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Electronically Filed January 8, 2013

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

DEBTOR'S REPLY TO THE ACTING UNITED STATES TRUSTEE'S OBJECTION TO DEBTOR'S FIRST AMENDED CHAPTER 11 PLAN OF REORGANIZATION

[Relates to Docket Nos. 714 and 812]

Hearing Date: January 15, 2013
Hearing Time: 10:00 a.m.

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TO THE HONORABLE MIKE K. NAKAGAWA, THE OFFICE OF THE UNITED STATES TRUSTEE AND ALL PARTIES IN INTEREST:

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 Reply (the "Reply") to the Objection [Docket No. 812] (the "Objection") filed by the Office of the United States Trustee (the "UST") to Debtor's First Amended Plan of Reorganization [Docket No. 714] (the "Plan").[1]

This Reply is made and based upon the following memorandum of points and authorities, the Debtor's separately and concurrently filed memorandum of law in support of confirmation of the Plan (the "Confirmation Brief"), the Declaration of Robert Evans filed in support of the Confirmation Brief (the "Evans Declaration"), the Declaration of Future Claims Representative James L. Moore, all other papers and pleadings on file with the Court in this Chapter 11 Case, and any oral arguments the Court may entertain at the Plan's confirmation hearing.

Dated this 8th day of January 2013.

FOX ROTHSCHILD LLP

By *__/s/ Brett Axelrod__*
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[1] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Plan.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Objection is a textbook example of failing to see the forest for the trees. The Plan before the Court received overwhelming creditor support. The Plan before the Court was proposed by Debtor as a good faith effort to reorganize its financial affairs, preserve value and provide fair and equitable treatment to creditors of this estate. The Plan before the Court will establish the Construction Defect Trust as a well-funded mechanism to resolve Construction Defect Claims. The Plan before the Court remedies each of the grounds upon which the Court denied confirmation of the original Plan.

The Objection fails to acknowledge any of these key points. Instead, the UST criticizes non-existent provisions, makes conclusory allegations and inapposite comparisons, and takes statements completely out of context. Central among these is the UST's erroneous allegation that the Plan includes nonconsensual third-party releases and injunctions. It does not. Also central to the Objection is the unsubstantiated assertion that the Futures Representative has somehow failed to perform his duties with "sufficient vigor." Yet the UST fails to identify any specific actions the Futures Representative purportedly failed to take, much less explain how these actions would have had any impact on whether the Plan should be confirmed.

Contrary to the UST's theoretical contentions, the facts that are of record in this Chapter 11 Case amply demonstrate that Debtor has satisfied its burden to prove the Plan should be confirmed. The Plan complies with the Bankruptcy Code and applicable Ninth Circuit law. Parties in interest have had a full and fair opportunity to be heard, and no party with an economic stake in Debtor's estate has raised any objection to the Plan. The Futures Representative has prudently and diligently represented the interests of his constituents. Despite Debtor having voluntarily waived its right to exclusivity on May 29, 2012, no one has come forward with any colorable alternative to the Plan that would treat creditors of Debtor's estate as well or better than they will be treated under the Plan. Therefore, the Court should overrule the Objection and enter an order confirming the Plan.

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II. ARGUMENT

A. The Plan Does Not Include Non-Consensual Third-Party Releases or Injunctions.

In response to the prior objection filed by the UST, the Court declined to confirm Debtor's original plan [Docket No. 263] (the "May Plan") based, in part, upon the fact that the May Plan included non-consensual releases of third parties and permanent injunctions against pursuing claims against third parties. See Order Denying Confirmation of Debtor's Chapter 11 Plan of Reorganization [Docket No. 723] (the "Confirmation Denial Order"). In its current Objection, the UST once again contends that the Plan should not be confirmed because it contains impermissible third-party releases and injunctions. However, the Objection misses the mark because, unlike the May Plan, the Plan now before the Court does not include any non-consensual third-party releases or injunctions.

