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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re AMERICAN WEST DEVELOPMENT, INC., a Nevada corporation, fdba Castlebay 1, Inc. fdba Development Management, Inc. fdba Fairmont 1, Inc. fdba Glen Eagles 3, Inc. fdba Heritage 1, Inc. fdba Inverness 5, Inc. fdba Kensington 1, Inc. fdba Kingsbridge 1, Inc. fdba Promontory Estates, LLC fdba Promontory Point 4, Inc. fdba Silverado Springs 1, Inc. fdba Silverado Springs 2, Inc. fdba Tradition, Inc. fdba Windsor 1, Inc., Debtor.	Case No. BK-S-12-12349-MKN Chapter 11 **MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF DEBTOR'S FIRST AMENDED CHAPTER 11 PLAN OF REORGANIZATION (DATED OCTOBER 15, 2012)** Hearing Date: January 15, 2013 Hearing Time: 10:00 a.m.

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I. OVERVIEW

American West Development, Inc. ("AWDI" or "Debtor"), debtor and debtor in possession in the above-captioned chapter 11 bankruptcy case (the "Chapter 11 Case"), by and through its counsel, the law firm of Fox Rothschild LLP, respectfully submits its Memorandum of Points and Authorities in support of confirmation of Debtor's First Amended Chapter 11 Plan of Reorganization [Dkt. # 714] (the "Plan").[1]

This memorandum is supported by these moving papers; the Declaration of Robert M. Evans filed in Support of Confirmation of Debtor's First Amended Chapter 11 Plan of Reorganization and Reply to the Acting United States Trustee's Objection to Debtor's First Amended Chapter 11 Plan of Reorganization (the "Evans Declaration") filed concurrently herewith; the Master Disclosure Statement Prepared In Connection With Debtor's First Amended Chapter 11 Plan of Reorganization [Dkt. # 721] (the "Master Disclosure Statement"); the Short Form Home Owner Disclosure Statement Prepared In Connection With Debtor's First Amended Chapter 11 Plan of Reorganization [Dkt. # 716] (the "Home Owner Disclosure Statement" and together with the Master Disclosure Statement, the "Disclosure Statements"), the ballots and other solicitation materials approved by the Court and served on parties entitled to vote to accept or reject the Plan; the Affidavit of Service dated December 20, 2012 [Dkt. # 808] regarding solicitation; the Declaration of Jeffrey S. Stein of the Garden City Group, Inc. Reporting and Certifying the Methodology for the Tabulation of Votes on and Results of Voting With Respect to Debtor's First Amended Chapter 11 Plan of Reorganization filed concurrently herewith (the "Voting Report"); the Omnibus Declaration of Robert M. Evans in Support of First Day Motions [Dkt # 56]; Debtor's Reply to the Acting United States Trustee's Objection to Debtor's First Amended Chapter 11 Plan of Reorganization filed concurrently herewith; any other oral or documentary evidence that may be presented in support of the Plan and any certificates of service relating the foregoing; the arguments and representations of counsel at the hearing regarding confirmation of the Plan; and the record in this Chapter 11 Case.[2]

[1] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Plan.

[2] Debtor respectfully requests that the Court take judicial notice of the record in this case, including all documents previously filed with the Court. See Fed. R. Evid. 201.

This Court has scheduled a hearing to consider confirmation of the Plan for January 15, 2013 at 10:00 a.m. Pacific time (the "Confirmation Hearing"). Debtor submits that the Court should confirm the Plan at the Confirmation Hearing. The Plan represents the culmination of Debtor's restructuring efforts. Debtor is poised to consensually resolve its remaining obligations to its creditors pursuant to the Plan and emerge from chapter 11 and continue in business thereafter.

The Plan separates Claims against Debtor into five (5) classes based on their level of priority under the Bankruptcy Code and the legal nature of the Claims. There is also one (1) class of Equity Interests. Administrative Claims and Priority Tax Claims are not classified because the Bankruptcy Code requires that they receive specific treatment. The Plan provides for a consensual restructuring of the Term Loan owed to the Secured Lenders pursuant to (and subject to the terms of) a pre-petition Restructuring Lock-Up and Settlement Letter Agreement (the "Lock-Up and Settlement Letter Agreement") with the Secured Lenders. The Plan also provides for Holders of Allowed General Unsecured Claims (which exclude Construction Defect Claims and certain other Claims) to share Pro Rata in a $1,500,000 cash pool up to the Allowed principal amount of the Claim. Importantly, the Plan provides that the Secured Lenders will waive their General Unsecured Deficiency Claims in Class 3 if and only if the Holders of Class 3 Claims vote, as a Class, to accept the Plan. Liability of Debtor for Allowed Construction Defect Claims, if any, will be channeled to the Construction Defect Trust, the corpus of which will consist primarily of either $500,000 or $1,500,000 in cash (a portion of which shall initially be used to make the aggregate Cash Out Payment), potential claims against insurance proceeds, and other causes of action contributed by Debtor. Debtor's existing Equity Interests will be canceled and the ownership of Reorganized Debtor will be vested in the DIP Lender or its assignee(s), each of which is an existing Affiliate. In return, the DIP Lender will provide $10,000,000 in funding to make payments under the Plan, provide cash funding for the Construction Defect Trust, and provide working capital for Reorganized Debtor.

