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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.
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19

Case No. BK-S-12-12349-MKN
Chapter 11
**DEBTOR’S MOTION PURSUANT TO
BANKRUPTCY CODE SECTIONS 105(A),
327, 328 AND 330 FOR AN ORDER
AUTHORIZING RETENTION AND
COMPENSATION OF CERTAIN
PROFESSIONALS UTILIZED BY
DEBTOR IN THE ORDINARY COURSE
OF BUSINESS**
Hearing Date: April 10, 2012
Hearing Time: 9:30 a.m.

20 American West Development, Inc. (“AWDI” or “Debtor”), debtor and debtor in possession in
21 the above-captioned case (the “Chapter 11 Case”), by the within motion hereby moves for an order
22 substantially in the form attached hereto as **Exhibit D** (the “Order”), authorizing Debtor to retain,
23 employ, and compensate certain professionals utilized by Debtor in the ordinary course of business
24 pursuant to Bankruptcy Code¹ sections 105(a), 327, 328 and 330, Bankruptcy Rules 2002(m) and 9007,
25 and Local Rule 2002 (the “Motion”).
26

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

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1 The Ordinary Course Professionals (term defined more fully below) will not be involved in the
2 administration of this Chapter 11 Case. Rather, they will provide services in connection with Debtor’s
3 ongoing business operations and financial affairs. As a result, Debtor does not believe that the Ordinary
4 Course Professionals are “professionals” as that term is used in section 327 of the Bankruptcy Code,
5 whose retention must be approved by this Court. Nevertheless, out of an abundance of caution, Debtor
6 seeks an order authorizing the retention and payment of all Ordinary Course Professionals during the
7 pendency of this Chapter 11 Case.

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

12 DATED this 1st day of March 2012.

13 **FOX ROTHSCHILD LLP**

14 By: /s/Brett A. Axelrod

15 BRETT A. AXELROD, ESQ.

16 Nevada Bar No. 5859

17 MICAELA RUSTIA MOORE, ESQ.

18 Nevada Bar No. 9676

19 3800 Howard Hughes Parkway, Suite 500

20 Las Vegas, Nevada 89169

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

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I.**

25 **JURISDICTION**

26 1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This
27 matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

28 2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

Bankruptcy Procedure; and all references to a “Local Rule” shall refer to the Local Rules of Bankruptcy
Practice of the U.S. Bankruptcy Court for the District of Nevada.

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1 postpetition, and description of the services each professional will provide, is attached as **Exhibit A**
 2 hereto.²

3 9. By this Motion, Debtor requests that this Court enter an order (a) authorizing it to retain
 4 and compensate the Ordinary Course Professionals without the submission of separate retention
 5 applications or the entry of specific retention orders, (b) approving the payment of one hundred percent
 6 (100%) of the monthly fees and expenses of the Ordinary Course Professionals, without requiring the
 7 filing of fee applications or further court orders, subject to the limitations set forth below, and (c)
 8 permitting the expansion of the list of Ordinary Course Professionals through the process described
 9 below.

10 10. In contrast, Debtor will file individual retention applications for any professionals that
 11 Debtor seeks to employ in connection with the conduct of this Chapter 11 Case (the “Chapter 11
 12 Professionals”). The Chapter 11 Professionals will be compensated and reimbursed only in accordance
 13 with procedures to be approved by this Court and in accordance with the terms of the orders approving
 14 each Chapter 11 Professional’s employment. The Ordinary Course Professionals will not be involved
 15 in the administration of this Chapter 11 Case. Debtor does not believe that the Ordinary Course
 16 Professionals are “professionals” as that term is used in section 327 of the Bankruptcy Code, whose
 17 retention must be approved by this Court.³ Nevertheless, out of an abundance of caution, Debtor seeks
 18 an order authorizing the retention and payment of all Ordinary Course Professionals during the
 19 pendency of this Chapter 11 Case. Debtor expects to employ, among others, the Ordinary Course
 20 Professionals listed on **Exhibit A** to perform ongoing services during the pendency of this Chapter 11
 21 Case.

22
 23 ² As discussed more fully below, Debtor reserves the right to supplement such list in the future in its
 24 sole discretion, pursuant to the procedures set forth herein.