Instead, Debtor took great pains to remove all provisions for non-consensual third-party releases and injunctions from the Plan. These changes are clearly reflected in the redline version of the Plan that was filed at the Court's request on October 30, 2012 [Docket No. 727] (the "Plan Redline"). As indicated in the Plan Redline:

- The reference to "Related Persons" was deleted from both (i) the exculpation provisions of section 12.3 of the Plan, and (ii) the definition of "Exculpated Party" used therein.
- Section 12.4(b) was clarified to clearly limit its effect to consensual releases granted by parties who voted in favor of the Plan, including all Holders of Construction Defect Claims for whom the Futures Representative casts a Ballot (but excluding any release of the Futures Representative for purposes of any Ballot that the Futures Representative casts).
- Section 12.5(a) was clarified to clearly limit its injunctive effect to parties who consensually granted releases by voting in favor of the Plan.
- The exculpation injunction in section 12.5(b) was deleted.
- The "channeling injunction" in section 12.5(d) was expressly limited to protect only Debtor, Reorganized Debtor, the Estate, the Assets, the Distribution Agent and the Professionals—the reference to third-party "Affiliates" was deleted.

Thus, the changes reflected in Article XII of the Plan are directly responsive to the very specific grounds upon which the Court denied confirmation of the May Plan. See Confirmation Denial Order at ¶2(b) and (d) (sustaining prior UST objection on the grounds that "under current Ninth Circuit law, the injunctive provisions set forth in Section 12.5(d) of the Plan, solely as they apply to and protect non-debtors third parties, are prohibited" and that "the injunctive provisions set forth in Section 12.5(b) of the Plan, solely as they apply to and protect the Futures Representative, are prohibited under current Ninth Circuit law").

The current Plan does contain provisions for consensual releases and injunctions that benefit third parties. However, these consensual provisions 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 consensual releases and injunctive provisions set forth in sections 12.4(b)&(c) and 12.5(a) 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.). Therefore, Article XII of the Plan is entirely consistent with current Ninth Circuit law.

The UST also raises a tardy and unsubstantiated challenge to the ability of the Futures Representative to consent to the releases and injunctive relief set forth in sections 12.4(b) and 12.5(a) of the Plan on behalf of Class 4 Construction Defect Claimants who chose not to vote to accept or reject the Plan. This is an impermissible collateral attack on the order approving the disclosure statements and solicitation procedures, which expressly confers this ability on the Futures Representative. See Amended Order: (I) Approving (A) Adequacy of First Amended Master Disclosure Statement […]

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[Docket No. 791] (the "Amended Disclosure Statement Order") ("Holders of Class 4 Claims who have not filed a proof of claim and who do not vote to accept or reject the Plan shall be deemed to have delegated to the Futures Representative their rights to vote and their rights to grant the consensual non-debtor releases set forth in section 12.4(b) of the Plan").

The Amended Disclosure Statement Order was entered following a hearing that was on full notice to the UST and all creditors. See Affidavit of Service dated October 31, 2012 [Docket No. 730]; Notice of Entry re: Amended Disclosure Statement Order [Docket No. 794]. Contrary to the UST's allegations, this issue was clearly and specifically addressed in Debtor's motion seeking entry of the Amended Disclosure Statement Order. See [Docket No. 718] at pp. 15-17. The UST had a full and fair opportunity to object to this relief, and failed to do so. Moreover, the Objection appears to challenge not only the voting provision in the Amended Disclosure Statement Order, but also the provisions of the order appointing the Futures Representative, which was entered on **April 12, 2012**. See [Docket No. 189] (the "Appointment Order"). Any attempt to seek relief from the Amended Disclosure Statement Order or the Appointment Order could only proceed by way of motion pursuant to Bankruptcy Rule 9024 (incorporating Federal Rule of Civil Procedure 60) and is not properly before the Court in the context of the Objection.[2]

Finally, even if the Court were to consider the substance of the UST's arguments concerning the Futures Representative's ability to consent on behalf of non-voting Construction Defect Claimants, the arguments have no merit. The fact that the future claims representative in Johns-Manville was not granted the power to bind claimants does not create a prohibition for any future claims representative to do so. The Bankruptcy Code permits a designated representative (like the Futures Representative) to vote on another party's behalf under appropriate circumstances such as these. See, e.g., In re Avondale

[2] Debtor is cognizant that, as the Court noted in connection with its ruling on the May Plan, even if a disclosure statement is approved under section 1125(a) of the Bankruptcy Code, the adequacy of disclosure may be revisited at plan confirmation. See, e.g., In re Michaelson, 141 B.R. 715, 720 (Bankr. E.D. Cal. 1992). However, the UST has not challenged the adequacy of Debtor's disclosure regarding the ability of the Futures Representative to grant consensual releases on behalf of Construction Defect Claimants (nor in any other respect). As described in greater detail below, this disclosure was comprehensive. Therefore, there is no basis in fact or law to revisit the issue now.