As described in detail in Section III below, the Plan complies with each of the applicable Bankruptcy Code requirements for confirmation of a chapter 11 plan. Among other things, the Plan is fair, reasonable and feasible, and all creditors will receive more under the Plan than they would receive in a chapter 7 liquidation. **Each of the Impaired Classes of Claims voted to accept the Plan.**

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Holders of Class 6 Old Equity Interests are deemed to reject the Plan because they neither receive nor retain anything under the Plan. As discussed in detail in Section III.B infra, section 1129(b) permits the Plan to be confirmed notwithstanding this deemed rejection. Finally, the Plan remedies the grounds upon which the Court denied confirmation of Debtor's Chapter 11 Plan of Reorganization [Dkt. # 263 (the "May Plan"). See Order Denying Confirmation of Debtor's Chapter 11 Plan of Reorganization [Dkt. # 723] (the "Confirmation Denial Order"). Accordingly, Debtor respectfully requests that the Court enter an order confirming the Plan.

II. VOTING RESULTS

On or about December 12, 2012, the Court entered its Amended Order: (I) Approving (A) Adequacy of First Amended Master Disclosure Statement […] [Dkt. # 791] (the "Solicitation Order"). As set forth in the Solicitation Order, the Court found that the Disclosure Statement contained "adequate information" within the meaning of Bankruptcy Code section 1125 and authorized Debtor to solicit acceptances with respect to the Plan pursuant to certain specified procedures. Debtor thereafter caused the Plan and related solicitation materials to be served upon the parties in accordance with the Solicitation Order. See Affidavit of Service [Dkt. # 808]. The deadline fixed by the Solicitation Order for receipt of Ballots accepting or rejecting the Plan was January 4, 2013 at 3:00 p.m. Pacific time.

Classes 1 and 5 are unimpaired and are therefore deemed to accept the Plan. See 11 U.S.C. § 1126(f). As indicated in the Voting Report, Classes 2, 3 and 4 have accepted the Plan.

III. OBJECTION TO THE PLAN

Debtor received only one (1) objection [Dkt. # 812] (the "Objection")to confirmation of the Plan, which was filed by the United States Trustee ("UST"). The Objection remains unresolved and is fully addressed in Debtor's Reply to the Acting United States Trustee's Objection to Debtor's First Amended Chapter Plan of Reorganization ("Debtor Reply") filed concurrently herewith.

IV. PLAN CONFIRMATION

A. The Plan Should be Confirmed Because it Complies with All Applicable Requirements of Bankruptcy Code Section 1129(a).

Bankruptcy Code section 1129(a) provides that the Court shall confirm a chapter 11 plan where each of the statute's applicable sixteen subsections has been satisfied. 11 U.S.C. § 1129(a). As

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described below, the Plan satisfies each of the applicable subsections of Bankruptcy Code section 1129(a) and should therefore be confirmed.[3]

a) Bankruptcy Code Section 1129(a)(1) — The Plan Complies with Applicable Provisions of the Bankruptcy Code.

Bankruptcy Code section 1129(a)(1) requires that a plan "compl[y] with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). The legislative history of this subsection indicates that it embodies and incorporates the requirements of Bankruptcy Code sections 1122 and 1123, which govern the classification of claims and interests and the requisite mandatory contents of a plan. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977). As demonstrated below, the Plan complies with Bankruptcy Code sections 1122 and 1123, and with all other applicable provisions of the Bankruptcy Code, and thus satisfies the requirements of this subsection.

1. The Plan Satisfies the Requirements of Bankruptcy Code Section 1122.

Bankruptcy Code section 1122 provides that "a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to other claims or interests of such class." 11 U.S.C. § 1122(a). By its plain language, Bankruptcy Code section 1122 prohibits only the classification of dissimilar claims into the same class. See Alan J. Resnick, et al., 7 COLLIER ON BANKRUPTCY at ¶ 1122.03[1] (16th ed. rev. 2011). As such, courts have broad discretion to determine the propriety of classification schemes in light of the facts of each case. See Steelcase Inc. v. Johnston (In re Johnston), 21 F.3d 323, 327 (9th Cir. 1994) ("bankruptcy court judges must have discretionary power in classifying claims under § 1122(a)").

Here, Article II, Section 2.3 of the Plan places claims in six (6) classes. Each claim placed in a particular class is substantially similar to the other claims in that class, and thus the Plan satisfies Bankruptcy Code section 1122.

Moreover, although not required by statute, each claim that is placed in a particular class is substantially *dissimilar* from those claims that have been placed in other classes. Thus, Class 1 contains

[3] As indicated below, Bankruptcy Code sections 1129(a)(13), (14) and (15) are not applicable to Debtor because it has no retiree benefits within the meaning of section 1129(a)(13) and is not an individual (sections 1129(a)(14) and (15)).

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only Other Priority Claims, Class 2 contains only Secured Claims, Class 3 contains only General Unsecured Claims, Class 4 contains only Construction Defect Claims, Class 5 contains only Bond Claims, and Class 6 contains only Old Equity Interests. Although Classes 3 and 4 each contain a different subset of non-priority, unsecured claims, the separation of General Unsecured Claims and Construction Defect Claims into two different classes is justified by: (1) the different nature of the claims, in that most (if not all) General Unsecured Claims will have been liquidated and Allowed or Disallowed as of the Effective Date, whereas Class 4 Construction Defect Claims (generally speaking) may have long term contingencies with wide ranges of potential size and number of Allowed Claims (and therefore are better suited for adjudication and payment over time by the Construction Defect Trust in accordance with the TDP although the voluntary Cash Out Election has also been made available to all Class 4 members); (2) Class 3 General Unsecured Claims (generally speaking) are not covered by insurance, whereas Class 4 Construction Defect Claims (generally speaking) are covered by insurance (subject to any applicable self-insured retention amount); (3) the Plan provides for funding of equal amounts ($1,500,000 to each Class) to be allocated for the benefit of Holders of Class 3 General Unsecured Claims and Class 4 Construction Defect Claims (as long as at least eighty percent (80%) in number of the Holders of Class 4 Construction Defect Claims actually vote to accept the Plan); and (4) regardless of whether eighty percent (80%) in number of the Holders of Class 4 Construction Defect Claims actually vote to accept the Plan, the Construction Defect Trust will also receive rights to Insurance Coverage Actions, Insurance Recoveries and Construction Defect Actions. Moreover, the Cash Out Election, which is similar to the option offered to a traditional unsecured convenience class, provides instant liquidity to those members of Class 4 that make the Cash Out Election if at least eighty percent (80%) in number of the Holders of Class 4 Construction Defect Claims actually vote to accept the Plan. Finally, no Class of Claims will receive payments or property with an aggregate value greater than the aggregate value of the Allowed Claims in such Class.