25 ³ See, e.g., In re That’s Entertainment Mkt’g Group, Inc., 168 B.R. 226, 230 (N.D. Cal. 1994) (only
 26 the retention of professionals whose duties are central to the administration of the estate require prior
 27 court approval under section 327 of the Bankruptcy Code); In re Madison Mgmt. Group, Inc., 137 B.R.
 28 275, 283 (Bankr. N.D. Ill. 1992) (same); In re Sieling Assocs. Ltd. P’ship, 128 B.R. 721, 723 (Bankr.
 E.D. Va. 1991) (same); In re Johns-Manville Corp., 60 B.R. 612, 619 (Bankr. S.D.N.Y. 1989) (only
 those professionals involved in the actual reorganization effort, rather than debtors’ ongoing business,
 require approval under section 327 of the Bankruptcy Code).

1 11. Debtor utilizes the services of a number of engineers, architects and other construction
2 professionals in the ordinary course of business. Debtor has not included in **Exhibit A** the architects,
3 engineers, or construction professionals that work on Debtor's projects and does not believe such
4 inclusion is necessary. Debtor intends to pay these architects and engineers in the ordinary course of
5 business.

6 12. Debtor desires to continue to employ the Ordinary Course Professionals to render
7 services in the same manner and for the same purposes as the Ordinary Course Professionals did prior
8 to the Petition Date. The work of the Ordinary Course Professionals, albeit ordinary course, is directly
9 related to the preservation of the value of Debtor's estate, even though the amount of fees and expenses
10 incurred by the Ordinary Course Professionals represents only a small fraction of that value.

11 13. Debtor owes certain of the aforementioned Ordinary Course Professionals amounts for
12 services rendered prepetition. Despite the protections of administrative priority status, Debtor believes
13 some Ordinary Course Professionals may refuse to provide services postpetition to Debtor if Debtor
14 does not pay all or part of an Ordinary Course Professional's Claims. Debtor seeks authorization to pay
15 Ordinary Professionals' Claims, in an amount not to exceed the Monthly Fee Caps identified on
16 **Exhibit A**, subject to certain conditions and procedures described below.

17 14. The operation of Debtor's business would be adversely affected if the Ordinary Course
18 Professionals were delayed in performing their work on behalf of Debtor while Debtor (i) submitted to
19 this Court an application, declaration, and proposed retention order for each Ordinary Course
20 Professional; (ii) waited until such order was approved before such Ordinary Course Professional
21 continued to render services; and (iii) withheld payment of the normal fees and expenses of the
22 Ordinary Course Professionals until they complied with the compensation procedures applicable to
23 Chapter 11 Professionals.

24 15. Further, the Ordinary Course Professionals generally are unfamiliar with the fee
25 application procedures employed in bankruptcy cases. Some Ordinary Course Professionals might be
26 unwilling or unable to assume the administrative and cost burden of such procedures and may therefore
27 be unwilling to work with Debtor if these requirements are imposed, forcing Debtor to incur additional
28 and unnecessary expenses to retain other professionals without such background and expertise and at

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1 potentially higher rates. The uninterrupted services of the Ordinary Course Professionals are vital to
2 Debtor's continuing operations and its ultimate ability to reorganize. More importantly, the cost of
3 preparing and prosecuting these retention applications and fee applications would be significant, and
4 such costs would be borne by Debtor's estate.

5 16. Moreover, a requirement that the Ordinary Course Professionals each file retention
6 pleadings and follow the usual fee application process required of the Chapter 11 Professionals would
7 unnecessarily burden the Clerk's office, this Court, and the U.S. Trustee's office with unnecessary fee
8 applications while significantly adding to the administrative costs of this Chapter 11 Case without any
9 corresponding benefit to Debtor's estate. This Motion proposes a procedure to alleviate such a burden.

10 17. Although some of the Ordinary Course Professionals may hold unsecured claims against
11 Debtor with respect to prepetition services rendered, Debtor does not believe that any of the Ordinary
12 Course Professionals have an interest materially adverse to Debtor, its estate, creditors, or other parties
13 in interest, and thus none would be retained who do not meet, if applicable, the special counsel retention
14 requirement of Bankruptcy Code section 327(e).