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Gateway Center Entitlement, LLC, 2011 WL 1376997 (D. Ariz. 2011) (citing authorities). Indeed, Bankruptcy Rule 3018(c) expressly recognizes that acceptance or rejection of a chapter 11 plan may be submitted by an authorized agent of an eligible creditor. Fed. R. Bankr. P. 3018(c). Thus, courts have accepted votes cast on behalf of creditors by other designated representatives, such as a court-appointed examiner, see In re Swyter, 263 B.R. 742, 744 (E.D. Va. 2001), or a subrogee under an intercreditor agreement, see Avondale at id.

The UST has not cited any authority to the contrary. The G-I Holdings, Inc. case concerned completely different facts—there, the debtor was attempting to involuntarily conscript the future claims representative as a defendant in a declaratory judgment action in order to bind claimants. See G-I Holdings, Inc. v. Bennet (In re G-I Holdings, Inc.), 328 B.R. 691, 693 (Bankr. D.N.J. 2005). The court specifically relied upon the fact that the debtor was attempting to use the future claims representative for a "nonbankruptcy" purpose in a "nonbankruptcy proceeding" as the basis for its decision that the representative could not bind claimants for purposes of the declaratory judgment action. See id. at 696-97. Accordingly, the court held that the declaratory judgment action did not sufficiently safeguard the claimants' rights to due process. See id. at 697.

Here, the Construction Defect Claimants have been given ample due process. They received notice of the disclosure statement hearing, which gave them a full and fair opportunity to be heard regarding the proposed relief set forth in the Amended Disclosure Statement Order that would authorize the Futures Representative to consent on behalf of non-voting Construction Defect Claimants. More importantly, each Construction Defect Claimant received a ballot that explains in clear, highlighted language that by choosing not to submit a vote on the Plan they would be delegating their right to vote to the Futures Representative, who intended to vote in favor of the Plan on their behalf and bind them to the Plan's consensual releases and injunctions. See Amended Disclosure Statement Order at Exhibit D; Affidavit of Service dated December 20, 2012 [Docket No. 808].

In order to withhold consent from the Futures Representative to vote on their behalf and bind them to the releases and injunctions provided in the Plan, all the Construction Defect Claimants needed to do was complete and return a ballot voting to reject the Plan. By affording this clear option to Construction Defect Claimants, the Plan amply satisfies the due process concerns that were found to be

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lacking in G-I Holdings. In addition, the action by the Futures Representative at issue here—voting to accept or reject a chapter 11 plan—is at the heart of the bankruptcy process, unlike the nonbankruptcy declaratory judgment action before the court in G-I Holdings. The Bankruptcy Code and the Bankruptcy Rules expressly permit this action to be taken by a designated representative like the Futures Representative.

Therefore, the UST could not satisfy the standards of Rule 60 even if it had acted timely according to the proper procedure, and the Objection should be overruled on this ground.

B. The Plan Has Been Proposed In Good Faith.

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 above, 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 from the current Plan has eliminated any basis for this comparison.

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, 676-77 (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).

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When the Court properly considers the Plan under the facts and circumstances at hand, Debtor's good faith in proposing the Plan is readily apparent. 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.

The UST has not adduced any evidence that would contravene this prima facie showing of good faith. Instead, the UST criticizes the Futures Representative (not Debtor), in conclusory fashion, for allegedly failing to perform his duties "with sufficient vigor." As a threshold matter, the Futures Representative is not a proponent of the Plan, so the vigor with which he performed his duties is irrelevant to Debtor's good faith in proposing the Plan. It is true that Debtor cited its request to appoint the Futures Representative as being indicative of Debtor's good faith. But once the Futures Representative was appointed, his performance stands and falls on its own merits.

Moreover, the UST does not provide any reasons to justify its contention that the Futures Representative did not perform adequately, and Debtor is not aware of any such reasons. Indeed, Debtor experienced the diligence of the Futures Representative firsthand—Debtor provided the Futures Representative with access to Debtors' construction documents upon request, Debtor negotiated a stipulation with the Futures Representative regarding voting on the Plan, and Debtor discussed with the Futures Representative the reasons why the treatment of Construction Defect Claims under the Plan was the best available under the circumstances.

