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

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

11 In re
12 AMERICAN WEST
DEVELOPMENT, INC., a Nevada
13 corporation,
14 Debtor.

Case No. BK-S-12-12349-MKN
Chapter 11
**DEBTOR’S MOTION FOR ORDER
AUTHORIZING PAYMENT OF
PREPETITION CRITICAL VENDOR
CLAIMS**
Hearing Date: OST REQUEST PENDING
Hearing Time: OST REQUEST PENDING

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18 American West Development, Inc. (“AWDI” or “Debtor”), the debtor and debtor in possession
19 in the above-captioned case (the “Chapter 11 Case”), by the within motion (the “Motion”) hereby
20 moves the Court for an order, substantially in the form attached hereto as **Exhibit C** (the “Critical
21 Vendor Order”), pursuant to Bankruptcy Code¹ §§ 105(a) and 363(b), and Bankruptcy Rules 6003 and
22 6004 authorizing, but not requiring, Debtor to honor and pay prepetition claims of certain critical
23 vendors (each, a “Critical Vendor Claim” and collectively, the “Critical Vendor Claims”) in accordance
24 with the Critical Vendor Procedures (as defined and described in greater detail below).

25
26
27 ¹ All references to “chapter” and “section” herein shall be to the “Bankruptcy Code” appearing
in Title 11 of the U.S. Code; all references to a “Bankruptcy Rule” shall refer to the Federal Rules of
28 Bankruptcy Procedure.

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Las Vegas, Nevada 89169
(702) 262-6899

1 The Motion is made and based upon the following memorandum of points and authorities, the
2 Omnibus Declaration of Robert M. Evans (the “Omnibus Declaration”) filed in support of Debtor’s
3 First Day Motions on March 1, 2012 (the “Petition Date”), the papers and pleadings on file with the
4 Court in this Chapter 11 Case, and any oral arguments the Court may entertain at the hearing on this
5 Motion.

6 DATED this 1st day of March 2012.

7 **FOX ROTHSCHILD LLP**

8 By: /s/Brett A. Axelrod
9 BRETT A. AXELROD, ESQ.
10 Nevada Bar No. 5859
11 MICAELA RUSTIA MOORE, ESQ.
12 Nevada Bar No. 9676
13 3800 Howard Hughes Parkway, Suite 500
14 Las Vegas, Nevada 89169
15 *[Proposed] Counsel for American West Development,*
16 *Inc.*

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I.**

19 **JURISDICTION AND VENUE**

20 1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and
21 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b).

22 2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

23 3. The statutory bases for the relief requested herein are Bankruptcy Code §§ 105(a) and
24 363(b) and Bankruptcy Rules 6003 and 6004.

25 **II.**

26 **FACTUAL BACKGROUND**

27 **A. General Background.**

28 4. On the Petition Date, Debtor filed a voluntary petition for relief under chapter 11 of the
Bankruptcy Code.

5. Debtor is continuing in possession of its property and is operating and managing its

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1 business, as debtor in possession, pursuant to Bankruptcy Code §§ 1107 and 1108. See generally
2 Chapter 11 Case Docket.

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

5 7. The factual background relating to Debtor, including its business operations, its capital
6 and debt structure, and the events leading up to the filing of this Chapter 11 Case, is set forth in detail in
7 the Omnibus Declaration and is incorporated for all purposes herein by this reference.

8 **B. The Need for Requested Relief.**

9 8. Debtor is a licensed general contractor engaged in the construction and delivery of new
10 homes. Initially, Debtor develops raw land, owned by a non-debtor affiliate, into a series of lots (after
11 obtaining the required zoning and entitlements). As general contractor for the non-debtor affiliate
12 landowner, Debtor subcontracts with licensed subcontractors to perform all work required to improve
13 the land, including permitting, grading, engineering, installation of utilities, over-excavation, and
14 building pads.

15 9. After completing the pre-construction work, including off-site improvements, Debtor is
16 then hired in the capacity of general contractor to provide home construction services for a different
17 non-debtor affiliate. Here, too, Debtor subcontracts with licensed subcontractors and material suppliers
18 to perform all of the required work and provide all materials for the home construction. The agreements
19 with subcontractors typically provide for a fixed price for work performed and materials supplied.
20 Debtor does not manufacture any of the materials or other items used in the development of its
21 residential communities. Only upon the closing of a home sale is Debtor paid through escrow for all of
22 the construction completed to date, i.e., work performed during the lot development phase as well as
23 work performed during the home construction phase.

24 10. In the ordinary course of its business, Debtor relies on third-party subcontractors and
25 material suppliers to provide the various services and materials identified above (each, a "Critical
26 Vendor," and collectively, the "Critical Vendors"), without whom Debtor could not sustain its
27 operations. Debtor has established relationships with these Critical Vendors over the years and believes
28 that these relationships ensure continued access to consistent labor and materials and otherwise provide

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1 substantial savings and benefits. These Critical Vendors provide the myriad products and services that
2 are necessary at all stages of home construction and development. The products and services the
3 Critical Vendors provide include, among other things, engineering services, slab/foundation, flooring,
4 framing, drywall, plumbing, electrical, roofing, paving, HVAC, landscaping, and utility construction, to
5 name a few.

