UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
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In re:	Chapter 11
FONTAINEBLEAU LAS VEGAS HOLDINGS, LLC, ET AL.,[1]	Case No. 09-21481-BKC-AJC
Debtors. _____/	(Jointly Administered)

M&M LIENHOLDERS' AND CONTRACTOR CLAIMANTS' JOINT OBJECTION TO:

(i) DEBTORS' MOTION FOR INTERIM AND FINAL ORDERS UNDER SECTIONS 105(a), 362, 363, 364(c), 364(d), AND 364(e) OF THE BANKRUPTCY CODE, AND FEDERAL RULES OF BANKRUPTCY PROCEDURE 2002, 4001 AND 9014 AND LOCAL BANKRUPTCY RULE 9013-1(F), (I) AUTHORIZING DEBTORS TO INCUR POST-PETITION SECURED INDEBTEDNESS ON SUPER-PRIORITY PRIMING LIEN BASIS AND MODIFYING THE AUTOMATIC STAY, (II) AUTHORIZING THE DEBTORS TO REPAY USED CASH COLLATERAL AND UNUSED CASH COLLATERAL, AND (III) PRESCRIBING FORM AND MANNER OF NOTICE AND SETTING FINAL HEARING, AND NOTICE OF EVIDENTIARY HEARING THEREON;

and

(ii) DEBTORS' MOTION FOR ENTRY OF ORDERS PURSUANT TO SECTIONS 105, 363 AND 365 OF THE BANKRUPTCY CODE AND FEDERAL RULES OF BANKRUPTCY PROCEDURE 2002, 6004, AND 6006 (A) ESTABLISHING BIDDING PROCEDURES FOR THE SALE OF ALL OR SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF LIENS, CLAIMS, AND ENCUMBRANCES; (B) AUTHORIZING THE DEBTORS TO PROVIDE CERTAIN STALKING HORSE BID PROTECTIONS; (C) SCHEDULING A FINAL HEARING TO CONSIDER APPROVAL OF THE SALE OF ALL OR SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS; AND (D) APPROVING THE FORM AND MANNER OF NOTICE, AND NOTICE OF EVIDENTIARY HEARING

and

[1] *In re Fontainebleau Las Vegas Holdings, LLC*, Case No. 09-21481-BKC-AJC, *In re Fontainebleau Las Vegas, LLC*, Case No. 09-21482-BKC-AJC, and *In re Fontainebleau Las Vegas Capital Corp.*, Case No. 09-21483-BKC-AJC.

COUNTERMOTION FOR DETERMINATION OF LIEN CLAIMS FOR CREDIT BIDDING PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 3012

The M&M Lienholders,[2] by and through their counsel, the law firms of Gordon Silver and Shraiberg, Ferrara & Landau, P.A., and the Contractor Claimants,[3] by and through their counsel, the law firm of the Ehrenstein Charbonneau Calderin, who collectively hold first priority liens against the Project[4] in the aggregate amount of $424,263,050.66, hereby submit this objection (the "Objection") to *Debtors' Motion for Interim and Final Orders Under Sections 105(a), 362, 363, 364(c), 364(d), and 364(e) of the Bankruptcy Code, and Federal Rules of Bankruptcy Procedure 2002, 4001 and 9014 and Local Bankruptcy Rule 9013-1(F), (I) Authorizing Debtors to Incur Post-Petition Secured Indebtedness on Super-Priority Priming Lien Basis and Modifying the Automatic Stay, (II) Authorizing the Debtors to Repay Used Cash Collateral and Unused Cash Collateral, and (III) Prescribing Form and Manner of Notice and Setting Final Hearing, and Notice of Evidentiary Hearing Thereon* (the "DIP Finance Motion") (D.E. 992) and *Debtors' Motion for Entry of Orders Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 2002, 6004, and 6006 (A) Establishing Bidding Procedures for the Sale of All or Substantially All of the Debtors' Assets*

[2] The M&M Lienholders are Architectural Materials, Inc., d/b/a AMI Hospitality, Inc., and its subsidiary Peregrine Installation Co., Rinker Materials West LLC d/b/a Cemex Construction Materials Pacific LLC, Collings Interiors, LLC, Commercial Roofers, Inc., Conti Electric, Inc., Desert Plumbing & Heating Co., Door-Ko, Inc., Eberhard Southwest Roofing, Inc., EIDS Steel Company, LLC, Gallagher-Kaiser Corp., Geo Cell Solutions, Inc., George M. Raymond Co., Inncomm International, Inc., J.F. Duncan Industries, Inc., d/b/a Duray, JS&S, Inc., Lally Steel, Inc., L.A. Nevada, Inc., d/b/a G&G Systems, LVI Environmental of Nevada, Inc., Marnell Masonry, Inc., Midwest Drywall Co., Inc., Midwest Pro Painting, Inc., Mechanical Insulation Specialists, Modernfold of Nevada, LLC, Southern Nevada Paving, Inc., Paramount Management Enterprises, Ram Construction Services of Michigan, Inc., The PENTA Building Group, LLC, Universal Piping, Inc., West Edna & Associates, d/b/a Mojave Electric, and W&W Steel LLC of Nevada.