During these discussions, the Futures Representative questioned why the Plan provides for the amount of funding to the Construction Defect Trust to depend on the voting results for the Plan (rather than providing for the full $1,500,000 amount in all circumstances). Debtor explained that (i) the DIP Lender insisted that it receive sufficient consideration (in the form of widespread consensual releases

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from Construction Defect Claimants) in return for funding the full $1,500,000 amount, but (ii) Debtor successfully convinced the DIP Lender to increase the minimum funding for the Construction Defect Trust from $200,000 (as originally proposed by the DIP Lender) to the $500,000 amount provided for in the Plan.

The Futures Representative cannot change the difficult realities of Debtor's financial condition—he can only review the relevant information and analyze whether the Plan provides fair and equitable treatment for his future claimant constituency under the circumstances. The fact that the Futures Representative ultimately concluded to support the Plan does not impugn Debtor's good faith in proposing the Plan—it reinforces it. To hold otherwise would be to adopt a *per se* rule in direct contravention of Ninth Circuit law.

Therefore, the record in this Chapter 11 Case, including the overwhelming creditor support for the Plan, provides ample grounds upon which the Court can conclude that the Plan was proposed in good faith.

C. The Plan is Feasible.

The UST challenges 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 the Liquidation Analysis filed in connection with the Plan.

In the Liquidation Analysis (attached as Exhibit B to the Master Disclosure Statement), Debtor used an estimate of $80 million for its maximum liability on Construction Defect Claims. As a matter of full disclosure, Debtor noted its belief that, under the Plan, the actual aggregate amount of Allowed Class 4 Construction Defect Claims will be significantly lower and is not likely to exceed approximately $8 million. However, Debtor referenced the full $80 million amount in its Liquidation Analysis based on the fact that "in a Chapter 7 liquidation there can be no assurance that there will be sufficient funding and expertise to achieve commensurate results in the adjudication of these claims."

The UST misconstrues this explanation (contained in a footnote) to suggest that "the success of the construction defect trust contemplated by the Plan" is premised solely on the amount of cash that would be used to fund the Construction Defect Trust. This interpretation is taken wholly out of context, and completely misses the point. The purpose of the Liquidation Analysis is to compare the treatment

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that creditors will receive under the Plan to the treatment they would receive in a hypothetical chapter 7 liquidation. See 11 U.S.C. § 1129(a)(7). For purposes of this comparison, Debtor contrasted (i) the Construction Defect Trust, which will receive cash funding of $1,500,000[3] and which will be administered by a Construction Defect Trustee and a Construction Defect Trust Advisory Board with specific expertise in the residential homebuilding industry, and (ii) a chapter 7 liquidation, where no cash funding would be provided specifically to administer Construction Defect Claims, and which would be administered by a chapter 7 trustee who might not have any experience in the residential homebuilding industry. Thus, the Plan provides a clear advantage over a chapter 7 liquidation by ensuring that there will be specific funds dedicated to the adjudication of Construction Defect Claims, which will be administered by well-qualified fiduciaries.

The UST's suggestion that recoveries for the Construction Defect Trust are too speculative and uncertain to be feasible echoes its prior contention that the self-insured retention amounts under Debtor's insurance policies render the potential benefits of the Construction Defect Trust illusory. It is true that Insurance Recoveries and the potential proceeds of Insurance Coverage Actions and Construction Defect Actions cannot be quantified at this time. But this is true for any chapter 11 plan that is proposed before all of the potential assets and causes of action vested in the estate have been liquidated. If debtors were required to resolve every possible contingency that might impact the implementation of a plan in order to prove its feasibility, then chapter 11 plans would never be confirmed because by the time a debtor could do so the estate would have been fully administered.

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[3] The Plan provides for the Construction Defect Trust to be funded with either $1,500,000 or $500,000, depending on whether a sufficient percentage of Construction Defect Claimants vote to accept the Plan and grant the consensual releases. See Errata to Debtor's First Amended Chapter 11 Plan of Reorganization [Docket No. 784]. As long as the votes of the Futures Representative on behalf of non-responding Construction Defect Claimants are counted, the requisite percentage has been satisfied (triggering the higher $1,500,000 funding amount). See 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. Ironically then, the only obstacle to prevent the Construction Defect Trust from being funded with the full $1,500,000 is the UST's tardy and meritless challenge to the ability of the Futures Representative to grant the consensual release. See §A, supra.