6 11. Debtor does not employ its own construction workers but rather hires the aforementioned
7 Critical Vendors to complete every aspect of its home building enterprise. In fact, Debtor's only
8 construction-related employees are its foremen, who oversee the subcontractors on Debtor's various
9 projects; its in-house architects, who work on design matters; and its janitors, who provide cleaning
10 services in connection with home sale closings. Without the essential relationships Debtor has
11 developed over the years with its Critical Vendors, and without the services and materials they provide,
12 Debtor has no home building operation.

13 12. The homebuilding industry in the United States is experiencing a significant and
14 sustained decrease in demand for new homes and an oversupply of new and existing homes available
15 for sale. This has led to widespread lay-offs in the construction industry, arguably, nowhere as strongly
16 felt as in Southern Nevada. But notwithstanding the availability of skilled construction laborers in Las
17 Vegas, and the potential to employ alternative subcontractors and material suppliers, Debtor's business
18 would significantly suffer if it did not continue its relationships with its current Critical Vendors.

19 13. Debtor has developed and continues to maintain longstanding relationships with
20 subcontractors and vendors who continue to meet Debtor's rigorous quality guidelines and cost
21 controls. More importantly, though, these subcontractors are so critical because they are liable for all
22 warranty work that may result from their labors. Homebuilding companies are typically exposed to
23 contingent liability stemming from potential construction defect allegations or warranty work. Debtor
24 has historically paid out very few construction defect claims largely because of the high quality work
25 performed by Debtor's Critical Vendors. If Debtor is forced to find new subcontractors and materials
26 providers for its projects mid-stream, those new vendors will not have the same history of providing
27 high quality materials and services within the strict cost controls Debtor demands. Of greater concern,
28 as to construction defect and warranty claims, Debtor would be in the difficult and non-cost effective

1 position of having to attempt to determine which subcontractor is liable for any construction defect
2 claim. This could well engender in the mind of home-buying customers a loss or at least a substantial
3 reduction of confidence in Debtor's ability to cause full satisfaction of all legitimate claims asserted,
4 thereby diminishing Debtor's stellar and hard won reputation of delivering the best quality product in
5 Southern Nevada and undoubtedly weakening Debtor's business prospects.

6 14. The Critical Vendors with whom Debtor has built long term relationships give Debtor a
7 level of certainty that materials of a specified quality will be provided, and services of a consistent
8 quality will be rendered, in accordance with the various requirements and deadlines of Debtor's
9 projects. Accordingly, any disruption in the services or materials such vendors provide would have a
10 detrimental impact upon the quality of homes built by Debtor and impede the timely completion of
11 projects in accordance with customers' specifications. Such a disruption would lead to an immediate
12 erosion in customer confidence and have a devastating effect on Debtor's reputation, which could be
13 impossible to restore. Debtor owes certain of the aforementioned Critical Vendors amounts for
14 prepetition goods and services. Without the continued support of, and the goods and services to be
15 provided by, the Critical Vendors, Debtor may not be able to continue operating and constructing
16 homes without critically suffering from added expense and delay.

17 15. Despite the need for these essential goods and services, Debtor has historically sought to
18 bargain with its Critical Vendors to achieve the lowest price, the best service, the highest quality, and
19 the most favorable terms possible for each necessary product or service. Debtor has developed valuable
20 relationships with its Critical Vendors that have met its standards for price, service, quality, and
21 payment terms, and it hopes to maintain and improve upon these Critical Vendor relationships on a
22 postpetition basis and to continue to negotiate with such vendors to insure these standards going
23 forward. Many of these Critical Vendor relationships span over numerous years, resulting in an
24 institutional knowledge among Debtor's Critical Vendors that would be impossible to immediately
25 replace.

26 16. Debtor believes that certain of the Critical Vendors, despite the protections of
27 administrative priority status, may refuse to provide goods and services postpetition to Debtor if it does
28 not pay all or part of the Critical Vendor Claims.

III.

RELIEF REQUESTED

17. By this Motion, Debtor respectfully requests entry of a Critical Vendor Order, substantially in the form attached hereto as Exhibit C, pursuant to Bankruptcy Code §§ 105(a) and 363(b), and Bankruptcy Rules 6003 and 6004. By this Critical Vendor Order, Debtor seeks authorization to pay, in its discretion, all or part of the Critical Vendor Claims, in an aggregate amount not to exceed \$1,000,000, subject to certain conditions and procedures described below.

18. Additionally, Debtor requests that financial institutions be authorized to receive, process, honor, and pay all checks presented for payment and electronic payment requests related to the Critical Vendor Claims described in this Motion, whether such checks were presented or electronic requests were submitted prior to or after the Petition Date.

19. Each of the Critical Vendors provides Debtor with goods and services that are essential to Debtor’s continuing operations. A comprehensive matrix of the vendors that Debtor is likely to identify as “Critical,” is attached to this motion as Exhibit B (the “Critical Vendor Matrix”). The Critical Vendor Matrix also includes a brief description of the goods and services that each vendor provides.

20. If one or more of the Critical Vendors refuse to continue providing its goods or services to Debtor, the magnitude of the potential injury to Debtor’s business, and to the creditors of the estate, will greatly exceed the amount of unpaid claims held by the Critical Vendors as a whole.

21. Debtor proposes to make full or partial payment to the Critical Vendors pursuant to this Motion, only to the extent it deems necessary, in the exercise of its business judgment, to ensure that the applicable Critical Vendor continues to provide essential goods and services to Debtor on a postpetition basis.

