.</p> <p>The Initial Cash Budget includes projected DIP Financing draws for any week in which Debtor’s projected revenue and expenses would cause their total cash balance to drop below one million dollars (\$1,000,000). The Initial Cash Budget revenues are based on Debtor’s internally-prepared projections of its home sales—if actual home sales do not meet projections, then Debtor will need to increase borrowings under the DIP Financing above the amounts set forth in the Initial Cash Budget. The Initial Cash Budget is attached to the Cash Collateral Agreement as Exhibit “A”</p>

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 3800 Howard Hughes Parkway, Suite 500
 Las Vegas, Nevada 89169
 (702) 262-6899

<p>1 CITATION TO 2 CASH 3 COLLATERAL 4 AGREEMENT/ 5 INTERIM ORDER³</p>	<p>MATERIAL PROVISIONS OF CASH COLLATERAL AGREEMENT⁴</p>
	<p>there to. The Cash Budget may be modified with the written consent of Debtor and the Pre-Petition Lenders, without the need for Bankruptcy Court approval.⁵</p>
<p>7 Cash Collateral Agreement, ¶ 10. 8 Interim Order, ¶ 2.</p>	<p>Term: The Pre-Petition Lenders’ consent to Debtor’s use of the Pre-Petition Lenders’ Cash Collateral shall be effective through the earliest of (a) twelve (12) months from the Petition Date, unless (x) the confirmation hearing for Debtor’s chapter 11 plan has commenced on or before such date, in which case the foregoing twelve (12) month period shall be extended automatically to fifteen (15) months from the Petition Date without action or approval by Debtor, the Pre-Petition Lenders or the Bankruptcy Court, or (y) a date as otherwise agreed to in writing by Debtor and the Pre-Petition Lenders (for which no Bankruptcy Court approval will be required), (b) the date any chapter 11 plan confirmed in the Chapter 11 Case becomes effective, or (c) the occurrence of an Event of Default (defined below) that is no longer subject to cure (each, a “<u>Termination Date</u>”).</p>
<p>15 Cash Collateral Agreement, ¶ 6. 16 Interim Order, ¶¶ F & 2.</p>	<p>Adequate Protection for Pre-Petition Lenders: As adequate protection under Bankruptcy Code sections 361, 362, 363 and 552 for any diminution in the value as of the Petition Date of Pre-Petition Lenders’ interest in the Debtor Collateral (the amount of any such diminution may only be determined by agreement of Debtor and the Pre-Petition Lenders, or by order of the Bankruptcy Court after notice and a hearing) caused by the imposition of the automatic stay and/or Debtor’s use of Cash Collateral and other Collateral (a “<u>Value Diminution</u>”), the Pre-Petition Lenders shall receive:</p> <p>(a) monthly, on or before the first day of each month and continuing during the pendency of the Chapter 11 Case, adequate protection payments made by Debtor to the Administrative Agent for the benefit of the Pre-Petition Lenders in an amount equal to the highest non-default rate of interest applicable from time to time to amounts outstanding under the Credit Agreement (calculated based on a year having 360 days for the actual number of days in the month) multiplied by \$49,635,000 (the “<u>Adequate Protection Payments</u>”), and the automatic stay shall be vacated and modified to the extent necessary to permit Debtor to make such</p>

⁵ Where consent of the Pre-Petition Lenders is required, such consent shall be requested and obtained in accordance with the Credit Agreement, and subject to the provisions thereof.

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 3800 Howard Hughes Parkway, Suite 500
 Las Vegas, Nevada 89169
 (702) 262-6899

<p>1 CITATION TO 2 CASH 3 COLLATERAL 4 AGREEMENT/ 5 INTERIM ORDER³</p>	<p>MATERIAL PROVISIONS OF CASH COLLATERAL AGREEMENT⁴</p>
	<p>Adequate Protection Payments and the Pre-Petition Lenders to apply them against the Pre-Petition Lenders’ Claims;</p> <p>(b) replacement liens to secure the amount of any Value Diminution (the “<u>Replacement Liens</u>”), which Replacement Liens shall: (i) be subject and junior only to the Carve-Out (defined below), liens to secure the DIP Financing and any Prior Liens,⁶ (ii) attach to: (x) the Debtor Collateral and any proceeds thereof, and (y) causes of action under chapter 5 of the Bankruptcy Code and the proceeds thereof (“<u>Avoidance Actions</u>”), and any other assets of Debtor, and (iii) be in addition to the Pre-Petition Lenders’ Claims and liens</p> <p>(c) to the extent permitted by Bankruptcy Code section 507(b), a superpriority claim (the “<u>Pre-Petition Lenders’ Superpriority Claim</u>”) against Debtor’s estate, subject and junior only to the Carve-Out and any superpriority claim and lien of the DIP Financing lender.</p>
<p>14 Cash Collateral Agreement, ¶ 12. 15 Interim Order, ¶ 4.</p>	<p>No Marshalling: The Cash Collateral Agreement provides that the Pre-Petition Lenders shall not be subject to the doctrine of marshalling.</p>
<p>17 Cash Collateral Agreement, ¶ 7.</p>	<p>DIP Financing: The Pre-Petition Lenders shall consent to and not oppose Debtor’s request for approval of DIP Financing to be provided by AWH Ventures, Inc. (the “<u>DIP Lender</u>”) in the form to be separately approved in writing by Administrative Agent and Pre-Petition Lenders, consisting of a revolving credit facility in an amount not to exceed ten million dollars (\$10,000,000), and secured by (i) a first priority lien on the Avoidance Actions and any other previously unencumbered assets of Debtor,⁷ and (ii) a junior lien on the Collateral and any other assets of Debtor that are subject to a valid and perfected lien as of the Petition Date; provided, however, that the DIP Financing shall be subject to a subordination and intercreditor agreement agreed upon by the Pre-Petition Lenders and the DIP Lender.</p>

