

Electronically Filed March 1, 2012

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

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

Case No. BK-S-12-12349-MKN
Chapter 11

**MOTION TO APPROVE SETTLEMENT
WITH BANK GROUP AS SET FORTH IN
RESTRUCTURING, LOCK-UP AND
SETTLEMENT LETTER AGREEMENT
PURSUANT TO FED. R. BANKR. P. 9019**

Hearing Date: April 10, 2012
Hearing Time: 9:30 a.m.

17 American West Development, Inc. ("AWDI" or "Debtor"), debtor and debtor in possession in
18 the above-captioned case (the "Chapter 11 Case"), by and through its proposed counsel, the law firm of
19 Fox Rothschild LLP, hereby submit this Motion to Approve Settlement With Bank Group As Set Forth
20 In Restructuring, Lock-Up And Settlement Letter Agreement Pursuant to Fed. R. Bankr. P. 9019 (the
21 "Motion"), for entry of an order, pursuant to Rule 9019(a) of the Federal Rules of Bankruptcy
22 Procedure ("Bankruptcy Rules"), approving the settlement (the "Settlement") set forth in that certain
23 Restructuring, Lock-Up And Settlement Letter Agreement (the "Lock-Up Agreement")¹, by and
24 between Debtor, California Bank & Trust ("CB&T") and the other lenders signatory to the Term Loan

25
26
27 ¹ All capitalized words and phrases not otherwise defined in this Motion shall have the meanings
28 given to them in the Lock-Up Agreement.

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1 Agreement (defined below) (collectively, the “Other Lenders” and together with CB&T, the “Bank
2 Group”).

3 This Motion is made and based upon the following memorandum of points and authorities, the
4 Omnibus Declaration of Robert M. Evans (the “Omnibus Declaration”), filed in support of each of the
5 Debtor’s First Day Motions on March 1, 2012 (the “Petition Date”), filed concurrently herewith and in
6 support hereof, the papers and pleadings on file with the Court in this Chapter 11 Case, including the
7 pleadings and documents filed on behalf of the Parties, the arguments and representations of counsel,
8 and any oral or documentary evidence presented at or prior to the time of the hearing on the Motion. A
9 true and correct copy of the Lock-Up Agreement is attached to the Omnibus Declaration as **Exhibit**
10 **“D”** thereto.

11 WHEREFORE, Debtor requests that the Court enter an order (i) approving the Settlement,
12 (ii) authorizing Debtor to perform according to the terms and provisions of the Lock-Up Agreement,
13 and (iii) granting such other relief as may be just and proper.

14 DATED this 1st day of March 2012.

15 **FOX ROTHSCHILD LLP**

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MEMORANDUM OF LAW
POINTS AND AUTHORITIES

I.

INTRODUCTION

Following extensive negotiations conducted in good faith prior to the Petition Date, Debtor and the Bank Group reached agreement on the terms of the Settlement regarding, among other things, the amount and treatment of the secured claims asserted by members of the Bank Group against Debtor. The terms and conditions of the Settlement, as memorialized in the Lock-Up Agreement attached as **Exhibit “D”** to the Omnibus Declaration and incorporated for all purposes herein by this reference, are reasonable, fair and equitable. Therefore, Debtor seeks approval of the Settlement pursuant to Bankruptcy Rule 9019, and authorization to perform according to the terms and provisions of the Lock-Up Agreement, in order to facilitate its efforts to reorganize via its proposed chapter 11 plan.

II.

JURISDICTION

1. This Court has jurisdiction to consider and determine this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b).
2. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory bases for the relief requested herein are section 105 of title 11 of the United States Code (the “Bankruptcy Code”) and Bankruptcy Rule 9019(a).

III.

FACTUAL BACKGROUND

4. On the Petition Date, AWDI² filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

² Prior to the Petition Date, the following former affiliates of AWDI (collectively, the “AWDI Affiliates”) merged into AWDI: 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. After the merger, AWDI was the surviving entity and successor-in-interest, assuming the operations, assets, and liabilities of the AWDI Affiliates.

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

4 6. No request has been made for the appointment of a trustee or examiner, and no statutory
5 committee has been appointed in the Chapter 11 Case. See id.

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

9 8. Prior to the Petition Date, Debtor and the Bank Group entered into that certain Term
10 Loan Credit Agreement dated as of December 31, 2009 and related documents (such documents
11 collectively, and as amended from time to time, including the exhibits attached thereto, the "Term
12 Loan Agreement"), by and between Debtor, as borrower, certain other of Debtor's non-debtor
13 affiliates, as co-borrowers³ and/or guarantors⁴ and the Bank Group. A true and correct copy of the
14 Term Loan Agreement is attached as **Exhibit "E"** to the Omnibus Declaration and is incorporated for
15 all purposes herein by this reference.