Proposed Critical Vendor Procedures

To further assure that Debtor’s business operations are minimally impacted during this Chapter 11 Case, and in light of the severe consequences Debtor may suffer if the Critical Vendors refuse to provide postpetition goods and services, Debtor proposes that the Court approve and adopt the following procedures (the “Critical Vendor Procedures”):

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- 1 (a) The payment of any Critical Vendor Claim would be conditioned on the express
 2 agreement (the “Vendor Agreement”) of a Critical Vendor to continue to
 3 provide reasonable and customary price, service, quality, and payment terms to
 4 Debtor on a postpetition basis (“Customary Trade Terms”), or upon other terms
 5 more favorable to Debtor than Customary Trade Terms. A letter substantially in
 6 the form of the Vendor Agreement, attached hereto as **Exhibit A**, along with a
 7 copy of the Critical Vendor Order granting the relief requested in this Motion
 8 would be sent to the Critical Vendors. The letter would include, without
 9 limitation, the following information and terms:
- 10 (i) The amount of the Critical Vendor’s estimated prepetition claim,
 11 accounting for any setoffs, other credits, or discounts thereto, which would
 12 be mutually determined in good faith by the Critical Vendor and Debtor
 13 (but such amount would be used only for the purposes of determining the
 14 Critical Vendor Claim under the Critical Vendor Order and would not be
 15 deemed a claim allowed by the Court for any other purpose in this Chapter
 16 11 Case, and the rights of all interested persons to object to such claims
 17 would be fully preserved until further order of the Court);
 - 18 (ii) The Critical Vendor’s agreement to provide goods and services to Debtor
 19 based upon Customary Trade Terms or upon such other terms more
 20 favorable to Debtor than Customary Trade Terms as Debtor and the
 21 Critical Vendor may agree;
 - 22 (iii) The Critical Vendor’s acknowledgement that it has reviewed the terms and
 23 provisions of the Critical Vendor Order, and consents to be bound thereby;
 - 24 (iv) A Critical Vendor’s agreement that it will not separately seek payment for
 25 any reclamation claims or claims under Bankruptcy Code § 503(b)(9)
 26 outside the terms of the Critical Vendor Order unless the Critical Vendor’s
 27 participation in the program to pay Critical Vendor Claims pursuant to the
 28 Critical Vendor Order is terminated; provided, however, that such claims
 would, if thereafter raised by the Critical Vendor as permitted by the
 Critical Vendor Order, be treated as though raised on the date of the
 Critical Vendor Order; and
 - (v) The Critical Vendor’s agreement that any payments received by such
 Critical Vendor under the Critical Vendor Order would be applied first to
 claims for the value of goods received by Debtor within 21 days prior to
 the Petition Date that were sold to Debtor in the ordinary course of
 business, and then to any other claims.
- (b) Such a letter, once agreed and accepted by a Critical Vendor, would be the
 Vendor Agreement between the parties that governs their relationship during
 this Chapter 11 Case. Debtor further would retain the right, on a case-by-case
 basis, to obtain other written acknowledgement from the Critical Vendors of the
 terms to which the parties have agreed.
- (c) If a Critical Vendor refuses to supply goods or services to Debtor on Customary
 Trade Terms (or fails to comply with other terms to which the parties have
 agreed), following its receipt of payment on the Critical Vendor Claim, or fails

1 to comply with the applicable Vendor Agreement in any way, Debtor may, in its
 2 discretion and without further order of this Court, declare that Critical Vendor
 3 in breach of its Vendor Agreement with Debtor. To the extent the Critical
 4 Vendor fails to cure such default or reach an alternative agreement with Debtor,
 5 Debtor may seek appropriate relief from the Court, including, without limitation,
 6 injunctive relief to compel performance pursuant to the Vendor Agreement.
 7 Further, such Critical Vendor would stipulate and agree that injunctive relief
 8 specifically enforcing the Critical Vendor Agreement would be appropriate. In
 9 addition, if a Critical Vendor refuses to comply with the Customary Trade
 10 Terms (or fails to comply with other terms to which the parties have agreed),
 11 any payment made to that Critical Vendor on account of that Critical Vendor's
 12 prepetition claim would be deemed to have been in payment of any then
 13 outstanding postpetition obligations owed to that Critical Vendor, and that
 14 Critical Vendor would be required to repay immediately to Debtor any payment
 15 previously made to it on account of its prepetition claim pursuant to this Motion,
 16 to the extent the aggregate amount of such payments exceeds the postpetition
 17 obligations then outstanding, without the right of any setoffs, claims, provision
 18 for payment of reclamation or trust fund claims, or otherwise.

- 11 (d) Debtor would maintain a summary list of all payments made to the Critical
 12 Vendors, and would provide updated copies of such list on a monthly basis to
 13 the United States Trustee, any official committees appointed in this Chapter 11
 14 Case, and to any other entity that the Court requires.

14 22. Debtor submits that the relief requested herein is essential, appropriate and in the best
 15 interests of Debtor, its creditors and all parties in interest.

16 IV.

17 LEGAL ARGUMENT

18 There are several precedents for the relief requested in this Motion. First, Bankruptcy Code
 19 section 105(a) empowers this Court to issue "any order, process, or judgment that is necessary or
 20 appropriate to carry out the provisions of" the Bankruptcy Code.