Additionally, Bankruptcy Code section 1122(b) expressly permits, but does not require, the separate classification of certain claims for purposes of administrative convenience. 11 U.S.C. § 1122(b). The Plan does not separately classify claims for administrative convenience.

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2. The Plan Satisfies Bankruptcy Code Section 1123(a).

Bankruptcy Code section 1123(a) sets forth eight mandatory requirements for the contents of a chapter 11 plan. 11 U.S.C. § 1123(a). Additionally, Bankruptcy Code section 1123(b) sets forth various provisions that may, but need not, be included within a chapter 11 plan. 11 U.S.C. § 1123(b). As shown below, the Plan complies with all applicable requirements of these subsections.[4]

(i) Bankruptcy Code Section 1123(a)(1): The Plan Designates Classes of Claims.

Bankruptcy Code section 1123(a)(1) requires that a chapter 11 plan designate classes of claims and interests other than claims of a kind specified in Bankruptcy Code section 507(a)(2) (administrative expense claims), Bankruptcy Code section 507(a)(3) (claims arising during the "gap" period in an involuntary bankruptcy case), and Bankruptcy Code section 507(a)(8) (priority tax claims). 11 U.S.C. § 1123(a)(1). Article II, Section 2.3 of the Plan complies with this requirement by expressly classifying all claims, other than Administrative Claims and Priority Tax Claims.[5]

(ii) Bankruptcy Code Section 1123(a)(2): The Plan Identifies Unimpaired Classes.

Bankruptcy Code section 1123(a)(2) requires that a plan "specify any class of claims or interests that is not impaired under the plan." 11 U.S.C. § 1123(a)(2). Article II, Section 2.3 of the Plan satisfies this requirement by specifying that Classes 1 and 5 are unimpaired.

(iii) Bankruptcy Code Section 1123(a)(3): The Plan Specifies the Treatment of Impaired Classes.

Bankruptcy Code section 1123(a)(3) requires that a plan "specify the treatment of any class of claims or interests that is impaired under the plan." 11 U.S.C. § 1123(a)(3). Article II, Section 2.3 of the Plan satisfy this requirement by specifying that Classes 2, 3, 4 and 6 are impaired, and by specifying the treatment of the claims or interests in each of those Classes.

(iv) Bankruptcy Code Section 1123(a)(4): The Plan Provides for the Same Treatment of Claims or Interests Within Each Class.

Bankruptcy Code section 1123(a)(4) requires that a plan "provide the same treatment for each

[4] Section 1123(a)(8) is not applicable to Debtor because Debtor is not an individual.

[5] Section 507(a)(3) is not applicable because Debtor voluntarily commenced the Chapter 11 Case.

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claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). Article II, Section 2.3 of the Plan satisfies this requirement by providing the same treatment to each claim or interest that is classified in each particular class established under the Plan unless the holder of a claim or interest has agreed to less favorable treatment.

(v) Bankruptcy Code Section 1123(a)(5): The Plan Provides Adequate Means of Implementation.

Bankruptcy Code section 1123(a)(5) requires that a plan "provide adequate means for the plan's implementation," and sets forth examples of adequate means for implementing a plan. 11 U.S.C. § 1123(a)(5). The Plan satisfies this requirement by setting forth specific means for its implementation. See Article V, Section 5.1. As set forth therein, the Plan will be implemented in all respects in a manner consistent with the terms and conditions of the Operative Documents, the Lock-Up and Settlement Letter Agreement, the DIP Financing Order, and the requirements of section 1123(a) and other applicable provisions of the Bankruptcy Code. Without limiting the generality of the foregoing, the New Capital Contribution will be used to fund the Plan and will be distributed or applied in the manner necessary to: (i) provide all required Confirmation Funds for Distribution pursuant to the Plan; (ii) fund the Construction Defect Trust Contribution; (iii) satisfy the costs, expenses, required payments and entitlements outlined in the Plan on the Effective Date, or pursuant to the TDP; and (iv) provide Reorganized Debtor with working capital and funding for operations and Plan needs.

(vi) Bankruptcy Code Section 1123(a)(6): The Plan Provides Appropriate Charters for the Reorganized Debtor.

Bankruptcy Code section 1123(a)(6) requires, with respect to a corporate debtor, that a chapter 11 plan provide for the inclusion in the charter of a reorganized debtor of a provision prohibiting the issuance of non-voting equity securities and, if necessary, providing protections for holders of preferred shares. 11 U.S.C. § 1123(a)(6). Reorganized Debtor will have only one class of equity securities, none of which are non-voting. See Exhibit F attached to Master Disclosure Statement.