6 “Prior Liens” shall consist of any and all valid and duly perfected liens, mortgages or other security interests in the Collateral in existence and senior to the interests of Pre-Petition Lenders as of the Petition Date.

7 Debtor is not aware of any other previously unencumbered assets.

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 (702) 262-6899

<p>1 CITATION TO 2 CASH 3 COLLATERAL 4 AGREEMENT/ 5 INTERIM ORDER³</p>	<p>MATERIAL PROVISIONS OF CASH COLLATERAL AGREEMENT⁴</p>
<p>4 Cash Collateral Agreement, ¶ 8. 5 Interim Order, ¶ 3.</p>	<p>Carve-Out: The Pre-Petition Lenders have agreed to a carve-out (the “Carve-Out”) for (i) all fees required to be paid to the Clerk of the Bankruptcy Court and to the Office of the United States Trustee pursuant to 28 § U.S.C. 1930, and (ii) only to the extent amounts are not available under the Cash Budget, an amount not exceeding three million dollars (\$3,000,000) in the aggregate, which amount may be used after the occurrence and during the continuation of an Event of Default, to pay the fees and expenses of professionals retained by Debtor and any Committee that are allowed (or allowable) by the Bankruptcy Court⁸ (as to which allowed or allowable fees and expenses the Pre-Petition Lenders waive any right to seek disgorgement); provided, however, that (x) Debtor shall be permitted to pay compensation and reimbursement of expenses allowed, allowable or otherwise authorized by the Bankruptcy Court and payable under Bankruptcy Code sections 330 and 331 in accordance with the Cash Budget; (y) the Carve-Out shall not be reduced by the amount of any compensation and reimbursement of expenses paid or incurred (to the extent ultimately allowed or allowable by the Bankruptcy Court) prior to the occurrence of an Event of Default in respect of which the Carve-Out is invoked; and (z) the Pre-Petition Lenders waive any right to seek disgorgement thereof; and provided, further, that nothing herein shall be construed to impair the ability of the Pre-Petition Lender to object to the reasonableness of any of the fees, expenses, reimbursement or compensation sought by the professionals retained by Debtor or any Committee.</p>
<p>18 Cash Collateral Agreement, ¶ 11.</p>	<p>Events of Default: Upon written notice from Administrative Agent on behalf of the Pre-Petition Lenders, any of the following is an event of default (“Event of Default”) under the Cash Collateral Agreement (for purpose of items (i) through (vii) by way of a final order, the effectiveness of which has not been stayed): (i) appointment of a chapter 11 trustee with respect to the Chapter 11 Case; (ii) appointment of an examiner with expanded powers with respect to the Chapter 11 Case; (iii) conversion of the Chapter 11 Case to a case under chapter 7 of the Bankruptcy Code; (iv) dismissal of the Chapter 11 Case; (v) the Bankruptcy Court terminating Debtor’s authority to operate its business; (vi) approval of a motion granting a party (other than the DIP Financing lender) any lien, superpriority claim, or other administrative expense claim which is senior</p>

26 ⁸ For avoidance of doubt, fees and expenses payable via the Carve-Out are subject to any
 27 reasonableness standard imposed by the Bankruptcy Code, including, without limitation, section 330
 28 thereof.