21 Also, consistent with a debtor's fiduciary duties, courts have authorized payment of prepetition
 22 obligations under section 363(b) of the Bankruptcy Code, where sound business purpose exists for
 23 doing so. See, e.g., In re Tropical Sportswear Int'l Corp., 320 B.R. 15, 17-18 (Bankr. M.D. Fla. 2005).

24 Further, pursuant to sections 1107 and 1108 of the Bankruptcy Code, a debtor is a fiduciary
 25 "holding the bankruptcy estate and operating the business for the benefit of its creditors and (if the
 26 value justifies) equity owners." In re CoServ, LLC, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002).
 27 Implicit in the fiduciary duties of any debtor in possession is the obligation to "protect and preserve the
 28 estate, including an operating business's going-concern value." Id. Some courts have noted that there

1 are instances in which a debtor can fulfill this fiduciary duty “only ... by the preplan satisfaction of a
2 prepetition claim.” Id.

3 **A. The Court May Rely On Its General Equitable Powers To Grant This Motion.**

4 The Court may authorize payment of prepetition claims in appropriate circumstances based on
5 section 105(a) of the Bankruptcy Code. The purpose of section 105(a) is to empower a bankruptcy
6 court to take whatever action “is appropriate or necessary in aid of the exercise of [its] jurisdiction.”
7 2 COLLIER ON BANKRUPTCY ¶ 105.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Section
8 105(a) authorizes the bankruptcy court to “issue any order, process, or judgment that is necessary or
9 appropriate to carry out the provisions of [Title 11].” Walls v. Wells Fargo Bank, N.A., 276 F.3d 502,
10 506 (9th Cir. 2002).

11 The Ninth Circuit Court of Appeals recognized the importance of paying certain prepetition
12 claims in a reorganization case, even when the claimants are provided an advantage over other
13 creditors, stating in dicta in Burchinal v. Central Washington Bank (In re Adams Apple, Inc.), 829 F.2d
14 1484 (9th Cir. 1987), “[c]ases have permitted unequal treatment of pre-petition debts when necessary
15 for rehabilitation, in such contexts as . . . debts to providers of unique and irreplaceable supplies”
16 Adams Apple, 829 F.2d at 1490; see also In re Just for Feet, Inc., 242 B.R. 821, 824-25 (D. Del. 1999)
17 (approving the payment of prepetition claims to certain critical vendors); see also Weinstein, Eisen &
18 Weiss, LLPL v. Gill (In re Cooper Commons, LLC), 424 F.3d 963, 969 (9th Cir. 2005) (citing Adams
19 Apple for its rejection of the fundamental tenet of bankruptcy law that like creditors must always be
20 treated alike). The rationale acknowledged by the Adams Apple court is that a debtor’s rehabilitation in
21 reorganization cases is “the paramount policy and goal of Chapter 11.” Adams Apple, 829 F.2d at 490;
22 see also In re Just For Feet, Inc., 242 B.R. 821, 826 (D. Del. 1999) (section 105 provides “a statutory
23 basis for the payment of prepetition claims”); In re NVR LP, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992)
24 (“[U]nder 11 U.S.C. § 105 the court can permit pre-plan payment of a prepetition obligation when
25 essential to the continued operation of the debtor.”).

26 Moreover, courts have permitted postpetition payment of prepetition claims under section 105(a)
27 where nonpayment would trigger a withholding of goods or services essential to a debtor’s business
28 reorganization. See In re UNR Indus., 143 B.R. 516, 520 (Bankr. D. Ill. 1992) (permitting the debtor to

1 pay prepetition claims of suppliers or employees whose continued cooperation is essential to the
 2 debtor’s successful reorganization); Ionosphere, 98 B.R. at 167-77 (finding that section 105 empowers
 3 bankruptcy courts to authorize payment of prepetition debt when such payment is needed to facilitate
 4 the rehabilitation of the debtor); In re Tropical Sportswear Int’l Corp., 320 B.R. 15, 20 (Bankr. M.D.
 5 Fla. 2005) (“Bankruptcy courts recognize that section 363 is a source for authority to make critical
 6 vendor payments, and section 105 is used to fill in the blanks.”); In re NVR L.P., 147 B.R. at 127
 7 (explaining that under section 105, the court can permit preplan payments of a prepetition obligation
 8 “when essential to the continued operation of the debtor”); In re Chateaugay Corp., 80 B.R. 279, 287
 9 (Bankr. S.D.N.Y. 1987) (explaining that a bankruptcy court may exercise its equity powers under
 10 section 105 to authorize the payment of prepetition claims where such payment is necessary to “permit
 11 the greatest likelihood of survival of the debtor and payment of creditors in full or at least
 12 proportionately”); see also Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am. Hardwoods, Inc.),
 13 885 F.2d 621, 625 (9th Cir. 1989) (section 105 endows the bankruptcy court with general equitable
 14 powers, where not inconsistent with more specific law).

15 Thus, section 105(a) of the Bankruptcy Code permits a court to authorize preplan payment of
 16 prepetition obligations when essential to the continued operations of a debtor’s business in furtherance
 17 of its reorganization effort.