15 **A. Proposed Retention Procedure.**

16 18. Debtor proposes that it be permitted to continue to employ and retain the Ordinary
17 Course Professionals listed on Exhibit A. Debtor proposes that each Ordinary Course Professional
18 provide Debtor's counsel with a declaration, substantially in the form attached hereto as **Exhibit B** (the
19 "Ordinary Course Professional Declaration"), certifying that the professional does not represent or hold
20 any interest adverse to Debtor or its estate for the matter on which the professional is to be employed,
21 and a completed retention questionnaire, substantially in the form attached hereto as **Exhibit C** (the
22 "Retention Questionnaire"). The Retention Questionnaire sets forth the following information: (a) a
23 description of the proposed scope of services to be provided by the Ordinary Course Professionals; (b)
24 the rates proposed to be charged for the services; (c) all information otherwise required to be disclosed
25 pursuant to Federal Rule of Bankruptcy Procedure 2014; and (d) any prepetition claims against Debtor.
26 Debtor will not make any payments to any Ordinary Course Professional who has failed to provide an
27 Ordinary Course Professional Declaration and Retention Questionnaire.
28

1 19. For each Ordinary Course Professional it seeks to retain, Debtor propose that it provide
2 such Ordinary Course Professional's Ordinary Course Professional Declaration and Retention
3 Questionnaire to: (i) the Office of the U.S. Trustee, 300 Las Vegas Boulevard South, Suite 4300, Las
4 Vegas, NV 89101; and (ii) counsel to any Official Committee of Unsecured Creditors appointed in this
5 Chapter 11 Case (collectively, the "Notice Parties").

6 20. Debtor requests that the Notice Parties will have fourteen (14) days from the date of
7 service of each Ordinary Course Professional Declaration and Retention Questionnaire to object to the
8 retention of such Ordinary Course Professional (the "Objection Period"). If Debtor and the Notice
9 Parties are unable to resolve any objection, either the Debtor or the Notice Parties may bring the dispute
10 to the Court for resolution. If no timely objection is received, or if an objection is withdrawn, Debtor
11 will be authorized to retain the Ordinary Course Professional on a final basis without further order of
12 this Court.

13 21. In the event Debtor seeks to retain any future/additional Ordinary Course Professionals,
14 Debtor proposes it provide such Ordinary Course Professional's Ordinary Course Professional
15 Declaration and Retention Questionnaire to the Notice Parties and that the Notice Parties be provided
16 with an Objection Period. If Debtor and the Notice Parties are unable to resolve any objection, either
17 the Debtor or the Notice Parties may bring the dispute to the Court for resolution. If no timely objection
18 is received, or if an objection is withdrawn, Debtor will be authorized to retain the Ordinary Course
19 Professional on a final basis without further order of this Court.

20 22. Debtor proposes it file with the Court, and provide to the Notice Parties, once each
21 month, as applicable, a report listing the Ordinary Course Professionals retained by Debtor on a final
22 basis, with the Ordinary Course Professional Declarations and Retention Questionnaires of such
23 Ordinary Course Professionals attached.

24 **B. Proposed Payment Procedure.**

25 23. Debtor seeks authority to pay, without formal application to, and order from, this Court,
26 one hundred percent (100%) of the fees and expenses of each Ordinary Course Professional upon
27 submission to, and approval by, Debtor of an appropriate billing statement setting forth in reasonable
28 detail the nature of the postpetition services rendered and expenses actually incurred; provided,

1 however, that such fees and expenses do not exceed the maximum authority under the authorized caps
2 identified on **Exhibit A**. Further, Debtor will not pay any fees and expenses to an Ordinary Course
3 Professional unless (i) the professional has provided Debtor with an Ordinary Course Professional
4 Declaration and Retention Questionnaire; (ii) the Objection Period has expired; and (iii) no timely
5 objection is pending. If a timely objection is received, no payment will be made until such objection is
6 resolved and withdrawn, or is otherwise disallowed by the Court. Further provided, however that the
7 payment of any such obligations or payments pursuant to this Motion shall be in accordance with the
8 terms and limitations imposed by any interim or final order authorizing Debtor to incur postpetition
9 financing or authorizing the use of the cash collateral of its pre or postpetition lenders, as well as any
10 limitations that may be imposed pursuant to any budget approved by any such interim or final orders.

11 **C. Monthly Payment Caps Proposed by Debtor.**

12 24. Debtor proposes that it be permitted to pay each Ordinary Course Professional, without a
13 prior application to the Court, one hundred percent (100%) of the fees and disbursements incurred, upon
14 the submission to, and approval by, Debtor of an appropriate invoice setting forth in reasonable detail
15 the nature of the services rendered and disbursements actually incurred, subject to the caps listed on
16 **Exhibit A**.