[3] The Contractor Claimants are Desert Fire Protection, a Nevada Limited Partnership, Bombard Mechanical, LLC, Bombard Electric, LLC, Warner Enterprises, Inc. d/b/a Sun Valley Electric Supply Co., Absocold Corporation d/b/a Econ Appliance, Austin General Contracting, Powell Cabinet and Fixture Co., Safe Electronics, Inc, SAMFET, and Union Erectors, LLC.

[4] For clarity, all capitalized terms not defined herein shall have the meanings set forth in the DIP Finance Motion and the Sale Motion.

Free and Clear of Liens, Claims, and Encumbrances; (B) Authorizing the Debtors to Provide Certain Stalking Horse Bid Protections; (C) Scheduling a Final Hearing to Consider Approval of the Sale of All or Substantially All of the Debtors' Assets; and (D) Approving the Form and Manner of Notice, and Notice of Evidentiary Hearing (the "Sale Motion") (D.E. 993), along with their *Countermotion for Determination of Lien Claims for Credit Bidding Pursuant Federal Rule of Bankruptcy Procedure 3012* (the "Countermotion") and respectfully state as follows:

I. INTRODUCTION

1. As set forth below, both the DIP Credit Facility and the Section 363 sale proposed by Penn National Gaming and the Debtors cannot be approved over the objection of the statutory lienholders as a matter of law. Based upon the onerous and commercially unreasonable terms proposed by the prospective buyer, the M&M Lienholders and Contractor Claimants do not consent. Notwithstanding the M&M Lienholders' and Contractor Claimants' current disapproval of the transaction, if the Court adopted certain procedural safeguards identified herein, the M&M Lienholders and Contractor Claimants would consent to the transaction.

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

2. Debtors contend that as of the Petition Date, Debtors owed approximately $1.7 billion in secured debt, not including debt owed to the statutory lienholders. Specifically, Debtors contend that as of the Petition Date, approximately $700 million was outstanding under the Term Loan Facility; approximately $336.7 million was outstanding under the Delayed Draw Facility; and letters of credit in the aggregate face amount of approximately $13 million were outstanding under the Revolver Facility. D.E. 5 at ¶ 13-23. Further, $675 million of the Junior

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Mortgage Notes, along with the accrued interest thereon, was outstanding. Id. The Debtors' debt structure is more fully set forth in Debtors' DIP Finance Motion.[5]

3. As set forth in the DIP Finance Motion, the Debtors entered into the Existing Credit Facility, consisting of the Term Loan Facility, the Delayed Draw Facility, and the Revolver Facility, on June 6, 2007.

The First and Second Interim Cash Collateral Orders

4. On June 10, 2009, immediately after commencing these Chapter 11 Cases, Debtors filed the *Emergency Motion for Interim and Final Orders (I) Authorizing the Debtors to Use Cash Collateral; (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 362, and 363 of the Bankruptcy Code; and (III) Scheduling Final Hearing* (the "Cash Collateral Motion"). D.E. 12.

5. On June 11, 2009, the Court entered the *Interim Order (I) Authorizing Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code, (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 362 and 363, of Bankruptcy Code, and (III) Scheduling Final Hearing* (the "First Interim Cash Collateral Order"). D.E. 49. Though given other protections, the Term Lenders were not given priming liens pursuant to the First Interim Cash Collateral Order.

6. On June 23, 2009, Debtors' filed their *Supplement to Emergency Motion for Interim and Final Orders (I) Authorizing the Debtors to Use Cash Collateral; (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 362, and 363 of the Bankruptcy Code; and (III) Scheduling Final Hearing* (the "First Supplement"). D.E. 166.

[5] Reference to the DIP Finance Motion is not intended to be and should not be construed as agreement with the characterization therein of the priority position of the Prepetition Lenders.