(vii) Bankruptcy Code Section 1123(a)(7): The Plan Appropriately Provides for Officers and Directors.

Finally, Bankruptcy Code section 1123(a)(7) provides that a plan must "contain only provisions

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that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director or trustee." 11 U.S.C. § 1123(a)(7). The current officer of AWDI, Mr. Robert Evans, shall continue in such position after the Effective Date with Reorganized Debtor.

3. The Plan Includes Appropriate Permissive Provisions under Bankruptcy Code Section 1123(b).

Bankruptcy Code section 1123(b) provides that a chapter 11 plan may provide for the relief described in sections 1123(b)(1)-(b)(5), and may include, pursuant to section 1123(b)(6) "any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). In short, Bankruptcy Code section 1123(b) is intended to be a broad grant of authority. As stated by the United States Supreme Court: "The Code ... grants the bankruptcy courts residual authority to approve reorganization plans including any appropriate provision not inconsistent with the applicable provisions of this title." United States v. Energy Resources Co., Inc., 495 U.S. 545, 549 (1990) (internal quotations omitted).

The Plan contains a number of permissive provisions, all of which are intended to facilitate a prompt resolution of this case and are appropriate under the circumstances and under section 1123(b).

(i) Assumption and Rejection of Contracts.

As permitted by Bankruptcy Code section 1123(b)(2), Article IV, Sections 4.2 and 4.3 of the Plan provide for the assumption or rejection of Debtor's remaining executory contracts and unexpired leases. See 11 U.S.C. § 1123(b)(2) (allowing the assumption, rejection, or assignment of unexpired leases and executory contracts that have not been previously rejected by the debtor).

(ii) Retention of Jurisdiction.

Pursuant to Article XI, Section 11.1 of the Plan, the Court shall retain jurisdiction over the Case after the Effective Date to the fullest extent provided by law, including the jurisdiction to enter appropriate orders in aid of implementation of the Plan and/or the Confirmation Order; to allow, disallow, determine, liquidate, classify, establish the priority or secured or unsecured states of, estimate, limit or subordinate any Claim; and over the other matters set forth in Section 11.1 of the Plan. This provision is permitted by section 1123(b) and does not conflict with any other section of the Bankruptcy

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Code.

(iii) Exculpations/Releases/Injunctions.

Sections 12.3, 12.4 and 12.5 of the Plan provide for exculpation, releases and injunctions, all of which comply with applicable Ninth Circuit precedent under the facts and circumstances of this Chapter 11 Case. The exculpation set forth in section 12.3 of the Plan excludes liabilities based upon fraud, gross negligence or willful misconduct, and is limited to protecting parties who directly participated in the Chapter 11 Case, and is limited to matters which directly relate to their participation, which is consistent with the relief offered under section 1125(e) of the Bankruptcy Code. Similarly, the releases by Debtor and its Estate set forth in section 12.4(a) exclude actual or intentional fraud or willful misconduct. Thus, these exculpation and release provisions are fairly and judiciously constructed to provide finality to the Plan process without excusing willful, fraudulent or grossly negligent conduct.

The releases by Holders of Claims and Interests set forth in section 12.4(b) and the Cash Out Release referenced in section 12.4(c) are entirely voluntary, which was clearly disclosed in the Ballot and the Confirmation Notice. As such, these releases do not implicate the effect of section 524(e) under Ninth Circuit law. See Resorts International, Inc. v. Lowenschuss (In re Lowenschuss), 67 F. 3d 1394 (9th Cir. 1995). Instead, the releases set forth in sections 12.4 and 12.5 of the Plan are appropriately and consensually given in exchange for the consideration provided to Holders of Allowed Claims who vote in favor of the Plan. See In re Pacific Gas & Elec. Co., 304 B.R. 395, 416-18 (Bankr. N.D. Cal. 2004) (confirming plan providing for governmental agency's release of debtor's parent entity and its officers and directors because agency consented to release); In re Hotel Mt. Lassen, Inc., 207 B.R. 935, 941 (Bankr. E.D. Cal. 1997). Indeed, this Court has observed that "[n]either Lowenschuss or American Hardwoods addressed consensual third-party releases and therefore do not appear to prohibit consensual third-party releases from being included in a Chapter 11 plan." In re Russell Boulder, LLC, Case No.BK-S-10-29724-MKN (Bankr. D. Nev. March 2, 2012) (Memorandum Decision on Confirmation of Debtor's Amended Plan of Reorganization at p. 14, n.17) (citing Hotel Mt. Lassen, Inc.).

Section 12.5 of the Plan contains certain injunctions enforcing the consensual releases and other provisions of the Plan, as well as an injunction channeling any liability of Debtor, Reorganized Debtor, the Estate, the Assets, the Distribution Agent and the Professionals for Construction Defect Claims to

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the Construction Defect Trust. None of these injunctions permanently enjoin parties from pursuing claims against third parties without their affirmative consent.

In sum, the exculpation, release and injunctive provisions in Article XII of the Plan (i) are integral to the overall objectives of the Plan, (ii) are essential to the formulation and successful implementation of the Plan, (iii) are being provided for valuable consideration and have been negotiated in good faith and at arms-length, (iv) confer substantial and material benefit on the Estate, and (v) are in the best interests of Debtor, its Estate and other parties in interest.

b) Bankruptcy Code Section 1129(a)(2): The Debtor Has Complied With All Applicable Provisions of the Bankruptcy Code.