17 25. If in any given month the fees and expenses of an Ordinary Course Professional exceed
18 its cap, such Ordinary Course Professional shall be required to apply for approval by the Court of all
19 such Ordinary Course Professional's fees and expenses for such month under Bankruptcy Code sections
20 330 and 331; provided, however, that such Ordinary Course Professional shall be entitled to an interim
21 payment of up to its cap as a credit against the invoices for such month for fees ultimately allowed by
22 the Court. As a routine matter, Debtor regularly reviews all billing statements received from Ordinary
23 Course Professionals to ensure that the fees and expenses charged are reasonable. This type of review
24 will continue postpetition and, coupled with the proposed monthly payment caps, will protect Debtor's
25 estate against excessive and improper billings.

26 **D. Debtor Proposes to File Periodic Statements of Payments Made.**

27 26. Debtor further proposes to file a payment summary statement with this Court not more
28 than thirty (30) days after the last day of each year this Chapter 11 Case is pending, or such other period

1 as this Court directs, and to serve such statement upon the Notice Parties. The summary statement will
 2 include the following information for each Ordinary Course Professional: (a) the name of the Ordinary
 3 Course Professional; (b) the aggregate amounts paid as compensation for services rendered and
 4 reimbursement of expenses incurred by such Ordinary Course Professional during the statement period;
 5 and (c) a brief statement of the type of services rendered.

6 IV.

7 LEGAL AUTHORITY

8 Section 105(a) authorizes the bankruptcy court to “issue any order, process, or judgment that is
 9 necessary or appropriate to carry out the provisions of [Title 11].” Walls v. Wells Fargo Bank, N.A.,
 10 276 F.3d 502, 506 (9th Cir. 2002).

11 Because the nature of the work performed by the Ordinary Course Professionals is only
 12 indirectly related to the bankruptcy case of Debtor, because the degree of discretion afforded the
 13 Ordinary Course Professionals in performing such work is marginal, and because the Ordinary Course
 14 Professionals will not be involved in the administration of this Chapter 11 Case, Debtor does not
 15 believe that the Ordinary Course Professionals are necessarily “professionals” within the meaning of
 16 Bankruptcy Code section 327, whose retention must be approved by the Court. That’s Entm’t Mktg.
 17 Group, 168 B.R. at 230 (stating that only the retention of professionals whose duties are central to the
 18 administration of the estate requires prior court approval under Bankruptcy Code section 327).

19 For purposes of interpreting section 327 of the Bankruptcy Code, a person’s status as a
 20 “professional” is not determinative of whether the person is a professional requiring court approval.
 21 “[T]he term ‘professional persons,’ is a ‘term of art reserved for those persons who play an intimate role
 22 in the reorganization of a debtor’s estate.” Id. The inquiry “focuses on that person’s duties.” Id. If the
 23 duties provided are “central to the administration of the estate, such duties are professional in nature.”
 24 Id. Courts have recognized the following as duties central to the administration of the estate: “assisting
 25 in the negotiation of the debtor’s plan, assisting in the adjustment of the debtor/creditor relationship,
 26 disposing of the assets of the estate and acquiring assets on behalf of the estate.” Id.

27 The Ordinary Course Professionals in the instant case will not be required to perform any duties
 28 “central to the administration of the estate.” For example, some of the attorneys will continue work on

1 litigation that is currently pending. Accountants for Debtor will assist with Debtor’s taxes and will
2 prepare tax documents for filing.

3 Nevertheless, out of an abundance of caution, Debtor seeks the relief set forth herein to avoid
4 any subsequent controversy as to Debtor’s employment and payment of the Ordinary Course
5 Professionals during the pendency of this Chapter 11 Case. Debtor shall seek specific Court authority
6 under section 327 of the Bankruptcy Code to employ any other professionals involved in activities that
7 are central to the administration of the above-captioned Chapter 11 Case.

8 Section 327(e) provides for the employment of counsel which was previously employed by a
9 debtor and who is owed prepetition fees. It provides:

10 The trustee, with the court’s approval, may employ, for a specified
11 special purpose, other than to represent the trustee in conducting the case,
12 an attorney that has represented the debtor, if in the best interest of the
13 estate, and if such attorney does not represent or hold any interest adverse
to the debtor or to the estate with respect to the matter on which such
attorney is to be employed.

14 11 U.S.C. § 327(e).

15 Accordingly, Debtor submits that its proposed procedures set forth herein for the retention and
16 compensation of the Ordinary Course Professionals are in the best interest of Debtor and its estate, its
17 creditors, and other parties in interest.