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7. On July 7, 2009, the Court entered the *Second Interim Order (I) Authorizing Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code, (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 362, and 363, of Bankruptcy Code, and (III) Scheduling Final Hearing* (the "Second Interim Cash Collateral Order"). D.E. 242. Again, though the Term Lenders were given certain protections, the Second Interim Cash Collateral Order did not provide the Term Lenders with priming liens.

The Nonconsensual Cash Collateral Orders

8. On July 20, 2009, Debtors filed their *Second Supplement to Emergency Motion for Interim and Final Orders (I) Authorizing the Debtors to Use Cash Collateral; (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 362, 363 and 364 of the Bankruptcy Code; and (III) Scheduling Final Hearing* (the "Second Supplement"). D.E. 302. Pursuant to the Second Supplement, Debtors proposed for the first time to grant a "priming replacement lien on the Project senior to all other liens presently encumbering the Project *inclusive of mechanics' and materialmen's liens* as well as superpriority claims" as "adequate protection" to the Term Lenders for Debtors' use of the Term Lenders' cash collateral. D.E. 302 at 2 (emphasis added).

9. On July 31, 2009, over the objection of the M&M Lienholders and Contractor Claimants and other holders of mechanics' and materialmen's liens, the Court entered the *Third Interim Order (I) Authorizing Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code, (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 362, 363, and 364, of Bankruptcy Code, and (III) Scheduling Final Hearing* (the "Third Interim Cash Collateral Order"). D.E. 359. The Third Interim Cash Collateral Order, unlike the

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First Interim Cash Collateral Order and Second Interim Cash Collateral Order, provides for the priming of the statutory lienholders' liens.[6]

10. On August 20, 2009, Debtors filed their *Third Supplement to Emergency Motion for Interim and Final Orders (I) Authorizing the Debtors to Use Cash Collateral; (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 362, 263 and 364 of the Bankruptcy Code; and (III) Scheduling Final Hearing* (the "Third Supplement"). D.E. 421. Under the Third Supplement, the Debtors sought to grant the Term Lenders additional priming liens as "adequate protection" for use of the Term Lenders' cash collateral.

11. On August 27, 2009, the Court entered the *Fourth Interim Order (I) Authorizing Use of Cash Collateral Pursuant to § 363 of Bankruptcy Code; (II) Adequate Protection to Secured Parties Pursuant to §§ 361, 362, 363, and 364, of Bankruptcy Code; and (III) Scheduling Final Hearing* (Mark, J.) (the "Fourth Interim Cash Collateral Order"). D.E. 454. The Fourth Interim Cash Collateral Order authorized Debtors' continued use of cash collateral and granted additional priming liens to the Term Lenders as adequate protection.

12. On September 14, 2009, after it had become clear that Debtors were unable to reach an agreement with the Term Lenders for continued use of the cash collateral, Debtors filed their *Emergency Motion for Interim and Final Orders (I) Authorizing use of Previously Authorized Cash Collateral; (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 363, and 374 of the Bankruptcy Code; and (III) Scheduling Final Hearing* (the "Cash Collateral Motion"), seeking to use approximately $2.9 million in cash collateral and to grant the Term Lenders priming liens in the same amount. D.E. 528.

[6] On August 7, 2009, the Bankruptcy Court entered the Amended Third Interim Order (I) Authorizing Use of Cash Collateral Pursuant to Section 363 of Bankruptcy Code, (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 362, 363, and 364 of Bankruptcy Code, and (III) Scheduling Final Hearing (the "Amended Third Interim Cash Collateral Order"). D.E. 389. The Bankruptcy Court entered the Amended Third Interim Order to correct a scrivener's error in paragraph 21 of the Third Interim Cash Collateral Order.

13. On September 18, 2009, the Bankruptcy Court entered the *First Interim Order (I) Authorizing the Nonconsensual Use of Cash Collateral and to (II) Provide Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 363, and 364 of the Bankruptcy Code and (III) Scheduling Final Hearing* (the "First Nonconsensual Cash Collateral Order"). D.E. 565. Under the First Nonconsensual Cash Collateral Order, Debtors were authorized to use $1,931,755 in cash collateral, and the Term Lenders were granted a priming lien in this same amount. Following entry of the First Nonconsensual Cash Collateral Order, the Bankruptcy Court entered the *Order Supplementing First Interim Order Authorizing the Nonconsensual Use of Cash Collateral*, entered in September 29, 2009 (the "First Supplemental Order") D.E. 617. The Bankruptcy Court also made oral rulings at the September 22, 2009 hearing which were subsequently reduced to the *Second Supplemental Order Authorizing the Nonconsensual Use of Cash Collateral* (the "Second Supplemental Order." D.E. 647.