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<p>1 CITATION TO 2 CASH 3 COLLATERAL 4 AGREEMENT/ 5 INTERIM ORDER³</p>	<p>MATERIAL PROVISIONS OF CASH COLLATERAL AGREEMENT⁴</p>
	<p>to or <u>pari passu</u> with the Pre-Petition Lenders’ Superpriority Claim; (vii) reversal, vacatur or stay of the effectiveness of the Interim Order (which must be in a form reasonably acceptable to the Pre-Petition Lenders); (viii) the Interim Order being amended, supplemented or otherwise modified without the prior written consent of the Pre-Petition Lenders; (ix) any use of Cash Collateral to make a payment that is not in compliance with the Cash Collateral Agreement; (x) failure of the Final Order (which must be final, non-appealable, in a form reasonably acceptable to the Pre-Petition Lenders and not subject to any stay) to have been entered by the Bankruptcy Court by the date that is forty-five (45) days (or such longer period as agreed to by the Pre-Petition Lenders and Debtor) after the date on which the Interim Order is entered; (xi) breach by Debtor of any other provision of the Interim Order or Final Order and such breach remains uncured for a period of ten (10) days after written notice of such breach is actually received by Debtor; or (xii) the filing of any action or joinder in any action, counter-claim, proceeding, application, motion, objection, defense or other contested matter, the purpose of which is to seek any order, determination or similar relief (a) challenging the legality, validity, priority, perfection or enforceability (as the case may be) of the Pre-Petition Lenders’ Claims; or (b) invalidating, setting aside, avoiding or subordinating, in whole or in part, any of the Pre-Petition Lenders’ Claims.</p>
<p>16 17 <i>Types of Provisions Identified in Bankruptcy Rules 4001(c)(1)(B)(i) through (xi)</i>⁹</p>	
<p>18 Cash Collateral 19 Agreement, ¶ 6. 20 Interim Order, ¶¶ F, 2 21 & 3.</p>	<p>(i) Grant of priority/lien under 11 U.S.C. § 364(c) or (d): Not under sections 364(c) or (d), but Debtor will grant the Pre-Petition Lenders the Replacement Liens and Pre-Petition Lenders’ Superpriority Claim as part of the proposed adequate protection under Bankruptcy Code sections 361, 362, 363 and 552.</p>
<p>22 Cash Collateral 23 Agreement, ¶ 6. 24 Interim Order, ¶¶ F & 25 2.</p>	<p>(ii) Adequate protection for pre-petition claims: Yes—see above.</p>

26 ⁹ Although Bankruptcy Rule 4001(c)(1)(B) applies to obtaining post-petition credit under
 27 Bankruptcy Code section 364, Debtor is identifying these types of provisions to the extent applicable to
 28 the Cash Collateral Agreement in an abundance of caution to ensure compliance with Bankruptcy Rule
 4001(d)(1)(B) and Local Rule 4001(c)(3).

1	CITATION TO CASH COLLATERAL AGREEMENT/ INTERIM ORDER³	MATERIAL PROVISIONS OF CASH COLLATERAL AGREEMENT⁴
4	N/A	<u>(iii) Determination re: pre-petition lien/claim:</u> None.
5	Cash Collateral Agreement, ¶ 6(a)	<u>(iv) Waiver/modification of the automatic stay:</u> The automatic stay is vacated and modified to the extent necessary to permit Debtor to make the Adequate Protection Payments and the Pre-Petition Lenders to apply them against the Pre-Petition Lenders' Claims.
6	Interim Order, ¶ 6.	
8	N/A	<u>(v) Waiver/modification of rights re: chapter 11 plan, cash collateral or post-petition financing:</u> None—Pre-Petition Lenders consent to proposed DIP Financing.
9		
11	Cash Collateral Agreement, ¶ 10	<u>(vi) Confirmation/disclosure statement deadlines:</u> A Termination Date will occur unless the confirmation hearing for Debtor's chapter 11 plan has commenced within twelve (12) months after the Petition Date, subject to an automatic extension through the date that is fifteen (15) months after the Petition Date if the confirmation hearing has commenced within twelve (12) months after the Petition Date.
12		
15	Cash Collateral Agreement, ¶ 12	<u>(vii) Wavier/modification of lien rights under non-bankruptcy law:</u> The Cash Collateral Agreement requires that the Interim Order and the Final Order hold that the Pre-Petition Lenders shall not be subject to the doctrine of marshalling.
16	Interim Order, ¶ 4.	
18	N/A	<u>(viii) Release of estate cause of action:</u> None.
19		
20	N/A	<u>(ix) Indemnification:</u> None.
21	Cash Collateral Agreement, ¶ 9	<u>(x) 506(c) waiver:</u> The Cash Collateral Agreement requires that no surcharge or costs or expense of administration, whether imposed or assessed pursuant to sections 105(a), 363, 364, 506(c), 510 or 552(b) of the Bankruptcy Code, or otherwise, whether asserted in the Chapter 11 Case or in any subsequent chapter 7 case for Debtor, will be imposed against the Pre-Petition Lenders or the Collateral, and that no consent to any such surcharge will be implied from any action, inaction or acquiescence by the Pre-Petition Lenders in the Chapter 11 Case or otherwise.
22		
27	Cash Collateral Agreement, ¶ 6.	<u>(xi) Lien/claim on avoidance actions:</u> Yes—see above.
28		

II.

FACTUAL BACKGROUND

A. General Background.

4. On the Petition Date, Debtor¹⁰ filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code together with Schedules of Assets and Liabilities and its Statement of Financial Affairs.