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).

The Plan amply provides the Construction Defect Trust with a reasonable probability of success by: (a) vesting it with valuable (though as yet unliquidated) assets in the form of Insurance Recoveries, Construction Defect Actions[4] and Insurance Coverage Actions; (b) appointing well-qualified fiduciaries to administer these assets and determine the interests of all beneficiaries; (c) establishing clear and appropriate procedures to govern the administration process; and (d) funding the Trust with $1,500,000 in initial liquidity. All of these well-founded attributes of the Construction Defect Trust ensure that the Plan provides Construction Defect Claimants with the best available opportunity to have their claims treated in a fair and equitable manner. There is no better alternative on the table, and the UST does not even speculate that there could be.

Moreover, as the Futures Representative has recognized, Debtor has a very low historic incidence of construction defects in the homes that it constructs, which is reinforced by the very small number of Construction Defect Claims that have been asserted in this Chapter 11 Case, See Evans Declaration at ¶ 24. This too is a key factor that must be taken into account when evaluating the *bona fides* of the Construction Defect Trust. If the total number and amount of Allowed Construction Defect Claims ultimately proves to be small, then the cash funding for the Construction Defect Trust alone may be sufficient to satisfy all of these claims in full. In contrast, if the total number and amount of Allowed

[4] One specific example of a Construction Defect Action is Debtor's claims against its former plumbing contractor, Interstate Plumbing, which are the subject of the proof of claim in the amount of not less than $5 million filed by Debtor in the Interstate Plumbing chapter 7 bankruptcy case.

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Construction Defect Claims ultimately proves to be large, the impact of any self-insured retention requirements on Insurance Recoveries will be significantly reduced.

Therefore, under the facts and circumstances of this Chapter 11 Case, the Construction Defect Trust has a sufficiently reasonable probability of success to satisfy the feasibility requirements of section 1129(a)(11).

D. The Objection Should Be Overruled on All Other Grounds As Well.

In addition to the arguments discussed above, the UST also raises at least two other issues in perfunctory fashion: (i) the continued service of the Futures Representative; and (ii) whether parties had sufficient time to file objections to the Plan. Neither of these issues provides any basis for the Court to deny confirmation of the Plan.

First, the Plan provides for the Futures Representative to be discharged from his duties as of the Effective Date. As such, the provisions of section 1129(a)(5) regarding post-confirmation service are inapplicable to the Futures Representative. It is true that Mr. Moore, who currently serves as the Futures Representative, also is the proposed Construction Defect Trustee. However, the UST has not provided any basis to challenge Mr. Moore's qualifications to serve as Construction Defect Trustee. Indeed, Mr. Moore's qualifications are a matter of record in this Chapter 11 Case. See Declaration of Disinterestedness of James. L. Moore re: Motion for Order Appointing Future Claims Representative [Docket No. 185]. Moreover, Mr. Moore will be supported by the Construction Defect Trust Advisory Board, whose qualifications are set forth in Exhibit "I" attached to the Master Disclosure Statement. Therefore, Debtor has satisfied the requirements of section 1129(a)(5) in all respects.

Second, the UST premises its criticism of the timing for objections to the Plan on the allegation that the Plan contains "extraordinary relief . . . in the form of channeling injunctions and non-debtor third party releases." This premise (as set forth above) is entirely incorrect. See §A, supra. The Plan no longer contains any nonconsensual third-party releases or injunctive provisions. Furthermore, no one other than the UST objected to the nonconsensual third-party releases and injunctive provisions that were contained in the May Plan, which was filed on full notice to all parties. The Plan before the Court includes only consensual releases and injunctive provisions, which are indisputably appropriate under Ninth Circuit law. See id. The proposed confirmation schedule for the Plan was sent out to all parties

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on full notice, no party (including the UST) objected, and the Court approved the objection deadline (and other timing) for the Plan confirmation pursuant to the Amended Disclosure Statement Order. Therefore, all parties in interest had a full and fair opportunity to object to the Plan.

III. CONCLUSION

WHEREFORE, Debtor respectfully requests that the Court enter an order (i) overruling the Objection in all respects, (ii) confirming the Plan, and (iii) granting such other and further relief as it deems to be just and proper.

Dated this 8th day of January 2013.

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