14. The M&M Lienholders and Contractor Claimants appealed the First Nonconsensual Order, along with the First Supplemental Order and the Second Supplemental Order. D.E. 584, 592. In their briefing to the District Court, the M&M Lienholders and Contractor Claimants argued (i) that a priming lien under Section 364(d) may not be granted as adequate protection for use of cash collateral under Section 363(e), and (ii) that the Bankruptcy Court erred in awarding liens to the Term Lenders which prime those of the statutory lienholders without requiring that the Debtors provide adequate protection to the statutory lienholders. See 1888 Fund, Ltd., et. al v. Fontainebleau Las Vegas Holdings, LLC, et. al, Case No. 09-22828-GOLD, D.E. 9, 18.

15. At the oral argument heard on October 7, 2009, the District Court orally ruled that until the Bankruptcy Court determines the priority of the liens of the Prepetition Lenders vis-à-

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vis the statutory lienholders, the nonconsensual cash collateral orders entered by the Bankruptcy Court are not final. The Term Lenders' appeal was dismissed, and the statutory lienholders' rights to appeal the priming liens granted under the non-consensual cash collateral orders is preserved.

16. Until Debtor's filed the DIP Finance Motion, the amount of cash used pursuant to each of the prior cash collateral orders described above was not clear. Pursuant to the DIP Finance Motion, it appears that a total of $18,244,170 in cash collateral has been used, which Debtors propose to repay to the Prepetition Lenders with the financing proposed to be provided pursuant to the DIP Credit Agreement. Of this, only $1,379,053 has been used with the consent of the M&M Lienholders and Contractor Claimants, as detailed below. However, the exact amount of cash used pursuant to each of the First Interim Cash Collateral Order, Second Interim Cash Collateral Order, Third Interim Cash Collateral Order, Fourth Interim Cash Collateral Order, and First Nonconsensual Cash Collateral Order along with the First Supplemental Order and the Second Supplemental Order thereto, remains unclear.

The Consensual Interim Cash Collateral Orders

17. Following the appeal, the Debtors, the Term Lender Steering Group, and the M&M Lienholders and Contractor Claimants (among other parties) entered into a series of six (6) consensual short-term interim cash collateral orders.

18. On October 8, 2009, the Court entered the *Interim Order (I) Authorizing the Consensual Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code, (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 363 and 364 of the Bankruptcy Code, and (III) Scheduling Final Hearing* (D.E. 730) (the "October 8

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Consensual Interim Cash Collateral Order"). The October 8 Consensual Interim Cash Collateral Order authorized the use of $133,000 in cash collateral.

19. On October 15, 2009, the Court entered the *Second Interim Order (I) Authorizing the Consensual Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code and (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 363 and 364 of the Bankruptcy Code* (D.E. 811) (the "October 15 Consensual Interim Cash Collateral Order"). The October 15 Consensual Interim Cash Collateral Order authorized the use of $129,000 in cash collateral.

20. On October 26, 2009, the Court entered the *Third Interim Order (I) Authorizing the Consensual Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code and (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 363 and 364 of the Bankruptcy Code* (D.E. 852) (the "October 26 Consensual Interim Cash Collateral Order"). The October 26 Consensual Interim Cash Collateral Order authorized the use of $582,700 in cash collateral.

21. On November 2, 2009, the Court entered the *Fourth Interim Order (I) Authorizing the Consensual Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code and (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 363 and 364 of the Bankruptcy Code* (D.E. 901) (the "November 2 Consensual Interim Cash Collateral Order"). The November 2 Consensual Interim Cash Collateral Order authorized the use of $151,500 in cash collateral.

22. On November 11, 2009, the Court entered the *Fifth Interim Order (I) Authorizing the Consensual Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code and (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 363 and*

364 of the Bankruptcy Code (D.E. 953) (the "November 11 Consensual Interim Cash Collateral Order"). The November 11 Consensual Interim Cash Collateral Order authorized the use of $237,500 in cash collateral.

23. On November 16, 2009, the Court entered the Sixth Interim Order (I) Authorizing the Consensual Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code and (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 363 and 364 of the Bankruptcy Code (D.E. 987) (the "November 16 Consensual Interim Cash Collateral Order" and, together with the October 8 Consensual Interim Cash Collateral Order, the October 15 Consensual Interim Cash Collateral Order, the October 26 Consensual Interim Cash Collateral Order, the November 2 Consensual Interim Cash Collateral Order, the November 11 Consensual Interim Cash Collateral Order, and the November 16 Consensual Interim Cash Collateral Order, the "Consensual Interim Cash Collateral Orders.") The November 16 Consensual Interim Cash Collateral Order authorized the use of $144,853 in cash collateral.