18 Debtor and its estate will be well served if granted the authority to employ and retain the
19 Ordinary Course Professionals given their past involvement with Debtor’s business operations. As in
20 this case, debtors in other chapter 11 cases have routinely requested authority to retain professionals
21 used in the ordinary course of their business operations. In an effort to ensure uninterrupted and orderly
22 administration of business services, courts have regularly granted the same or similar relief as requested
23 by this Debtor.⁴

24 ///

25 ///

27 ⁴ See, e.g., In re Station Casinos, Inc., Case No. BK-N-09-52477-GWZ (Bankr. D. Nev.); In re
28 155 East Tropicana, LLC., Case No. BK-S-11-22216-BAM (Bankr. D. Nev.).

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V.

NOTICE

Notice of this Motion has been served upon the Office of the U.S. Trustee for the District of Nevada, and the 20 largest unsecured non-insider creditors of the Debtor. Debtor submits that no other or further notice need be given in light of the circumstances of this Chapter 11 Case.

VI.

CONCLUSION

WHEREFORE, Debtor respectfully requests that the Court enter an Order authorizing Debtor to (a) retain the Ordinary Course Professionals, pursuant to Bankruptcy Code sections 105(a), 327, 328, and 330 and the procedures outlined herein without the necessity of a separate, formal retention application approved by this Court for each Ordinary Course Professional, (b) to compensate the Ordinary Course Professionals for postpetition services rendered, under the terms set forth herein, without the necessity of additional Court approval, and (c) to supplement the list of Ordinary Course Professionals, from time to time, in accordance with procedures outlined herein.

Dated this 1st day of March 2012.

FOX ROTHSCHILD LLP

By /s/Brett A. Axelrod

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Nevada Bar No. 9676
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[Proposed] Counsel for American West Development, Inc.

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EXHIBIT A**Professionals Utilized in the Ordinary Course of Business**

Name	Address	Services Provided	Monthly Fee Cap¹
Mark Ferrario	Greenberg Traurig, LLP 3773 Howard Hughes Parkway Suite 500 North Las Vegas, NV 89169	Counsel on various construction defect litigation	\$22,000.00
Ed Lubbers	Lubbers Law 8345 W. Sunset Road, Ste. 250 Las Vegas, NV 89113-2092	Counsel on various litigation, general corporate counsel	\$18,000.00
Kyle Smith	Smith Law Office 10161 Park Run Dr., Ste. 150 Las Vegas, NV 89145	Counsel on various litigation	\$3,000.00
Susan Frankewich	3210 W. Charleston Blvd. Las Vegas, NV 89102	Counsel on litigation – pursuing guarantee claims against borrowers for AWH Ventures	\$2,000.00
Gary Lambrix	McGladrey and Pullen, LLP 300 South 4th Street, Suite 600 Las Vegas, NV 89101-6017	Accountants	\$50,000.00
Tony Tominac	Tominac Company 7373 North Scottsdale Rd., b-270 Scottsdale, AZ 85253-3513	Outside consultant – loan compliance documentation/covenant calculations; projected financial statements	\$14,000.00
Jack Levy	12180 E. Altadena Dr. Scottsdale, AZ 85259	Outside consultant working with Tony Tominac.	The \$14,000 fee cap is the total combined monthly fee cap for both Tominac and Levy.

¹ Debtor acknowledges the possibility that lower Monthly Fee Caps that could arise out of budgets imposed by cash collateral stipulations and DIP financing agreements and would adjust the Monthly Fee Caps upon such an occurrence.

EXHIBIT B

Form of Ordinary Course Professional Declaration

ORDINARY COURSE PROFESSIONAL DECLARATION

I, _____, hereby declare that the following is true to the best of my knowledge, information and belief:

1. I am a partner or officer of _____ (the “Firm”) located at _____.

2. American West Development, Inc., debtor and debtor-in-possession (“Debtor”), has requested that the Firm provide _____ services to Debtor during the pendency of Debtor’s chapter 11 case (the “Chapter 11 Case”), and the Firm has consented to provide those services.

3. The Firm may have performed services in the past and may perform services in the future, in matters unrelated to this Chapter 11 Case, for persons that are parties in interest in Debtor’s Chapter 11 Case. As part of its customary practice, the Firm is retained in cases, proceedings and transactions involving many different parties, some of whom may be creditors or employees of Debtor, or other parties in interest in this Chapter 11 Case. The Firm will not perform services for any such person in connection with this Chapter 11 Case.