18 **B. The Court May Rely on Section 363(b) of the Bankruptcy Code to Grant This Motion.**

19 The Court may also authorize Debtor to pay Critical Vendor Claims under section 363(b) of the
 20 Bankruptcy Code. Section 363(b) provides, in pertinent part, that “[t]he trustee, after notice and a
 21 hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11
 22 U.S.C. § 363(b)(1). Under this section, a court may authorize a debtor to pay certain prepetition claims.
 23 See Ionosphere, 98 B.R. at 175 (authorizing payment of prepetition wages pursuant to section 363(b) of
 24 the Bankruptcy Code); In re UAL Corp., 2002 WL 34344254, at *1 (Bankr. N.D. Ill. 2002) (authorizing
 25 payment of prepetition claims under section 363 of the Bankruptcy Code as an out-of-ordinary-course
 26 transaction). In order to do so, “the debtor must articulate some business justification, other than mere
 27 appeasement of major creditors.” Ionosphere, 98 B.R. at 175. As discussed more fully herein, Debtor’s
 28 request to pay the Critical Vendors meets this standard because the failure to satisfy the Critical Vendor

1 Claims would likely have a material adverse impact on the day-to-day operations of Debtor's business,
2 as all pre-construction lot-preparation work and all home construction work is performed by Debtor's
3 Critical Vendors, without whom no construction could be completed. Without the ability to complete
4 its projects, Debtor's revenues would dwindle, along with the possibility for recovery by Debtor's
5 creditors and its estate.

6 Consistent with Debtor's fiduciary duties, courts have authorized payment of prepetition
7 obligations under Bankruptcy Code section 363(b) where a sound business purpose exists for doing so.
8 See, e.g., Ionosphere, 98 B.R. at 175 (finding that a sound business justification existed to justify
9 payment of prepetition wages); see also Armstrong World Indus., Inc. v. James A. Phillips, Inc., (In re
10 James A. Phillips, Inc.), 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying on section 363 of the Bankruptcy
11 Code to allow contractor to pay prepetition claims of suppliers who were potential lien claimants
12 because the payments were necessary for general contractors to release funds owed to debtors); In re
13 Tropical Sportswear Int'l Corp., 320 B.R. at 20 ("Bankruptcy courts recognize that section 363 is a
14 source for authority to make critical vendor payments").

15 In keeping with the foregoing, courts have also authorized a debtor's payment of prepetition
16 obligations under Bankruptcy Code sections 363 and 105(a) when a sound business purposes exists for
17 such payment. See Tropical Sportswear, 320 B.R. at 17-18 (authorizing payment to critical vendors
18 for prepetition amounts and finding that a sound business justification existed for payment because the
19 vendors would not do business with the debtors absent critical vendor status, and the disfavored
20 creditors were not any worse off due to the critical vendor order).

21 As set forth above, Debtor has determined, in the exercise of its sound business judgment, that
22 payment of Critical Vendor Claims is essential (i) for maintenance of Debtor's day-to-day operations,
23 (ii) to ensure that the value of the business as a going concern is preserved through the pendency of this
24 Chapter 11 Case, and (iii) to Debtor's ability to rehabilitate for the benefit of all stakeholders.

25 Instituting normal industry trade credit terms will improve Debtor's chances of successfully
26 reorganizing by, among other things, allowing Debtor to continue purchasing goods and services on
27 credit, preserving Debtor's working capital and liquidity and enabling Debtor to maintain its
28 competitiveness. Hence, allowing Debtor to selectively pay the prepetition claims of Critical Vendors,

1 in exchange for favorable credit terms, will serve the purposes of facilitating Debtor’s reorganization
2 and maximizing value for creditors.

3 As stated above, Debtor is not able to compel the Critical Vendors to perform pursuant to
4 contracts or otherwise, and many of the Critical Vendors could take advantage of their commercial
5 arrangements. For example, notwithstanding the automatic stay, vendors could attempt to coerce
6 Debtor to pay claims by placing Debtor on cash-on-delivery trade terms. Accordingly, Debtor submits
7 the relief requested is necessary and in the best interests of Debtor’s estate and creditors.

8 Debtor submits that, for the reasons set forth herein, the relief requested in this Motion is
9 necessary to avoid immediate and irreparable harm and Bankruptcy Rule 6003 has been satisfied.

10 **C. The Court Can And Should Waive Any Application Of Bankruptcy Rule 6004(h).**

11 To successfully implement the foregoing, Debtor seeks a waiver of the notice requirements
12 under Bankruptcy Rule 6004(a) and the 14-day stay under Bankruptcy Rule 6004(h).

13 Bankruptcy Rule 6004(h) provides that an “order authorizing the use, sale or lease of property.
14 . . . is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.”
15 Debtor submits that the facts of this Chapter 11 Case warrant a waiver of Bankruptcy Rule 6004(h) in
16 this instance in order to avert any disruption to Debtor’s operation that would occur in the absence of
17 immediate relief.

18 As noted herein, Debtor’s ability to continue to complete and deliver homes to customers is
19 dependant on the continued delivery of goods and services provided by its Critical Vendors.
20 Accordingly, Debtor requests that the Court waive Bankruptcy Rule 6004(h) such that an order
21 consistent with the Motion be immediately effective upon entry.