24. On November 19, 2009, Debtors filed their *Seventh Emergency Motion for Interim and Final Orders (I) Authorizing Use of Cash Collateral and (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 362, 363, and 364 of the Bankruptcy Code* (D.E. 1006) (the "Seventh Interim Cash Collateral Motion"). The Debtors seek to use an additional $353,786 in cash collateral pursuant to the Seventh Interim Cash Collateral Motion.

25. Collectively, the Consensual Interim Cash Collateral Orders have authorized the use of $1,379,053 of the Prepetition Lenders' cash collateral to fund certain administrative expenses of the Debtors, in exchange for which the Prepetition Lenders were given priming liens

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in equivalent amounts. Presumably the Debtors have utilized all of the cash collateral authorized under the Consensual Interim Cash Collateral Orders.

The DIP Finance Motion and the Sale Motion

26. The Debtors' DIP Finance Motion seeks approval of the Debtor-in-Possession Credit Agreement (the "DIP Credit Agreement") along with the Agreed Budget and the Stabilization Plan (collectively, the "DIP Credit Facility") between the Debtors and Nevada Gaming Ventures, Inc.,[7] a Nevada corporation which is an affiliate of Penn National Gaming, in the total amount of $51,503,734. This amount is to be used, in part, as follows:

- $8,154,100 in professional fees, $4,614,100 of which is for Debtors' professionals, and $2,400,000 is for the Proposed Stalking Horse's professionals;
- $1,525,000 in post-closing professional fees, $400,000 of which is for Debtors' professionals;
- $512,000 in professional fees in connection with Retail;
- $1,775,000 in DIP Financing Costs (including the 2% "Upfront Fee" and interest and fees);
- $18,244,170 for repayment of the Term Lenders;
- $10,700,000 in Stabilization Costs.

27. The DIP Credit Facility further provides numerous benefits for the Proposed Stalking Horse, including:

- Interest at the rate of 10% per annum or 12% of amounts overdue or after default;
- An "Upfront Fee" of 2% of the aggregate amount of the Commitments due and payable on the Closing Date (i.e., all funds loaned);
- Commitment Fees in an amount equal to .50% per annum of the Available Unused Commitment of each Lender assessed on the last day of each month for the preceding

[7] Nevada Gaming Ventures, Inc., or "NGV," is referred to throughout the DIP Credit Facility documents as the "DIP Lenders" or the "DIP Agent," and in the Sale Motion as the Stalking Horse Bidder. For ease of reference, NGV will be identified herein as the Proposed Stalking Horse.

month or on the date upon which the commitments of all DIP Lenders terminate;

- All of the Proposed Stalking Horse's "reasonable out-of-pocket expenses," including the fees and costs of its counsel, Wachtell, Lipton, Rosen & Katz;
- An "Exit Fee" of 5% of the total Commitments outstanding at the Termination Date.

28. The Debtors' Sale Motion seeks approval of, *inter alia*, a sale of all or substantially all of the Debtors' assets, including the Project. The Proposed Stalking Horse's bid includes two primary components. First, the bid includes a credit bid in the amount of the aggregate amount of the Obligations (defined in the DIP Credit Facility) outstanding as of the date of the Auction, including the Exit Fee, plus any additional amount of obligations projected to be outstanding under the DIP Credit Facility on the maturity date (the "Credit Bid"). Under the terms of the DIP Credit Facility, discussed above, the Credit Bid would be worth approximately $51.5 million if the DIP Credit Facility was approved in full.

29. The second component of the bid is the Closing Cash Payment, a maximum amount of $50,000,000, which may be reduced by up to $10,000,000 as set forth in Section 2.5 of the Asset Purchase Agreement. The maximum sale price, consisting of both the Credit Bid and the Closing Cash Payment (the "NGV Bid"), is thus $101.5 million.

III. ARGUMENT

30. The M&M Lienholders and Contractor Claimants[8] do not object to the DIP Financing and Sale Motions on a universal basis. Rather, the statutory lienholders object to the allocation of funds proposed to be lent under the DIP facility and the subsequent leveraging of that financing into both a priming lien and a credit bid under the Sale Motion. Specifically, the Debtors attempt to justify the size and structure of the DIP Credit Facility by asserting that the

[8] The M&M Lienholders and Contractor Claimants may be included in references to Statutory Lienholders from time to time.