4. Debtor owes the Firm \$_____ for prepetition services. Other than that claim, if any, neither I nor any principal or professional employed by the Firm, insofar as I have been able to ascertain, holds or represents any interest adverse to Debtor or its estate.

5. At any time during the period of its employment by Debtor, if the Firm should discover any facts bearing on the matters described herein, the Firm will supplement the information contained in this Declaration.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

NAME:

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EXHIBIT C

Retention Questionnaire

RETENTION QUESTIONNAIRE

To be completed by professionals employed by American West Development, Inc. ("Debtor"), and delivered to:

Fox Rothschild LLP
3800 Howard Hughes Parkway, Suite 500,
Las Vegas, Nevada 89169
Attention: Micaela Rustia Moore, Esq.

All questions must be answered. Please use "none," "not applicable," or "N/A," as appropriate. If more space is needed, please complete on a separate page and attach.

1. Name and address of firm:

2. Brief description setting forth professional's connections with the Debtor, creditors, and any other party in interest, their attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee:

3. Brief description of services to be provided to the Debtor:

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1 **3. Arrangements for compensation (hourly, contingent, etc.):**

2 _____
3 _____

4 **4. Estimated monthly compensation based on prepetition retention (if firm was employed**
5 **prepetition):**

6 _____

7 **5. Prepetition claims against Debtor held by the firm:** _____

8
9
10 **6. Prepetition claims against Debtor held individually by any member, associate or**
professional employee of the firm:

11 **Name:** _____

12 **Status:** _____

13 **Amount of claim: \$** _____

14 **Date claim arose:** _____

15 **Nature of claim:** _____

16 _____

17 _____

18 _____

19 _____

20
21
22 **7. Name of individual completing this form.**

23 _____

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EXHIBIT D
Proposed Form of Order

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[Proposed] Counsel for American West Development, Inc.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re

AMERICAN WEST
DEVELOPMENT, INC., a Nevada
corporation,

Debtor.

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

Chapter 11

**ORDER AUTHORIZING DEBTOR
TO RETAIN, EMPLOY, AND
COMPENSATE CERTAIN
PROFESSIONALS UTILIZED BY
DEBTOR IN THE ORDINARY COURSE
OF BUSINESS**

Hearing Date:
Hearing Time:

The Court, having reviewed and considered Debtor’s Motion (the “Motion”)¹ for an order authorizing Debtor to retain, employ, and compensate certain professionals utilized by Debtor in the

¹ All capitalized terms not otherwise defined herein shall have the same meaning ascribed in the Motion.

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1 ordinary course of business pursuant to Bankruptcy Code sections 105(a), 327, 328 and 330; and upon
2 consideration of the Omnibus Declaration of Robert M. Evans; and the Court having jurisdiction to
3 consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and
4 consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28
5 U.S.C. § 157(b); and venue being proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; and
6 due and proper notice of the Motion having been provided; and it appearing that no other or further
7 notice need be provided; and the Court having determined that the relief sought in the Motion is in the
8 best interests of Debtor, its creditors and all other parties in interest; and the Court having determined
9 that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein;
10 and upon all the proceedings held before the Court, and after due deliberation and sufficient cause
11 appearing therefor, it is hereby

12 **ORDERED** that the Motion is GRANTED;

13 **IT IS FURTHER ORDERED** that Debtor is authorized and empowered to employ the
14 Ordinary Course Professionals, listed on **Exhibit A** attached hereto, in the ordinary course of business,
15 without the submission of separate retention applications and the issuance of separate retention orders
16 for each individual professional, and effective of the commencement of Debtor's Chapter 11 Case;

17 **IT IS FURTHER ORDERED** that each Ordinary Course Professional shall provide Debtor's
18 counsel with a declaration, substantially in the form attached hereto as **Exhibit B**, certifying that the
19 professional does not represent or hold any interest adverse to Debtor or its estate for the matter on
20 which the professional is to be employed, and a completed retention questionnaire, substantially in the
21 form attached hereto as **Exhibit C**. Debtor shall provide the Ordinary Course Professional Declaration
22 and Retention Questionnaire to the U.S. Trustee and, counsel to any Official Committee of Unsecured
23 Creditors appointed in this Chapter 11 Case (subsequent to its appointment in this Chapter 11 Case)
24 (collectively, the "Notice Parties"), who shall have 14 days to notify Debtor of any objection to the
25 retention of such Ordinary Course Professional (the "Objection Period"). If Debtor and the Notice
26 Parties are unable to resolve any objection, either the Debtor or the Notice Parties may bring the dispute
27 to the Court for resolution. If no timely objection is received, or if an objection is withdrawn, Debtor
28