22 **V.**

23 **RESERVATION OF RIGHTS**

24 Nothing contained in this Motion is, or should be construed as, (a) an admission as to the
25 validity of any claim against Debtor; (b) a waiver of Debtor’s right to dispute any claim on any
26 grounds; (c) a promise to pay any claim; (d) an assumption or rejection of any executory contract or
27 unexpired lease pursuant to Bankruptcy Code § 365; or (e) otherwise affecting Debtor’s rights under
28 Bankruptcy Code § 365 to assume or reject any executory contract with any party subject to this

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Las Vegas, Nevada 89169
(702) 262-6899

1 EXHIBIT A
2 FORM OF CRITICAL VENDOR AGREEMENT
3
4

5 [Company Letterhead]
6

7 [Date]

8 To: [Critical Vendor]
9 [address]
[city, state, zip]

10 Dear Valued Supplier/Service Provider:

11 As you may be aware, American West Development, Inc. (the "Company") filed a voluntary
12 petition for relief under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Case") in
13 the United States Bankruptcy Court for the District of Nevada (the "Bankruptcy Court") on March 1,
14 2012 (the "Petition Date"). On the Petition Date, the Company also filed a motion requesting the
15 Bankruptcy Court's authority to pay, on certain conditions, the pre-bankruptcy claims of certain
16 suppliers and service providers in recognition of the importance of the Company's relationship with
17 such trade creditors and its desire that the Bankruptcy Case have as little effect on the Company's
ongoing business operations as possible. On March __, 2012, the Bankruptcy Court entered an order (the
18 "Order") authorizing the Company, under certain conditions, to pay the prepetition claims of certain
19 trade creditors that agree to the terms set forth below and to be bound by the terms of the Order. A
20 copy of the Order is enclosed.

21 In order to receive payment on account of prepetition claims, you must agree to continue to
22 supply goods and services to the Company based on "Customary Trade Terms." For our purposes,
23 Customary Trade Terms are defined as the reasonable and customary price, service, quality, and
24 payment terms (including, but not limited to, credit limits, pricing, cash discounts, timing of payments,
25 allowances, rebates, coupon reconciliation, normal product mix and availability and other applicable
26 terms and programs) that were most favorable to the Company and in effect between you and the
27 Company prior to the Petition Date.

28 For purposes of administration of this critical vendor payment program (the "Critical Vendor
Payment Program") as authorized by the Bankruptcy Court, you and the Company both agree as
follows:

1. The estimated balance of the prepetition claim (net of any setoffs, credits or discounts)
(the "Vendor Claim") that you will receive from the Company is \$_____.
2. You agree to waive any prepetition general unsecured claim against the Company that
does not fall within the Vendor Claim.

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1 3. You will provide an open trade balance or credit line to the Company for providing
2 postpetition goods or services in the amount of \$ _____ (which shall not be less than the greater of
3 the open trade balance outstanding: (a) on _____, or (b) on normal and customary terms on a
historical basis before and up to the Petition Date).

4 4. The terms of such open trade balance or credit lien are as follows (if more space is
5 required, attach continuation pages):
6 _____
7 _____

8 5. During the pendency of the Bankruptcy Case, you will continue to extend to the
9 Company all Customary Trade Terms (as defined in the Order).

10 6. You will not demand a lump sum payment upon consummation of a plan of
11 reorganization in this Bankruptcy Case on account of any administrative expense priority claim that you
12 assert but instead agree that such claims will be paid in the ordinary course of business after
consummation of a plan under applicable Customary Trade Terms if the plan provides for the ongoing
operations of the Company.

13 7. The undersigned, a duly authorized representative of [**Critical Vendor**], has reviewed
14 the terms and provisions of the Order and agrees that [**Critical Vendor**] is bound by such terms.

15 8. You will not separately seek payment for any reclamation claims or claims under
16 Bankruptcy Code section 503(b)(9) outside the terms of the Critical Vendor Order unless your
17 participation in the Critical Vendor Payment Program is terminated; provided, however, that such
18 claims would, if thereafter raised by a Critical Vendor as permitted by the Critical Vendor Order, be
treated as though raised on the date of the Critical Vendor Order.

19 9. You agree not to file or otherwise assert against the Company, the estate or any other
20 person or entity or any of its respective assets or property (real or personal) any lien (regardless of the
21 statute or other legal authority upon which such lien is asserted) related in any way to any remaining
22 prepetition amounts allegedly owed to you by the Company arising from agreements entered into prior
to the Petition Date. Furthermore, you agree to take (at your own expense) all necessary steps to
remove any such lien as soon as possible.

23 10. You agree that any payments received under the Critical Vendor Payment Program
24 would be applied first to claims for the value of goods received by Debtor within 21 days prior to the
Petition Date that were sold to Debtor in the ordinary course of business, and then to any other claims.

25 11. If either the Critical Vendor Payment Program or your participation therein terminates
26 as provided in the Order or you later refuse to continue to supply goods to the Company on Customary
27 Trade Terms during the pendency of the Bankruptcy Case, any payments you receive on account of
28 your Vendor Claim (including claims arising under section 503(b)(9) of Chapter 11 of Title 11 of the
United States Code) will be deemed voidable postpetition transfers pursuant to Bankruptcy Code
section 549(a). You will immediately repay to the Company any payments made to you on account of

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Las Vegas, Nevada 89169
(702) 262-6899

1 your Vendor Claim to the extent that the aggregate amount of such payments exceeds the postpetition
2 obligations then outstanding without giving effect to alleged setoff rights, recoupment rights,
3 adjustments or offsets of any type whatsoever. Your Vendor Claim shall be reinstated in such an
4 amount so as to restore the Company and you to the same positions as would have existed if payment of
5 the Vendor Claim has not been made.