Bankruptcy Code section 1129(a)(2) requires that the proponent of a chapter 11 plan "compl[y] with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). The principal purpose of this subsection is to ensure that a proponent complies with the Bankruptcy Code's requirements regarding the solicitation of acceptances of a plan. See In re Texaco Inc., 84 B.R. 893, 906-07 (Bankr. S.D.N.Y. 1988). By the Solicitation Order, the Court found that the Disclosure Statement contained adequate information within the meaning of Bankruptcy Code section 1125(b), and the Court thus authorized Debtor to disseminate the Plan, the Disclosure Statement, and other solicitation materials to parties in interest and to solicit votes pursuant to certain specified procedures. As demonstrated by the previously filed Affidavit of Service regarding solicitation [Dkt. # 808] and the Voting Report, Debtor has complied with the procedures set forth in the Solicitation Order and with all applicable provisions of the Bankruptcy Code and Bankruptcy Rules. The Plan thus complies with the requirements of Bankruptcy Code section 1129(a)(2).

c) Bankruptcy Code Section 1129(a)(3): Debtor Has Proposed the Plan in Good Faith.

Bankruptcy Code section 1129(a)(3) requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The primary purpose of chapter 11 is to reorganize the debtor and to maximize the value of its estate. See In re Bonner Mall Partnership, 2 F.3d 899, 915 (9th Cir. 1993), cert. dismissed, 513 U.S. 18 (1994). Accordingly, a plan satisfies Bankruptcy Code section 1129(a)(3) when it "is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success." Brite v. Sun Country Development, Inc. (In re Sun

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Country Development, Inc.), 764 F.2d 406, 408 (5th Cir. 1985).

Good faith for purposes of section 1129(a)(3) of the Bankruptcy Code must be evaluated based upon "the totality of the circumstances. . . on a case-by-case basis, taking into account the particular features of each ... plan." Hornwood v. Sylmar Plaza, L.P. (In re Sylmar Plaza), 314 F.3d 1070, 1074 (9th Cir. 2002). The Ninth Circuit has rejected attempts to impose a *per se* rule to govern the good faith analysis. See id. As the court in Dow Corning aptly observed:

> [The plan before the court] was proposed in a legitimate effort to rehabilitate a solvent but financially-distressed corporation, besieged by massive pending and potential future product liability litigation against it—an articulated policy objective of chapter 11. A plan proposed as a means to resolve tort liability claims does not violate the § 1129(a)(3) "good faith" confirmation requirement. [citation omitted] . . . The Debtor 'is a real company with real debt, real creditors and a compelling need to reorganize in order to meet these obligations' and is therefore, exactly the type of debtor for which chapter 11 was enacted.

In re Dow Corning Corp., 244 B.R. 673, 676 -677 (Bankr. E.D.Mich.1999) (emphasis added). Cf. In re The Billing Resource, 2007 WL 3254835, 12 (Bankr. N.D. Cal. 2007) (citing Dow Corning).

The Plan represents the culmination of Debtor's restructuring efforts, and of this Chapter 11 Case. At all times, Debtor's goal has been to reorganize its financial affairs, to preserve value and provide fair and equitable treatment to creditors of the estate. The Plan accomplishes this goal by restructuring the Term Loan owed to the Secured Lenders, providing $1,500,000 in cash to satisfy Class 3 General Unsecured Claims (which is estimated to result in a recovery that may approach 80% due to Debtor's successful restructuring of the Term Loan and the waiver of the Secured Lenders' deficiency claim), providing the opportunity to all home owners to receive the Cash Out Payment, and establishing the Construction Defect Trust to administer Class 4 Construction Defect Claims for those home owners who do not make the Cash Out Election.[6] Therefore, the record in this Chapter 11 Case, including the

[6] In the Objection, the UST challenges whether Debtor has met its burden to prove that the Plan was proposed in good faith based on an inapposite comparison with the provisions of section 524(g) of the Bankruptcy Code. As discussed in the Debtor Reply, the Plan no longer contains the kind of nonconsensual releases and injunctions that may be implicated by section 524. Therefore, even if the provisions of section 524(g) were relevant to the May Plan, the removal of all nonconsensual release and injunctive provisions has eliminated any basis for this comparison.

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overwhelming creditor support for the Plan, provides ample grounds upon which the Court can conclude that the Plan was proposed in good faith.

d) Bankruptcy Code Section 1129(a)(4): The Plan Provides for Requisite Court Approval of Payments for Services in Connection with this Case.

Bankruptcy Code section 1129(a)(4) requires that "[a]ny payment made or to be made by the [plan] proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case," be approved by the Court as reasonable. 11 U.S.C. § 1129(a)(4); see In re Resort Int'l, Inc., 145 B.R. 412, 475-76 (Bankr. D.N.J. 1990); In re Elsinore Shore Assocs., 91 B.R. 238, 268 (Bankr. D.N.J. 1988) (section 1129(a)(4) satisfied where plan provides for payment of "allowed" administrative expenses); In re Future Energy Corp., 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988) ("Court approval of payments for services and expenses are governed by various Bankruptcy Code provisions – e.g., §§ 328, 329, 330, 331 and 503(b) – and need not be explicitly provided for in a chapter 11 plan."). The Plan provides that Professional Fee Claims will be paid under the Plan after approval of the final fee applications of the professionals asserting those Professional Fee Claims. *See* Plan, § 2.2(B)(3). In addition, the Plan provides that other Administrative Claims will paid only after they are "Allowed" as set forth in the Plan, except that UST fees are not subject to an allowance process. See Plan, § 2.2(A) and (B). The Plan therefore complies with Bankruptcy Code section 1129(a)(4).

e) Bankruptcy Code Section 1129(a)(5): Debtor has Disclosed Directors and Officers.