1 will be authorized to retain the Ordinary Course Professional on a final basis without further order of
2 this Court;

3 **IT IS FURTHER ORDERED** that Debtor is authorized to supplement the list of Ordinary
4 Course Professionals from time to time, by providing a copy of the Ordinary Course Professional
5 Declaration and Retention Questionnaire to the Notice Parties, who shall have the Objection Period. If
6 Debtor and the Notice Parties are unable to resolve any objection, either the Debtor or the Notice Parties
7 may bring the dispute to the Court for resolution. If no timely objection is received, or if an objection is
8 withdrawn, Debtor will be authorized to retain the additional Ordinary Course Professional on a final
9 basis without further order of this Court, provided that the provisions of this Order shall apply to such
10 additional Ordinary Course Professional;

11 **IT IS FURTHER ORDERED** that Debtor shall file with the Court, and provide to the Notice
12 Parties, once each month, as applicable, a report listing the Ordinary Course Professionals retained by
13 Debtor on a final basis, with the Ordinary Course Professional Declarations and Retention
14 Questionnaires of such Ordinary Course Professionals attached.

15 **IT IS FURTHER ORDERED** that Debtor shall be authorized to pay to each of the Ordinary
16 Course Professionals, without application to the Court, 100% of the fees and expenses charged by such
17 professionals, which payments are to be made following the submission to and approval by Debtor of
18 appropriate invoices setting forth in reasonable detail the nature of the services rendered and
19 disbursements actually incurred; provided, however, that subject to further order of the Court, each of
20 the Ordinary Course Professionals' fees and disbursements shall not exceed the monthly caps contained
21 in **Exhibit A** hereto;

22 **IT IS FURTHER ORDERED** that for any monthly period during which a professional
23 requests payments from Debtor in excess of its monthly fee cap, such payments shall be subject to the
24 prior approval of the Court, as set forth in the Motion, provided, however, that such Ordinary Course
25 Professionals shall be entitled to an interim payment of up to its monthly cap as a credit against the
26 invoices for such month for fees ultimately allowed by the Court;

27 **IT IS FURTHER ORDERED** that the payment of any such obligations or payments pursuant
28 to this Motion shall be in accordance with the terms and limitations imposed by any interim or final

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1 order authorizing Debtor to incur postpetition financing or authorizing the use of the cash collateral of
2 its pre or postpetition lenders, as well as any limitations that may be imposed pursuant to any budget
3 approved by any such interim or final orders;

4 **IT IS FURTHER ORDERED** that Debtor shall file a payment summary statement with this
5 Court not more than thirty (30) days after the last day of each year this Chapter 11 Case is pending, or
6 such other period as this Court directs, and to serve such statement upon the Notice Parties. The
7 summary statement will include the following information for each Ordinary Course Professional: (a)
8 the name of the Ordinary Course Professional; (b) the aggregate amounts paid as compensation for
9 services rendered and reimbursement of expenses incurred by such Ordinary Course Professional during
10 the statement period; and (c) a brief statement of the type of services rendered;

11 **IT IS FURTHER ORDERED** that Debtor’s right to dispute any invoice of any of the Ordinary
12 Course Professionals shall not be affected or prejudiced in any manner by this Order;

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

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

17 **IT IS FURTHER ORDERED** that this Order shall not apply to any professional retained by
18 Debtor pursuant to the provisions of Bankruptcy Code sections 327 or 328.

19 Prepared and Respectfully Submitted by:

20 **FOX ROTHSCHILD LLP**

21 By _____

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

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APPROVED/DISAPPROVED:

OFFICE OF THE UNITED STATES TRUSTEE

BY: _____
Athanasios Agelakopoulos
Trial Attorney for Acting United
States Trustee August B. Landis

CERTIFICATION OF COUNSEL PURSUANT TO LOCAL RULE 9021

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

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

ATHANASIOS
AGELAKOPOULOS, OFFICE OF
THE UNITED STATES TRUSTEE _____

Approved / Disapproved

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

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