6 12. If you refuse to supply goods or services to Debtor on Customary Trade Terms (or fail to
7 comply with other terms to which you and the Debtor have agreed), following your receipt of payment
8 on the Critical Vendor Claim, or fail to comply with the above Vendor Agreement in any way, Debtor
9 may, in its discretion and without further order of this Court, declare that you are in breach of this
10 Vendor Agreement with Debtor. To the extent you fail to cure such default or reach an alternative
11 agreement with Debtor, Debtor may seek appropriate relief from the Court, including, without
12 limitation, injunctive relief to compel performance pursuant to the Vendor Agreement. Further, you
13 would stipulate and agree that injunctive relief specifically enforcing the Critical Vendor Agreement
14 would be appropriate. In addition, if you refuse to comply with the Customary Trade Terms (or fail to
15 comply with other terms to which you and the Debtor have agreed), any payment you receive on
16 account of your prepetition claim would be deemed to have been in payment of any then outstanding
17 postpetition obligations owed to you, and you would be required to repay immediately to Debtor any
18 payment previously received by you on account of your prepetition claim pursuant to the Motion you
19 received in connection with this Vendor Agreement, to the extent the aggregate amount of such
20 payments exceeds the postpetition obligations then outstanding, without the right of any setoffs, claims,
21 provision for payment of reclamation or trust fund claims, or otherwise.

22 13. Any dispute with respect to this letter agreement, the Order and/or your participation in
23 the Critical Vendor Payment Program shall be determined by the Bankruptcy Court.

24 If you have any questions about this agreement or our financial restructuring, please do not
25 hesitate to call.

26 Sincerely,

27 **AMERICAN WEST DEVELOPMENT, INC,**
28 **a Nevada corporation**

BY: ROBERT M. EVANS,
ITS: PRESIDENT

By _____
ROBERT M. EVANS, PRESIDENT

29 Agreed and Accepted by:
30 **[Critical Vendor]**

31 By: _____

32 Title: _____

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

EXHIBIT B

CRITICAL VENDOR MATRIX

		(\$'s in actuals)	
<u>Critical Vendors</u>	<u>Type of Vendor</u>	<u>Q1 2011 Expense Run</u>	
		<u>Rate</u>	
Gilmore Construction	Framing	\$	130,658.30
Loftco, LLC	Framing	\$	40,697.72
Sunrise Carpentry Inc.	Framing	\$	244,419.25
Ponderosa Plastering LLC	Drywall	\$	83,613.14
Roadrunner Drywall Corp	Drywall	\$	71,423.56
Red Rose Inc. and Pacific Supply	Roofing	\$	58,263.25
Carpets-N-More	Flooring	\$	17,922.75
Del Grosso Floor Covering, Inc.	Flooring	\$	24,090.00
Sterling Nevada LLC	Flooring	\$	38,322.25
Pioneer Plumbing, Inc.	Plumbing	\$	37,500.00*
RSP, Inc.	Plumbing	\$	37,500.00*
Bombard Mechanical, LLC	Plumbing	\$	37,500.00*
Interstate Plumbing	Plumbing	\$	137,075.38
Double A Electric LLC	Electrical	\$	64,305.36
Maile Concrete	Paving	\$	99,668.26
Sunrise Paving Inc.	Paving	\$	16,758.34
Sierra Air Conditioning, Inc	HVAC	\$	37,500.00*
Sunrise Mechanical, Inc.	HVAC	\$	76,598.50
Clark County Water Reclamation District	Utility Construction	\$	48,904.74
Freedom Underground, LLC	Utility Construction	\$	27,255.00
Mammoth Underground, LLC	Utility Construction	\$	20,607.08
NV Energy	Utility Construction	\$	131,604.60
Pahrump Utility Company	Utility Construction	\$	23,128.88
Western State Contracting, Inc	Utility Construction	\$	28,032.18
Southwest Foundations	Slab/Foundation	\$	128,086.53
Rim Rock Engineering	Engineering	\$	9,786.70
Comfort Engineering Inc.	Engineering	\$	5,150.00
Post, Buckley, Schuh & Jernigan Inc.	Engineering	\$	4,571.25

1	Olympia Management Services (Landscape Maintenance Company)	Common area landscape installation and expenses the LMC incurs until there are enough homeowners paying dues to cover the expenses.	\$	12,500.00
2				
3	RMI Management, LLC (Landscape Maintenance Company)	Common area landscape installation and expenses the LMC incurs until there are enough homeowners paying dues to cover the expenses.	\$	12,500.00
4				
5	Sunstate Companies Inc.	Landscaping	\$	132,395.93
6	Piece of the Rock Inc.	Tile	\$	25,712.50
7	CTM Contractors, Inc.	Tile	\$	3,392.75
8	DP Sales	Windows	\$	53,718.21
9	Dan Bradley's Glass Shop	Windows	\$	15,213.00
10	P.R. Construction Inc.	Doors	\$	39,741.43
11	Anvil Masonry LLC	Fencing	\$	21,002.00
12	Alcal Arcade	Contracting	\$	1,875.00
13	Brandon Iron	Custom Iron	\$	2,500.00
14	Cal/Pac Painting	Painting	\$	250.00
15	Clark County Building Dept.	Building Inspection	\$	30,000.00
16	Developers Maintenance	Residential Clean Up	\$	7,500.00
17	Hutchins Drywall	Drywall	\$	625.00
18	JD Stairs	Custom Stairs	\$	1,250.00
19	K & B Door	Doors	\$	3,000.00
20	Progressive Home	Contractor	\$	12,500.00
21	Red Rock Insulation	Insulation	\$	5,500.00
22	Republic Electric	Electric	\$	2,000.00
23	Southern California Construction Cleanup	Construction Clean Up	\$	6,250.00
24	Statewide Lighting	Lighting	\$	8,750.00
25	Walldesign	Wall design	\$	22,500.00
26	Whirlpool	Refrigeration	\$	6,750.00
27	CGF Management, Inc.	Administrative Management		**
28	The Clean Trust	Cleaning Service		**
29	Dynamic Plumbing Systems, Inc.	Plumbing		**
30	KLAS LLC	Media		**
31	LM 3 Media, LLC	Media		**
32	Platinum Plumbing LLC	Plumbing		**
33	T&R Construction Group	Roofing		**
34	Xpand Realty & Property Management	Property Management		**