16 9. Additional factual background related to the Settlement for purposes of this Motion is
17 set forth in the Lock-Up Agreement and is incorporated for all purposes herein by this reference.

18
19 ³ The non-debtor affiliates of Debtor that are co-borrowers under the Term Loan Agreement
20 (collectively, the "Non-Debtor Co-Borrowers") include: Adaven Management, Inc.; AWH North, LLC;
21 AWH North NLV 2009, LLC; AWH Ventures, Inc.; Canfam Holdings, LLC; CFT Lands, LLC;
22 Colorado Companies, Inc.; Colorado Housing Investments, Inc.; Colorado Land Investments, Inc.;
23 Colorado Land Investments 2, Inc.; Deferred Revenue, LLC; Fairmont 2, LLC; Gameday, LLC;
24 Heritage 2, Inc.; Highlands Land Investment, Inc.; HLI, LLC; Indiana Investments, Inc.; Kensington 2,
25 Inc.; Lawrence D. Canarelli and Heidi Canarelli, individually and as trustees of The Jeffrey Lawrence
26 Graves Canarelli Irrevocable Trust, The Scott Lyle Graves Canarelli Irrevocable Trust, the Stacia Leigh
27 Lemke Irrevocable Trust, the Alyssa Lawrence Graves Canarelli Irrevocable Trust; Lawrence D.
28 Canarelli, as trustee of the Canarelli Family Trust; Lexington 1, LLC; LH Ventures, LLC; Model
Renting 2008, LLC; Model Renting 2009, LLC; Model Renting Company, Inc.; Mountain West
Associates, LLC; Newcastle 1, LLC, NLV Parcel 5.03, LLC; Parcel NLV 1.3, LLC; Parcel NLV 1.4,
LLC; Parcel NLV 1.13, LLC; SJSA Ventures, LLC; and Woodbridge 1, Inc.

⁴ The non-debtor affiliates of Debtor that are guarantors under the Term Loan Agreement include:
C&H Adams Land Investments, LLC; CS 2005 Investments, LLC; EH 2002, LLC; GVR King, LLC;
GVR King Commercial, LLC; Green Valley Aurora, LLC; Green Valley East, LLC; HC Land
Investments, LLC; Tower Road Farms, LLC; and Yampa-Telluride Land Investments, LLC.

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IV.

SETTLEMENT

10. As Debtor's only secured creditors and the holders, collectively, of the largest claims as of the Petition Date, the Bank Group is a key constituency in this Chapter 11 Case. Debtor has had a constructive lending relationship with the Bank Group over the years, which has motivated Debtor's efforts to continue that constructive relationship through and after the conclusion of its current reorganization process. Therefore, Debtor engaged the Bank Group in discussions regarding the terms of a potential plan of reorganization in advance of the Petition Date. Debtor's goal was to reach agreement with the Bank Group on the outline of a plan of reorganization, including the key economic points for the treatment of the Bank Group's secured claims.

11. After careful diligence review and arms' length, good faith negotiations, Debtor and the Bank Group entered into the Lock-Up Agreement, which (among other things) is based upon the terms of Debtor's proposed chapter 11 plan (the "Plan"). The Lock-Up Agreement sets forth the terms and conditions of the commitments that Debtor and the Bank Group have made regarding the Plan, the Plan confirmation process, and certain other aspects of the Chapter 11 Case. In particular, the Lock-Up Agreement sets forth the following terms of the Settlement regarding the allowance and treatment of the Bank Group's claims against Debtor's estate:

(a) The members of the Bank Group shall have allowed secured claims in the Chapter 11 Case in an aggregate amount of not more than \$49,635,000 (the "Claim Value"), which is equal to the net present value of the Receivable;

(b) Consistent with the Plan, upon the effective date of the Plan and in full satisfaction of the Bank Group members' allowed secured claims against Debtor, each member of the Bank Group will be issued a promissory note secured by the Receivable (collectively, the "New Secured Notes"). Each member of the Bank Group shall receive a New Secured Note in a principal amount equal to the product of (x) the Claim Value, and (y) its Pro Rata Interest.