5. Debtor is continuing in possession of its property and is operating and managing its businesses, as a debtor in possession, pursuant to Bankruptcy Code sections 1107 and 1108. See generally Chapter 11 Case Docket.

6. No request has been made for the appointment of a trustee or examiner, and no statutory committee has been appointed. See id.

7. The factual background relating to Debtor’s commencement of this Chapter 11 Case is set forth in detail in the Omnibus Declaration and is incorporated for all purposes herein by this reference.

B. Debtor’s Need to Use Cash Collateral.

8. As described in greater detail in the Omnibus Declaration, Debtor faces a continuous need to compensate its various subcontractors for work in developing lots and constructing homes for sale, yet Debtor is not paid by its affiliated home seller entities for its services until the closing of each sale. Prior to the Petition Date, Debtor relied on advances from its affiliate, AWH Ventures, Inc. (funded with borrowings from the Pre-Petition Lenders under the Credit Agreement and advances from affiliated entities) to provide the liquidity necessary to bridge the gaps between outlaying expenses for development/construction and receiving payment for these services at home sale closings.

9. Now that Debtor has commenced its Chapter 11 Case, Debtor requires the consent of the Pre-Petition Lenders or approval of the Court to use fee income that is paid to satisfy Debtor’s

¹⁰ Prior to the Petition Date, the following former affiliates of Debtor merged with Debtor: Castlebay 1, Inc., Development Management, Inc., Fairmont 1, Inc., Glen Eagles 3, Inc., Heritage 1, Inc., Inverness 5, Inc., Kensington 1, Inc., Kingsbridge 1, Inc., Promontory Estates, LLC, Promontory Point 4, Inc., Silverado Springs 1, Inc., Silverado Springs 2, Inc., Tradition, Inc., and Windsor 1, Inc.

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1 accounts receivable since they are the Pre-Petition Lenders' cash collateral. Debtor does not have any
2 other source of cash to fund its operations that is not the Pre-Petition Lenders' cash collateral. If
3 Debtor was unable to use the Pre-Petition Lenders' cash collateral, Debtor would not have any ability
4 to satisfy the expenses of its day-to-day operations, much less the additional expenses of its Chapter 11
5 Case.

6 10. Although Debtor negotiated the DIP Financing in order to provide additional
7 postpetition liquidity, Debtor still primarily needs to rely on the use of cash collateral to maintain its
8 operations and remain current on expenses. See Initial Cash Budget. As set forth in the Initial Cash
9 Budget, Debtor projects that it will need to use more than \$10,800,000 of cash collateral (exclusive of
10 its existing cash as of the Petition Date and any DIP Financing borrowings) during the first thirteen
11 (13) weeks following the Petition Date in order to meet its operating expenses and make interest-only
12 adequate protection payments to the Pre-Petition Lenders. The Initial Cash Budget is based on
13 Debtor's internally prepared projections of home sales and development expenses—if actual home
14 sales and/or development expenses do not match projections, then Debtor's need to use cash collateral
15 and/or borrow under the DIP Financing may differ from the amounts set forth in the Initial Cash
16 Budget. In addition, Debtor estimates that it will incur approximately \$1,521,000 in expenses
17 associated with the Chapter 11 Case during this same period. Thus, Debtor has an urgent and
18 immediate need to use cash collateral. With this necessity in mind, Debtor negotiated the Cash
19 Collateral Agreement with the Pre-Petition Lenders.

20 III.

21 RELIEF REQUESTED

22 11. By this Motion, Debtor seeks authorization to use the Pre-Petition Lenders' Cash
23 Collateral and provide adequate protection to the Pre-Petition Lenders on the terms set forth in the
24 Cash Collateral Agreement pursuant to a Cash Budget. The Initial Cash Budget (pertaining to the first
25 13-week period) is attached to the Cash Collateral Agreement as **Exhibit "A."**

26 12. Pursuant to Bankruptcy Rule 4001(b)(2), Debtor is seeking authorization to use cash
27 collateral pending a final hearing on the Motion in order to avoid immediate and irreparable harm to
28 the estate. In order to keep Debtor's business operational, Debtor must be able to pay its

1 subcontractors for work performed in the construction of homes (sales of which are Debtor's only
 2 material source of revenue), satisfy other ongoing working capital needs and expenses of operation,
 3 including, without limitation, employee payroll expenses, and fund the costs of administering Debtor's
 4 estate, including without limitation, fees assessed by the Office of the United States Trustee and the
 5 Clerk of Court and fees and expenses of estate professionals. Ensuring uninterrupted payment to
 6 Debtor's subcontractors is particularly crucial because in this difficult real estate environment, many of
 7 Debtor's subcontractors may not be able to make payroll without weekly payment from Debtor.

8 13. As indicated by the Initial Cash Budget, Debtor projects that it will need to use more
 9 than \$4,500,000 in cash collateral (exclusive of existing cash as of the Petition Date) during the first
 10 five (5) weeks after the Petition Date in order to fund its ongoing operational expenses. Accordingly,
 11 timely approval of the proposed use of cash collateral is critical to preserving the going concern value
 12 of Debtor's estate from the outset of the Chapter 11 Case.