Bankruptcy Code section 1129(a)(5) requires: (i) that the proponent of a plan disclose the identity and affiliations of any individual proposed to serve after confirmation as a director, officer, or voting trustee of the debtor; (ii) that the appointment or continuance in office of such individuals be consistent with the interests of creditors and shareholders and with public policy; and (iii) that the proponent disclose the identity of any insider that will be employed or retained by the reorganized debtor and the nature of the compensation to be provided to such insider. 11 U.S.C. §§ 1129(a)(5)(A) and (B).

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Exhibit "I" attached to the Master Disclosure Statement contains the disclosures required by section 1129(a)(5). As noted above and set forth in the Master Disclosure Statement, the current officer of AWDI shall continue in such position after the Effective Date with Reorganized Debtor. In the Objection, the UST raised in perfunctory fashion an objection regarding the continued service of the Futures Representative. As set for in greater detail in the Debtor Reply, this objection should be overruled based upon (i) the fact that the Plan provides for the Futures Representative to be discharged from his duties as of the Effective Date, and (ii) Mr. Moore as (proposed Construction Defect Trustee) and the proposed members of the Construction Defect Trust Advisory Board are well-qualified to administer the Construction Defect Trust. The Plan therefore complies with Bankruptcy Code section 1129(a)(5).

f) Bankruptcy Code Section 1129(a)(6): The Plan Does Not Effect Any Change in Publicly Regulated Rates.

Bankruptcy Code section 1129(a)(6) requires that any regulatory commission with jurisdiction over the rates of a debtor approve any changes in rate regulations provided in a plan. 11 U.S.C. § 1129(a)(6). Debtor is not subject to any such regulation and the Plan does not propose any rate changes. Bankruptcy Code section 1129(a)(6) therefore is not applicable.

g) Bankruptcy Code Section 1129(a)(7): The Plan is in the "Best Interests" of Creditors.

Bankruptcy Code section 1129(a)(7) establishes what is commonly referred to as the "best interests" test. Specifically, Bankruptcy Code section 1129(a)(7)(A) requires that, with respect to each class of impaired claims or interests under a plan, every holder of a claim or interest in such impaired class either (i) accept the plan, or (ii) receive or retain property of a value, as of the effective date of the plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code. 11 U.S.C. § 1129(a)(7)(A).[7]

As discussed at length in the Master Disclosure Statement, see Master Disclosure Statement at

[7] As no election has been made under Bankruptcy Code section 1111(b), section 1129(a)(7)(B) is not applicable.

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Section D(3), the Plan satisfies the best interests test as to all impaired creditors, whether or not those holders voted to accept the Plan. As illustrated by the liquidation analysis prepared by Debtor, see Master Disclosure Statement, Exhibit 'B' ("Liquidation Analysis"), all unsecured creditors are projected to receive substantially less than the recovery provided by the Plan (or nothing) if Debtor is liquidated under chapter 7 of the Bankruptcy Code. Only a negligible (at best) Liquidation Distribution would be made to Holders of Allowed Claims in Class 3 (other than the Secured Lenders) given (i) the joint and several nature of the Secured Lenders' Secured Claims, (ii) the size of the Secured Lenders' unsecured Deficiency Claims, and (iii) the fact that the Secured Lenders' settlement of the amount of their Secured Claims and, since Class 3 has voted to accept the Plan, waiver of distribution on account of their unsecured Deficiency Claims pursuant to the Lock-Up and Settlement Letter Agreement would not be effective in a chapter 7 liquidation.

Class 4 Construction Defect Claims would be treated like Class 3 General Unsecured Claims in a chapter 7 liquidation and for the same reasons would receive a negligible (at best) Liquidation Distribution. Moreover, the Plan provides a superior opportunity for recovery by Holders of Class 4 Construction Defect Claims by (i) establishing the Construction Defect Trustee as a fiduciary with the dedicated duty to maximize returns to the Holders of Class 4 Construction Defect Claims as beneficiaries of the Construction Defect Trust; (ii) providing at least $500,000 in cash (increasing up to $1,500,000 in cash since at least eighty percent (80%) in number of the Holders of Class 4 Construction Defect Claims actually have voted to accept the Plan) to fund the administration of the Construction Defect Trust; (iii) providing for the assignment to the Construction Defect Trust of the Insurance Coverage Actions, Insurance Recoveries and Construction Defect Actions, which will be pursued for the benefit of the Holders of Allowed Class 4 Construction Defect Claims; and (iv) making the Cash Out Election available, which affords the Holders of Class 4 Construction Defect Claims the flexibility to choose an immediate cash disbursement rather than having any potential Class 4 Construction Defect Claims liquidated pursuant to the TDP (or some other process if the Plan was not confirmed).

Although the Plan does not conclusively determine the availability of insurance coverage for Class 4 Construction Defect Claims or the applicability of any self-insured retention amounts, it does provide the Construction Defect Trustee with the authority and funding to address these issues in an

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organized and consolidated fashion on behalf of the Holders of Allowed Class 4 Construction Defect Claims. Without the establishment of the Construction Defect Trust, each Holder of Class 4 Construction Defect Claim would be left to its own devices to pursue its Claim and obtain any recovery, potentially in competition with other Holders of similar Claims.

Accordingly, the distribution to creditors under the Plan is more than creditors would receive in a chapter 7 liquidation. See Master Disclosure Statement, Exhibit 'B'.

h) Bankruptcy Code Section 1129(a)(8): The Plan Has Been Accepted by All Impaired Classes Entitled to Vote.