The New Secured Notes shall:

(i) have a maximum aggregate principal amount equal to the Claim Value;

and

1 (ii) be substantially in the form attached to the Lock-Up Agreement as
2 Appendix 2 thereto, which is expressly incorporated herein and made part of this
3 Agreement by this reference;

4 (c) Each member of the Bank Group shall have an allowed unsecured claim in the
5 Chapter 11 Case, in the aggregate, in the deficiency amount of \$127,871,450.25;

6 (d) Upon the effective date of the Plan, and without further action on the part of the
7 Bank Group or otherwise:

8 (i) the members of the Bank Group shall be deemed to waive and shall
9 waive their respective rights against Debtor to receive any distribution on account of
10 their unsecured claims in the Chapter 11 Case, or any right to be paid interest by Debtor
11 during the pendency of the Chapter 11 Case beyond what they received as adequate
12 protection payments under Section 2.01(h) of the Lock-Up Agreement, so long as the
13 general unsecured creditors, as a class, vote to accept the Plan;

14 (ii) the Term Loan Obligations shall be deemed fully discharged and
15 satisfied solely as to Debtor, and the Term Loan Agreement shall immediately
16 terminate solely with respect to Debtor; and

17 (iii) AWDI shall be deemed to be the sole owner of the Receivable, free and
18 clear of the Bank Group's interests under the Term Loan Agreement (but subject to the
19 Bank Group's interests under the New Secured Notes); and

20 (e) all liens and security interests in property of Debtor's estate securing the Term
21 Loan Obligations shall automatically be deemed to be replaced by the New Secured Notes and
22 the documents and instruments in connection therewith without further action (but without
23 effect on the Bank Group's liens on the Receivable to secure the New Secured Notes);

24 (f) At the reasonable request of AWDI (and at the sole cost and expense of AWDI)
25 after the effective date of the Plan, the Administrative Agent on behalf of the Bank Group will
26 amend any UCC financing statement filings (to the extent naming Debtor as "debtor") to
27 conform to the collateral description provided in the documents and instruments in connection
28 with the New Secured Notes;

1 (g) Monthly on or before the first day of each month and continuing during the
2 pendency of the Chapter 11 Case, Debtor shall make adequate protection payments to the
3 Administrative Agent for the benefit of the members of the Bank Group in an amount equal to
4 the highest non-default rate of interest applicable from time to time to amounts outstanding
5 under the Term Loan Agreement, multiplied by \$49,635,000; and

6 (h) The members of the Bank Group shall waive any respective right to seek from
7 Debtor or the reorganized Debtor interest accruing under the Term Loan Agreement prior to the
8 Plan effective date in excess of the non-default rate.

9 12. Debtor believes that negotiation of the Lock-Up Agreement was a key accomplishment
10 in its efforts to reorganize because it will avoid the delay and expense of attempting to negotiate (or
11 worse yet, litigate) with the Bank Group during the course of the Chapter 11 Case, and instead
12 facilitate Debtor’s timely and cost-effective emergence from chapter 11 protection.

13 **V.**

14 **ARGUMENT**

15 Bankruptcy Rule 9019 provides that “[o]n motion by the trustee and after notice and a hearing,
16 the court may approve a compromise or settlement.” Fed. R. Bankr. P. 9019(a). The Court is afforded
17 great latitude in approving compromise agreements. Woodson v. Fireman’s Fund Ins. Co. (In re
18 Woodson), 839 F.2d 610, 620 (9th Cir. 1988). “The purpose of a compromise agreement is to allow the
19 trustee and the creditors to avoid the expenses and burdens associated with litigating sharply contested
20 and dubious claims.” Martin v. Kane (In re A & C Properties), 784 F.2d 1377, 1380-81 (9th Cir. 1986)
21 (citations omitted). Moreover, “[t]he law favors compromise and not litigation for its own sake”
22 Id., at 1381. Accordingly, to approve a settlement agreement, a bankruptcy court need not conduct a
23 mini-trial on the merits of the claims or an exhaustive investigation into the underlying dispute between
24 the parties. Matter of Walsh Construction, Inc., 669 F.2d 1325, 1328 (9th Cir. 1982). It is sufficient
25 that a bankruptcy court find the settlement was negotiated in good faith and that it is fair and equitable
26 in order to approve such compromise. In re A & C Properties, 784 F.2d at 1381.

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1 In A & C Properties, the Ninth Circuit Court of Appeals identified the factors that a bankruptcy
 2 court must consider in determining whether a proposed settlement agreement is reasonable, fair and
 3 equitable:

- 4 (a) the probability of success in the litigation;
 5 (b) the difficulties, if any, to be encountered in the matter of collection;
 6 (c) the complexity of the litigation involved, and the expense, inconvenience
 7 and delay necessarily attending it; and
 8 (d) the paramount interest of the creditors and a proper deference to their
 9 reasonable views in the premises.