13 14. In addition, Debtor is requesting that the Court set a final hearing on the proposed use of
 14 cash collateral. Debtor requests that the Court set the final hearing within thirty (30) days of the
 15 Petition Date, subject to availability on the Court's calendar. Obtaining certainty regarding Debtor's
 16 ability to use cash collateral is a key step for Debtor to stabilize its operations as a chapter 11 debtor in
 17 possession, which will then enable Debtor and its professionals to focus complete attention on the
 18 implementation of Debtor's plan of reorganization. In addition, the Cash Collateral Agreement
 19 provides that an Event of Default will occur if the Final Order is not entered within forty-five (45) days
 20 of the date that the Interim Order is entered (unless otherwise agreed by Debtor and the Pre-Petition
 21 Lenders).

22 IV.

23 LEGAL ARGUMENT

24 A. Debtor's Use of Cash Collateral and Proposed Adequate Protection of the Pre-Petition 25 Lenders' Interest Pursuant to the Cash Collateral Agreement Complies With 26 Bankruptcy Code Sections 361, 362 and 363.

27 15. As a debtor in possession, Debtor is authorized to operate its business under the
 28 Bankruptcy Code. See 11 U.S.C. § 1108. The Bankruptcy Code provides that a debtor in possession

1 may use cash collateral only with a secured creditor's consent or if the Court, after notice and a
2 hearing, authorizes such use. See 11 U.S.C. § 363(c)(2). Absent consent, courts look to whether a
3 secured creditor has "adequate protection" of its interest in cash collateral as a condition to authorizing
4 its use. See, e.g., 11 U.S.C. § 363(e); see also United Savings Ass'n v. Timbers of Inwood Forest
5 Ass'n, 484 U.S. 365, 369-73 (1988) (the "interest in property" entitled to protection is "the value of the
6 collateral" that secures the claim). In addition, section 362(d)(1) enables a party with an interest in
7 property of the estate (such as cash collateral) to obtain relief from the automatic stay if there is a lack
8 of adequate protection. 11 U.S.C. § 362(d)(1).

9 16. Bankruptcy Code section 361 provides some examples of adequate protection, including
10 payment of cash or periodic cash payments and the grant of additional or replacement liens.
11 See 11 U.S.C. § 361. However, the concept of adequate protection is not limited to these specific
12 examples—Bankruptcy Code section 361(3) makes it clear that adequate protection can take any form
13 so long as it will result in the realization of "the indubitable equivalent of [the secured creditor's]
14 interest in such property." 11 U.S.C. § 361(3).

15 17. The legislative history of section 361 provides further reinforcement for the broad
16 flexibility that bankruptcy courts have in deciding what constitutes adequate protection on a case-by-
17 case basis:

18 This section specifies the means by which adequate protection may be provided.
19 It does not require the court to provide it. To do so would place the court in an
20 administrative role. Instead, the trustee or debtor-in-possession will provide or
21 propose a protection method. If the party that is affected by the proposed action
22 objects, the court will determine whether the protection provided is adequate.
The purpose of this section is to illustrate means by which it may be provided
and to define the contours of the concept.

23 H.R. Rep. No. 95-595, at 338, 95th Cong., 1st Sess. (1977); see also Resolution Trust Corp. v.
24 Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.), 16 F.3d 552, 564 (3d Cir. 1994) ("[A]
25 determination of whether there is adequate protection is made on a case by case basis."); MBank Dallas,
26 N.A. v. O'Connor (In re O'Connor), 808 F.2d 1393, 1396-97 (10th Cir. 1987) (same).

27 18. Pursuant to Bankruptcy Code section 507(b), if a party is provided with adequate
28 protection and, notwithstanding such protection, the party has a claim allowable under section

1 507(a)(2), then such claim shall have priority over every other claim allowable under section 507(a)(2).

2 19. Here, the Pre-Petition Lenders have consented to the use of their Collateral, including
3 cash collateral, on the terms set forth in the Cash Collateral Agreement. The Cash Collateral
4 Agreement includes certain forms of adequate protection (cash payments, Replacement Liens, the
5 Pre-Petition Lenders' Superpriority Claim) which fall directly within the ambit of Bankruptcy Code
6 sections 361 and 507(b). The other forms of adequate protection proposed under the Cash Collateral
7 Agreement, such as the payment of the Pre-Petition Lenders' reasonable attorneys' fees and the
8 nullification of the marshalling doctrine, are fair and customary in complex chapter 11 cases like this
9 one. Debtor negotiated the terms of the Cash Collateral Agreement in good faith and at arms' length,
10 and on balance, the adequate protection proposed in the Cash Collateral Agreement does not unduly
11 impair or prejudice the rights of any other parties in interest. The Cash Collateral Agreement provides
12 for a generous Carve-Out, which covers fees and expenses of professionals employed by a Committee
13 (if appointed) as well as professionals employed by Debtor. Therefore, because the Cash Collateral
14 Agreement complies with the requirements of the Bankruptcy Code, the Court should authorize Debtor
15 to use cash collateral and provide adequate protection to the Pre-Petition Lenders in accordance
16 therewith.