Bankruptcy Code section 1129(a)(8) requires that each class of claims and interests established under a plan either accept the plan or not be impaired under the plan. 11 U.S.C. § 1129(a)(8). "A class of claims has accepted a plan if such plan has been accepted by creditors .. . that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors ... that have accepted or rejected such plan." 11 U.S.C. § 1126(c). A class of claims that is not impaired is deemed to have accepted the plan. 11 U.S.C. §§ 1126(f) and 1129(a)(8). A class of claims that does not receive or retain any property under the plan is deemed to reject. 11 U.S.C. § 1126(g).

Classes 2, 3 and 4 are impaired under the Plan and are therefore entitled to vote to accept or reject the Plan. As set forth in the Voting Report submitted to the Court and as described above, Classes 2 3, and 4 have each voted to accept the Plan. Classes 1 and 5 are unimpaired, and are therefore deemed to accept the Plan. The requirements of section 1129(a)(8) are thus satisfied as to all Classes of Claims. See Section III.B, below, regarding application of section 1129(b) to Class 6 Old Equity Interests.

i) Bankruptcy Code Section 1129(a)(9): The Plan Complies with the Required Treatment of Administrative Claims and Priority Claims.

The Plan satisfies the requirements of Bankruptcy Code section 1129(a)(9). First, as required by Bankruptcy Code sections 1129(a)(9)(A) and (B), Section 2.2 of the Plan provides that each Holder of an Allowed Administrative Claims shall, either: (a) be paid from the Confirmation Funds in the Allowed amount of such Administrative Claim on, or as soon as reasonably practicable after, the later of (i) the Effective Date, (ii) the date upon which such Administrative Claim becomes Allowed, or

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(iii) such date as is otherwise agreed to by Debtor or Reorganized Debtor, as the case may be, and the Holder of such Administrative Claim; or (b) have such Administrative Claim assumed by Reorganized Debtor, to be paid by Reorganized Debtor in Cash in the Allowed amount of such Administrative Claim on, or as soon as reasonably practicable after, the later of (i) the date upon which such Administrative Claim becomes Allowed, (ii) the date on which such Administrative Claim becomes due in the ordinary course of business, or (iii) such date as is otherwise agreed by Debtor, Reorganized Debtor and the Holder of such Administrative Claim.

Second, in accordance with Bankruptcy Code section 1129(a)(9)(B), Section 2.2 of the Plan provides that holders of an Allowed Other Priority Claim shall, either: (i) be paid the Allowed amount of such Claim in Cash on the Effective Date; or (ii) receive such other treatment as is agreed to by the Holder of such Allowed Other Priority Claim, and Debtor or Reorganized Debtor, as the case may be.

Third, in accordance with Bankruptcy Code sections 1129(a)(9)(C)(i) and (ii), Section 2.2 of the Plan provides that, unless agreed otherwise, Allowed Priority Tax Claim shall be entitled to receive, on account of such Allowed Priority Tax Claim, in full satisfaction, settlement, release and discharge of and in exchange for such Allowed Priority Tax Claim, equal quarterly, consecutive Cash payments beginning on the Effective Date, and continuing until completed no later than five (5) years after the Petition Date totaling the principal amount of such Claim plus interest on any outstanding balance from the Petition Date. The rate of interest on such payments shall be determined under applicable nonbankruptcy law, pursuant to Bankruptcy Code section 511.

Finally, section 1129(a)(9)(D) is inapplicable because there are no secured tax claims against Debtor's estate.

j) Bankruptcy Code Section 1129(a)(10): At Least One Impaired Class of Claims Has Voted to Accept the Plan, Not Including Any Votes of Insiders.

Bankruptcy Code section 1129(a)(10) requires that at least one class of claims that is impaired under the plan has voted to accept the plan, determined without including any acceptance of the plan by any insider. 11 U.S.C. § 1129(a)(10). As set forth in the Voting Report, Classes 2, 3 and 4 have voted to accept the Plan, without including any Ballots received from insiders. The Plan therefore satisfies Bankruptcy Code section 1129(a)(10).

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k) Bankruptcy Code Section 1129(a)(11): The Plan is Feasible.

Bankruptcy Code section 1129(a)(11) requires that the Court find that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). Bankruptcy Code section 1129(a)(11) does not require an absolute assurance of financial success by the debtor. Instead, the key issue for determining feasibility as it applies to the Construction Defect Trust is whether it has "has a reasonable probability of success." In re Acequia, Inc., 787 F.2d 1352, 1364 (9th Cir. 1986). Accord In re Sound Radio, Inc., 103 B.R. 521, 524 (D.N.J. 1989), aff'd, 908 F.2d 964 (3d Cir. 1990); Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.), 843 F.2d 636, 649 (2d Cir. 1988) ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."); In re Orlando Investors, L.P., 103 B.R. 593, 600 (Bankr. E.D. Pa. 1989) ("The purpose behind the statutory requirement of feasibility is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation.") (internal quotations omitted).

Although no plan is without some risk (see Article VII of Master Disclosure Statement discussing potential risks), Debtor has established sufficient evidence that the Plan is feasible, i.e., that its confirmation is not likely to be followed by the need for further financial reorganization.