* Estimated run rate for Interstate Plumbing based on Q1 2011.

** New Vendor, estimated run rate unavailable.

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EXHIBIT C

PROPOSED FORM OF ORDER

BRETT A. AXELROD, ESQ.
Nevada Bar No. 5859
MICAELA RUSTIA MOORE, ESQ.
Nevada Bar No. 9676
FOX ROTHSCHILD LLP
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
Telephone: (702) 262-6899/Facsimile: (702) 597-5503
Email: baxelrod@foxrothschild.com
mmoore@foxrothschild.com
[Proposed] Counsel for American West Development, Inc.

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

<p>In re</p> <p>AMERICAN WEST DEVELOPMENT, INC., a Nevada corporation,</p> <p style="text-align: right;">Debtor.</p>	<p>Case No. BK-S-12-12349-MKN</p> <p>Chapter 11</p> <p>ORDER AUTHORIZING PAYMENT OF PREPETITION CRITICAL VENDORS CLAIMS</p> <p>Hearing Date: Hearing Time:</p>
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The Court, having reviewed and considered American West Development, Inc.’s (“Debtor”) Motion (the “Motion”) for an order (i) authorizing Debtor to pay certain prepetition claims of contractors, subcontractors, and certain other vendors who are currently performing on Debtor’s ongoing construction and development projects, and (ii) implementing procedures for payment thereof, pursuant to sections 105(a) and 363(b) of Title 11 of the United States Code (the “Bankruptcy Code”); and upon consideration of the Omnibus Declaration of Robert M. Evans; and the Court having

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

1 jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. § 1334; and
2 consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28
3 U.S.C. § 157(b); and venue being proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; and
4 due and proper notice of the Motion having been provided; and it appearing that no other or further
5 notice need be provided; and the Court having determined that the relief sought in the Motion is in the
6 best interests of Debtor, its creditors and all other parties in interest; and the Court having determined
7 that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein;
8 and upon all the proceedings had before the Court and after due deliberation and sufficient cause
9 appearing therefor, it is hereby,

10 **ORDERED** that the Motion is granted; and, without limiting the generality of the foregoing, the
11 Critical Vendor Procedures set forth therein are approved.

12 **IT IS FURTHER ORDERED** that the terms and conditions of this order shall be immediately
13 effective and enforceable upon its entry; and

14 **IT IS FURTHER ORDERED** that this Court shall retain jurisdiction to hear and determine all
15 matters arising from the implementation or interpretation of this Order; and

16 **IT IS FURTHER ORDERED** that notice of this Motion as provided therein shall be deemed
17 good and sufficient notice of the Motion.

18 **IT IS FURTHER ORDERED** that this Order is not subject to the 14-day stay provision of
19 Rule 6004 of the Bankruptcy Rules.

20 Prepared and Respectfully Submitted by:

21 **FOX ROTHSCHILD LLP**

22 By _____

23 BRETT A. AXELROD, ESQ.
Nevada Bar No. 5859

24 MICAELA RUSTIA MOORE, ESQ.
Nevada Bar No. 9676

25 3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169

26 *[Proposed] Counsel for American West Development, Inc.*

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

1 APPROVED/DISAPPROVED:

2 **OFFICE OF THE UNITED STATES TRUSTEE**

3 BY: _____

4 Athanasios Agelakopoulos
5 Trial Attorney for Acting United States Trustee,
6 August B. Landis

7 **CERTIFICATION OF COUNSEL PURSUANT TO LOCAL RULE 9021**

8 In accordance with Local Rule 9021, counsel submitting this document certifies as follows:

- 9 The Court has waived the requirement of approval in LR 9021(b)(1).
- 10 No party appeared at the hearing or filed an objection to the motion
- 11 I have delivered a copy of this proposed order to all counsel who appeared
- 12 at the hearing, any unrepresented parties who appeared at the hearing, and
- 13 each has approved or disapproved the order, or failed to respond, as
- 14 indicated below:

15 ATHANASIOS 16 AGELAKOPOULOS, OFFICE OF THE UNITED STATES TRUSTEE	[INSERT, AS APPLICABLE] _____
---	----------------------------------

17 Approved / Disapproved

- 18 I certify that this is a case under Chapter 7 or 13, that I have served a
- 19 copy of this order with the motion pursuant to LR 9014(g), and that no
- 20 party has objected to the form or content of the order.

21 ###

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