17 **B. Debtor's Decision to Enter into the Cash Collateral Agreement Is Supported by Sound**
18 **Business Judgment.**

19 20. Courts generally give broad deference to the business decisions of a debtor. See, e.g.,
20 Stephens Indus., Inc. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986); In re Continental Air Lines, Inc.,
21 780 F.2d 1223, 1226 (5th Cir. 1986); In re Lionel Corp., 722 F.2d 1063, 1070 (2d Cir. 1983); Walter v.
22 Sunwest Bank (In re Walter), 83 B.R. 14, 19-20 (B.A.P. 9th Cir. 1987).

23 21. Here, Debtor's decision to enter into the Cash Collateral Agreement represents a
24 reasonable exercise of business judgment. As demonstrated by the Initial Cash Budget, Debtor has an
25 immediate need for the use of cash collateral in order to fund its operations and the expenses of the
26 Chapter 11 Case. As noted above, Debtor and the Pre-Petition Lenders negotiated the terms of the Cash
27 Collateral Agreement at arms' length in good faith.

28 22. Without the use of cash collateral, Debtor would not be able to fund its operations and

1 proceed with its chapter 11 plan. Instead, Debtor would be faced with the potential for administrative
2 insolvency followed by a liquidation. Given the choice between these two alternatives, Debtor
3 prudently negotiated the Cash Collateral Agreement with the Pre-Petition Lenders to ensure that
4 Debtor would have the necessary funding for its Chapter 11 Case. Therefore, the Court should
5 approve Debtor's decision to enter into the Cash Collateral Agreement as an exercise of sound
6 business judgment.

7 **D. The Court Should Schedule Interim and Final Hearings On This Motion Pursuant To**
8 **Bankruptcy Rule 4001(b)(2).**

9 23. Bankruptcy Rule 4001(b)(2) provides that a final hearing on a motion for authorization
10 to use cash collateral may be commenced not earlier than fourteen (14) days after service of the motion.
11 Upon request, however, the Bankruptcy Court is empowered to conduct an expedited hearing on the
12 motion and authorize the use of cash collateral to the extent necessary to avoid immediate and
13 irreparable harm to a debtor's estate.

14 24. Pursuant to Bankruptcy Rule 4001(b)(2) and Local Rule 9006, Debtor requests that the
15 Court conduct an expedited interim hearing on the Motion (the "Interim Hearing") and, after the entry
16 of the Interim Order, allow Debtor to use cash collateral in accordance therewith. Debtor has an urgent
17 and immediate need for cash to fund chapter 11 administration expenses and operations, as set forth in
18 the Initial Cash Budget. In particular, Debtor must be able to continue to make weekly payments to its
19 subcontractors, who rely on timely payment from Debtor to fund their own operational expenses.
20 Debtor does not have any non-cash collateral source of funding (other than the DIP Financing, which is
21 not sufficient in and of itself to satisfy Debtor's post-petition expenses). Debtor submits that the terms
22 of the Cash Collateral Agreement are fair, reasonable and in the best interests of Debtor's estate.
23 Therefore, entry of the Interim Order is proper under Bankruptcy Rule 4001(b)(2).

24 25. Also pursuant to Bankruptcy Rule 4001(b)(2), Debtor requests that the Court schedule
25 the final hearing on the Motion within thirty (30) days of the Petition Date, subject to availability on the
26 Court's calendar. Obtaining certainty regarding Debtor's ability to use cash collateral is a key step for
27 Debtor to stabilize its operations as a chapter 11 debtor in possession, which will then enable Debtor
28 and its professionals to focus complete attention on the implementation of Debtor's plan of

1 reorganization.

2 **V.**

3 **NOTICE**

4 26. Notice of this Motion is being given by electronic mail, facsimile or overnight delivery
5 to the following parties or their counsel: (a) the Office of the United States Trustee for the District of
6 Nevada; (b) counsel to the DIP Financing lender; (c) counsel to Pre-Petition Lenders; (d) the Internal
7 Revenue Service; (e) the Securities and Exchange Commission; and (f) all parties listed on the List of
8 Creditors Holding the 20 Largest Unsecured Claims. In light of the nature of the relief requested,
9 Debtor respectfully submits that no further notice is necessary.