First, as of the Effective Date there will be adequate funds available to satisfy the obligations under the Plan for which Debtor is responsible. See Evans Declaration at ¶¶ 12-13; see also, Master Disclosure Statement, Exhibit 'C'. The New Capital Contribution will ensure that Debtor has sufficient funding to make the aggregate Cash Out Payment and other payments and contributions required for the Plan to become effective. In addition, the Construction Defect Trust will have sufficient funding to administer the Construction Defect Trust and make payment on Allowed Class 4 Claims for which the Holders did not make the Cash-Out Election (if it is available). See Master Disclosure Statement, Exhibit 'D'.[8]

[8] In the Objection, the UST questions whether Debtor has met its burden to satisfy the "feasibility" requirements of section 1129(a)(11) of the Bankruptcy Code based upon a misreading of (footnote continued)

Second, the Evans Declaration demonstrates that the Reorganized Debtor will have ample means to satisfy its post-Effective Date obligations. See Evans Declaration at ¶ 14; see also, Master Disclosure Statement, Exhibit 'C'. The Reorganized Debtor will obtain the benefit of additional working capital from the balance of the New Capital Contribution remaining after funding the Plan Effective Date payments. Reorganized Debtor will be able to service the New Secured Loan and satisfy its other post-Effective Date liabilities in the ordinary course of it business operations.

Thus, the Plan is a good faith, reasonable and expeditious resolution to this Chapter 11 Case that will restructure Debtor's remaining obligations to the Secured Lenders, pay all Allowed Administrative Claims and all Allowed Priority Claims against the estate in full, provide a recovery for general unsecured creditors, and allow the Reorganized Debtor to continue its business. The evidence strongly supports a finding that the Plan is feasible and it not likely to be followed by the liquidation or need for further financial reorganization of the Reorganized Debtor.

l) Bankruptcy Code Section 1129(a)(12): The Plan Provides for Payment of all Statutory Fees.

Bankruptcy Code section 1129(a)(12) requires that a chapter 11 plan provide that all fees payable under 28 U.S.C. § 1930 (consisting primarily of quarterly fees owing to the United States Trustee) be paid on or before the effective date of the plan. Section 2.2 of the Plan provides that the Reorganized Debtor shall pay, or cause to be paid, all accrued US Trustee Fees on or before the Effective Date; and following the Effective Date, Reorganized Debtor shall be responsible for timely payment of all US Trustee Fees until such time as the Final Decree closing the Chapter 11 Case is entered and all US Trustee Fees due are paid in full. The Plan thus satisfies Bankruptcy Code section 1129(a)(12).

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the Liquidation Analysis. See Debtor Reply at §C. However, when all of the well-founded attributes of the Construction Defect Trust are considered, it is clear that the Plan provides Construction Defect Claimants with the best available opportunity to have their claims treated in a fair and equitable manner, which satisfies the feasibility requirement that there be a "reasonable probability of success," particularly because there is no better alternative on the table . See id.

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m) Bankruptcy Code Sections 1129(a)(13), (14) and (15) are Not Applicable to Debtor.

Bankruptcy Code section 1129(a)(13) is not applicable to Debtor because Debtor has no retiree benefits within the meaning of section 1129(a)(13). See 11 U.S.C. § 1129(a)(13). Bankruptcy Code sections 1129(a)(14) and (15) are only applicable to individual debtors. See 11 U.S.C. §§ 1129(a)(14) and (15).

n) Bankruptcy Code Section 1129(a)(16): The Plan Complies with Applicable Non-Bankruptcy Law.

Bankruptcy Code section 1129(a)(16) requires that any transfers of property by a nonprofit corporation under a plan of reorganization be made in accordance with any applicable non-bankruptcy law governing the transfers of property by nonprofit corporations. See 11 U.S.C. § 1129(a)(16). Debtor is not a non-profit corporation, and thus there are no provisions in Chapter 82 of the Nevada Revised Statutes, which governs nonprofit corporations, that prohibit the transfers that will be made under the Plan. See 7 Nev. Rev. Stat. §§ 82.006-82.546 (2011). Therefore, the Plan complies with Bankruptcy Code section 1129(a)(16).

B. Bankruptcy Code Section 1129(b) is Satisfied as to Class 6 Old Equity Interests.

Bankruptcy Code section 1129(b)(1) provides:

> Notwithstanding section 510(a) of this title, if all of the applicable requirements of [1129(a)] other than [1129(a)(8)] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

Bankruptcy Code section 1129(b) is not applicable to any of the Classes of Claims under Debtor's Plan, as all requirements of Bankruptcy Code section 1129(a), including Bankruptcy Code section 1129(a)(8), are satisfied with respect to each Class of Claims. See, e.g., In re Zenith Elecs. Corp., 241 B.R. 92, 106-07 (Bankr. D. Del. 1999), aff'd, 258 F.3d 180 (3d Cir. 2001); In re New Midland Plaza Assocs., 247 B.R. 877, 895 (Bankr. S.D. Ga. 2000). As set forth above, in accordance with Bankruptcy Code section 1129(a)(8)(A), all impaired Classes of Claims – Classes 2, 3, and 4– have voted to accept the Plan. In addition, pursuant to Bankruptcy Code section 1129(a)(8)(B), Classes 1 and 5 are unimpaired and deemed to accept the Plan.

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With respect to Class 6 Old Equity Interests, section 1129(b)(2)(C) requires that either:

> (i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidating preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or
>
> (ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

11 U.S.C. § 1129(b)(2)(C).

The Plan satisfies this requirement in three different ways: (a) as demonstrated by the Liquidation Analysis, Old Equity Interests do not have value, (b) there are no junior interests to Old Equity Interests, and (c) no Holder of a Claim is receiving more than the value of such Claim. Therefore, section 1129(b) is satisfied to the extent that it is applicable.

V. CONCLUSION

WHEREFORE, for all of the foregoing reasons, Debtor requests that the Court enter an order confirming the Plan.

Dated this 8th day of January 2013.

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