10 A & C Properties, 784 F.2d at 1381 (citations omitted).

11 In considering these factors, bankruptcy courts need not decide disputed facts and questions of
 12 law but, rather, need only canvass the issues. See Burton v. Ulrich (In re Schmitt), 215 B.R. 417, 423
 13 (B.A.P. 9th Cir. 1997). “If the court were required to do more than canvass the issue, ‘there would be
 14 no point in compromising; the parties might as well go ahead and try the case.’” Suter v. Goedert (In re
 15 Suter), 396 B.R. 535, 548 (D. Nev. 2008) (quoting 10 Collier on Bankruptcy, ¶9019.02). Additionally,
 16 “while creditors’ objections to a compromise must be afforded due deference, such objections are not
 17 controlling.” In re A & C Properties, 784 F.2d 1382. Indeed, the settlement need not be the best that
 18 could have been achieved, but only must not “fall below the lowest point in the range of
 19 reasonableness.” In re Drexel Burnham Lambert Group, Inc., 134 B.R. 493, 496 (Bankr. S.D.N.Y.
 20 1991) (citations omitted).

21 Debtor submits that the Settlement is well within the range of reasonableness and meets the
 22 Ninth Circuit’s test for approving compromises of controversies under Bankruptcy Rule 9019. First,
 23 absent the Lock-Up Agreement, Debtor would be liable for the full obligation owed under the Term
 24 Loan Agreement, jointly and severally with the Non-Debtor Co-Borrowers, in an amount equal to
 25 approximately \$177,506,450.25, as of the Petition Date. Term Loan Agreement, ¶ 16.1. Even if
 26 Debtor was to prevail in a valuation contest such that the Court set the Bank Group’s aggregate allowed
 27 secured claims against AWDI at the discounted value of \$49,635,000 (the value Debtor believes the
 28 Bank Group’s collateral to be worth on a net present value basis and the value to which the Bank

1 Group has agreed pursuant (and subject) to the Settlement), the resulting aggregate unsecured
2 deficiency claims held by members of the Bank Group would be sufficiently large (almost
3 \$128,000,000) to severely dilute any recovery for other creditors holding general unsecured claims.

4 By entering into the Settlement regarding the allowance and treatment of the Bank Group's
5 claims against Debtor's estate, Debtor avoids (i) expending time and expense associated with litigating
6 difficult valuation issues in the context of cash collateral usage and claim allowance, which would
7 diminish assets of the estate, (ii) joint and several liability with the Non-Debtor Co-Borrowers for the
8 full amount of the obligation due under the Term Loan Agreement by establishing a cap on the amount
9 Debtor owes to the Bank Group on a secured basis, and (iii) so long as the general unsecured creditors,
10 as a class, vote to accept the Plan, severe dilution of other general unsecured claims that would result if
11 the members of the Bank Group did not waive their unsecured deficiency claims. Moreover, the
12 Settlement is conditioned on the Plan's effectiveness, such that, if the Plan is not confirmed, the
13 Settlement is of no force and effect with Debtor and Bank Group being restored to their respective
14 rights, interests and positions regarding the Bank Group's claims against the estate.

15 Thus, the creditors of Debtor's estate are best served by a compromise of the Bank Group's
16 claims against Debtor under the Term Loan Agreement on the terms and conditions of the Settlement
17 outlined herein and set forth in more detail in the Lock-Up Agreement. The Settlement constructs a
18 framework for this Chapter 11 Case and provides the most cost-effective way of dealing with some of
19 the thorniest issues that can arise in a chapter 11 bankruptcy proceeding. Application of the A & C
20 Properties factors in consideration of the foregoing concerns clearly establishes that the Settlement
21 warrants approval as being reasonable, fair and equitable and in the best interests of creditors.
22 Accordingly, the Court should approve the Settlement to allow Debtor to proceed with this Chapter 11
23 Case and facilitate Debtor's reorganization efforts.

24 VI.

25 NOTICE

26 Debtor is providing notice of this Motion to (i) CB&T and its counsel, (ii) each of the members
27 of the Bank Group, (iii) the Office of the United States Trustee, (iv) the 20 largest unsecured creditors
28 listed in the bankruptcy schedules and statements filed by Debtor in this Chapter 11 Case, and (v) any

1 other party who has requested notice and service of process in this Chapter 11 Case, pursuant to
2 Bankruptcy Rule 2002. Debtor submits that the notice provided is sufficient in all respects for the relief
3 requested by this Motion.

4 **VII.**

5 **CONCLUSION**

6 WHEREFORE, for all of the foregoing reasons, Debtor respectfully requests that this Court
7 enter an Order (i) approving the Settlement, (ii) authorizing Debtor to perform in accordance with the
8 terms and provisions of the Lock-Up Agreement, and (iii) granting such further relief as the Court
9 deems just and proper.

10 DATED this 1st day of March 2012.

11 **FOX ROTHSCHILD LLP**

12 By /s/ Brett A. Axelrod

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