10 **VI.**

11 **CONCLUSION**

12 WHEREFORE, based upon all the foregoing, as set forth in this Memorandum, the Motion, the
13 Omnibus Declaration and all other papers, documents, and other evidence submitted in support of the
14 Motion, Debtor respectfully requests that the Court grant the Motion in its entirety and: (1) approve
15 Debtor’s use of cash collateral pursuant to the Cash Collateral Agreement on an interim basis pending a
16 final hearing on the Motion; (2) enter the Interim Order, in substantially the form attached hereto as
17 **Exhibit “1;”** (3) grant the Pre-Petition Lenders the Replacement Liens, Pre-Petition Lenders’
18 Superpriority Claim and other forms of adequate protection as provided in the Cash Collateral
19 Agreement; (4) schedule a final hearing on this Motion; (5) in conjunction with the final hearing, enter
20 the Final Order approving Debtor’s use of cash collateral pursuant to the Cash Collateral Agreement on
21 a final basis; and (6) grant to Debtor such other relief as the Court deems necessary and appropriate.

22 DATED this 1st day of March, 2012.

23 **FOX ROTHSCHILD LLP**

24 By /s/Brett A. Axelrod

25 BRETT A. AXELROD, ESQ.
26 Nevada Bar No. 5859
27 MICAELA RUSTIA MOORE, ESQ.
28 Nevada Bar No. 9676
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169

[Proposed] Counsel for Debtor

1 U.S. Bankruptcy Court, District of Nevada (“Local Rules”): (i) authorizing and approving, among
2 other things, (a) Debtor to use the cash collateral of the Pre-Petition Lenders¹ pursuant to the terms of
3 the Cash Collateral Agreement, (b) Debtor to provide adequate protection to the Pre-Petition Lenders,
4 (c) the form and manner of service of the Motion; and (ii) scheduling interim and final hearings with
5 respect to the relief requested therein; and it appearing that the relief requested is in the best interests of
6 Debtor’s estate, its creditors and all other parties in interest; and the Court having jurisdiction to
7 consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and
8 consideration of the Motion and the relief requested therein being a core proceeding pursuant to
9 28 U.S.C. § 157(b); and venue being proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and
10 the Court having reviewed and considered all other pleadings and evidence submitted by the parties in
11 connection with the Motion; and due and proper notice of the Motion having been provided; and it
12 appearing that no other or further notice need be provided; and the Court having determined that the
13 legal and factual grounds set forth in the Motion establish just cause for the relief granted herein; and
14 the Court having considered the oral arguments of counsel at the hearings held on March __, 2012; and
15 the Court having made findings of fact and conclusions of law on the record, which (to the extent not
16 expressly set forth below) are incorporated herein pursuant to Rule 52 of the Federal Rules of Civil
17 Procedure, made applicable to these proceedings by Bankruptcy Rule 7052; and good and sufficient
18 cause appearing therefor,

19 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that:

20 **I. Background, Jurisdiction and Notice.**

21 A. On March 1, 2012 (the “Petition Date”), Debtor commenced its bankruptcy case
22 by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Debtor is continuing
23 to operate its business as a debtor-in-possession pursuant to Bankruptcy Code sections 1107(a) and
24 1108. No trustee, examiner, or statutory committee has been appointed in this case.

25
26 _____
27 ¹ Capitalized terms used but not defined herein shall have the meaning set forth in the agreement
28 (the “Cash Collateral Agreement”) attached as **Exhibit “B”** to the Omnibus Declaration of Robert M. Evans filed in support of Debtor’s First Day Motions on March 1, 2012.

1 B. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b) and 1334.
2 This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant
3 to 28 U.S.C. §§ 1408 and 1409.

4 C. Debtor has complied with the requirements of Bankruptcy Rules 4001(b) and 4011(d),
5 and Local Rules 4001(b), 4001(c) and 9006, requiring, among other things, that the Interim Hearing be
6 held on less than twenty-one (21) days notice by serving the Motion and providing notice of the Interim
7 Hearing by facsimile or overnight mail to: (i) the U.S. Trustee; (ii) all parties listed on the List of
8 Creditors Holding the 20 Largest Unsecured Claims; (iii) the DIP Financing lender; (iv) the Pre-Petition
9 Lenders; and (v) all other parties requesting notice pursuant to Bankruptcy Rule 2002. Given the nature
10 of the relief sought in the Motion, the Court concludes that the foregoing notice was sufficient and
11 adequate under the circumstances and complies with Bankruptcy Rule 4001 in all respects.

12 **II. Findings Regarding the Use of Cash Collateral Based on the Record at the Interim**
13 **Hearing.**

14 D. Debtor has an immediate and critical need to use cash collateral. Debtor's ability to use
15 cash collateral is critical to Debtor's ability to continue as a going concern during the course of this
16 Chapter 11 Case. The Initial Cash Budget provides for Debtor to use cash collateral to fund the costs of
17 administering Debtor's estate, including, without limitation, (i) funding the operations of Debtor's
18 business, (ii) making adequate protection payments to the Pre-Petition Lenders, (iii) paying expenses
19 incurred for the administration of the Chapter 11 Case, including compensation of professional fees and
20 expenses, (iv) paying contractual obligations consistent with the Final Order, and (v) repaying
21 borrowings under any DIP Financing. Debtor's ability to use cash collateral under the terms of the
22 Cash Collateral Agreement and this Interim Order are vital to the preservation and maintenance of the
23 going concern value of Debtor's estate and to Debtor's successful reorganization. Consequently,
24 without the ability to use cash collateral to the extent authorized pursuant to this Interim Order, Debtor
25 and its estate would suffer immediate and irreparable harm.

26 E. The Cash Collateral Agreement has been negotiated in good faith and at arms' length,
27 and is fair and reasonable under the circumstances. The Cash Collateral Agreement reflects Debtor's
28 sound exercise of prudent business judgment consistent with its fiduciary duties.

1 F. The adequate protection to be provided pursuant to the Cash Collateral Agreement,
2 including, without limitation, the Replacement Liens and the Pre-Petition Lenders' Superpriority Claim,
3 is consistent and in compliance with the Bankruptcy Code, including sections 361, 362 and 363 thereof.

4 G. Good cause has been shown for immediate entry of this Interim Order pursuant to
5 Bankruptcy Rules 4001(b)(2) and 4001(d), and, to the extent it applies, Bankruptcy Rule 6003, as the
6 Court finds that entry of this Interim Order is necessary to avoid immediate and irreparable harm to
7 Debtor and its estate. Entry of this Interim Order is in the best interest of Debtor, its estate and
8 creditors.

9 H. Based on the foregoing, and upon the record made before this Court at the Interim
10 Hearing, and good and sufficient cause appearing therefor:

11 **III. Disposition.**

12 1. The Motion is granted on an interim basis on the terms and conditions set forth in this
13 Interim Order. This Interim Order shall become effective immediately upon its entry. To the extent the
14 terms of the Cash Collateral Agreement differ in any material respect from the terms of this Interim
15 Order, this Interim Order shall control.

16 2. The terms and conditions of the Cash Collateral Agreement, including, without
17 limitation, the Replacement Liens and the Pre-Petition Lenders' Superpriority Claim, are hereby
18 approved on an emergency interim basis. Debtor is hereby authorized to use cash collateral pursuant to
19 the Cash Collateral Agreement and the Initial Cash Budget for a period up to and including the date of
20 entry of the Final Order.

21 3. The Replacement Liens and the Pre-Petition Lenders' Superpriority Claims shall be
22 subject to the payment of the Carve-Out.

23 4. The Pre-Petition Lenders shall not be subject to the doctrine of marshalling.

24 5. The provisions of this Interim Order shall be binding upon and inure to the benefit of the
25 Pre-Petition Lenders, Debtor, and their respective successors and assigns.

26 6. The automatic stay is vacated and modified to the extent necessary to permit Debtor to
27 make the Adequate Protection Payments and the Pre-Petition Lenders to apply them against the Pre-
28

FOX ROTHSCHILD LLP
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 262-6899

1 Petition Lenders' Claims as provided in the Cash Collateral Agreement, the Motion and this Interim
2 Order.

3 7. To the extent applicable, this Interim Order is not subject to the 14-day stay provision of
4 Bankruptcy Rules 4001(a)(3) or 6003.

5 8. Service of Notice. Debtor shall cause a copy of this Interim Order to be served within
6 three (3) business days of its entry, by electronic mail, U.S. Mail or the Court's ECF noticing of the
7 Interim Hearing to: (a) the DIP Financing lender: _____; (b) Pre-Petition Lenders:
8 _____, (b) the Office of the United States Trustee for the District of Nevada, Attn: ____;
9 (c) counsel for any statutory committee appointed in this case, and if no such committee was appointed,
10 then to the parties listed on the List of Creditors Holding the 20 Largest Unsecured Claims; and (d) all
11 other secured creditors, and all other parties requesting notice pursuant to Bankruptcy Rule 2002 (the
12 "Notice Parties").

13 9. Final Hearing. A hearing to consider entry of an order granting the relief set forth in this
14 Interim Order on a final basis (the "Final Order") shall be held on _____, at _____.m. (the
15 "Final Hearing") in _____; with any objections (the "Objections") to entry of a Final Order
16 due to be timely filed electronically with the Court and served on the Notice Parties and Debtor's
17 counsel: Fox Rothschild, LLP, 3800 Howard Hughes Parkway, Suite 500, Las Vegas, Nevada 89169,
18 Attn: Brett A. Axelrod, Esq. (collectively, the "Objection Notice Parties") (with a courtesy copy
19 delivered directly to the Chambers of the Honorable Mike K. Nakagawa) so as to be actually received
20 no later than _____, 2012. Replies to timely-filed Objections, if any, shall be filed with the
21 Bankruptcy Court electronically and served so that they are received no later than
22 _____, 2012 (with a courtesy copy delivered directly to the Chambers of the
23 Honorable _____) by the Objection Notice Parties and the objecting party.

24 DATED: March ___, 2012.

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FOX ROTHSCHILD LLP
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 262-6899