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funds provided will used to stabilize the Project for the benefit of secured creditors, including statutory lienholders. The cost of this benefit to first position, statutory lienholders, including the M&M Lienholders and the Contractor Claimants, is *yet another* priming lien for the full value of the $51.5 million DIP Credit Facility. It is difficult, however, for lienholders, who are otherwise in first priority position, to accept that a credit facility that devotes only $10.7 million to stabilize the Project will provide a benefit proportional to a $51.5 million priming lien. The second lien position Prepetition Lenders, however, get the benefit of the repayment of all of the $18,244,170 million of their previously lent cash collateral.[9]

31. Moreover, the Sale Motion and proposed bid procedures effectively preclude credit bids for everyone except the Proposed Stalking Horse. The Sale Motion anticipates that the stalking horse bid will repay the Proposed Stalking Horse the entire value of the DIP Credit Facility from first dollars of any bid such that, despite a competing bidder having to post a bid of $105 million or greater, the Proposed Stalking Horse gets to credit bid its $51.5 million priming lien. First priority, statutory lienholders, however, are precluded from placing a credit bid that counts as a "qualified bid" unless they hold a judgment or order that determines their liens to be in first position as a matter of law. These bidding restrictions are unfair, will chill bidding, will preclude otherwise lawful credit bids from competing for the Project, and will depress the price paid for the Project. The proposed bid procedures will guarantee that the NVG Bid is the winning bid, and the amount of cash that will be distributed to the first lien position, statutory lienholders will be depressed.

[9] It is presently unclear from the face of the Budget attached to the DIP Finance Motion whether the $18,244,170 figure includes pre or post-petition interest on the cash collateral or the Term Lender Steering Group's or Aurelius Capital Management's professional fees. In the event that interest and professional fees are repaid to any of the Term Lenders under the DIP, the M&M Lienholders and Contractor Claimants argue that such fees and interest should be separately enumerated as line items in the Budget, and under no circumstances paid.

32. The foregoing terms and conditions of the proposed DIP Credit Facility and bid procedures as set forth in the DIP Finance Motion and Sale Motion are not supported in law, and the Court should not approve the motions on their present terms. The Debtors current proposed sale process is so stacked in favor of the Proposed Stalking Horse that the scheduled "auction" for the Debtors' assets will be very short indeed. Accordingly, the Joint Objection of the M&M Lienholders and the Contractor Claimants should be sustained and the offending provisions stricken from any DIP financing and bid procedures that the Court may approve.

A) THE PROPOSED DIP CREDIT FACILITY MUST BE DENIED AS NO ADEQUATE PROTECTION HAS BEEN OFFERED TO THE M&M LIENHOLDERS OR CONTRACTOR CLAIMANTS

33. Under Section 364(d)(1)(B), an extension of credit secured by a senior or equal lien on property of the estate that is already subject to a lien, a/k/a a "priming lien," may be granted to a postpetition lender only if there is "adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted." 11 U.S.C. §364(d)(1)(B). More simply, the "primed" lienholder must be adequately protected.

34. Each of the M&M Lienholders and Contractor Claimants, along with each of the other statutory lienholders, is a "holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted." Though the Debtors bear the ultimate burden of proof on the issue of adequate protection, 11 U.S.C. §364(d)(2), Section 363(p) provides that an entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest. 11 U.S.C. §363(p). Debtors thus contend that the statutory lienholders are not entitled to adequate protection because there has been no determination of the extent, validity, and priority of their liens. This argument is specious for several reasons.

35. Courts have held that only a prima facie showing of the validity, extent, and priority of a secured creditor's lien need be shown to establish a secured creditor's entitlement to adequate protection. See In re Megan-Racine Assoc., Inc., 192 B.R. 321, 325-26 (Bankr. N.D.N.Y. 1995) (citing 2 COLLIER ON BANKRUPTCY, ¶ 363.15 (15th ed. 1995), In re Placid Oil Co., 102 B.R. 538, 542 (Bankr. N.D.Tex. 1988)). In the case before the Court, such a showing has been made with respect to both the validity and extent of the liens, and such a showing can be made expeditiously with respect to the priority of the liens.

36. The M&M Lienholders and Contractor Claimants have each filed Proofs of Claim totaling more than $424 million in the aggregate. No objection has been filed to these Proofs of Claim and they are *prima facie* valid. In addition, multiple mechanics' lien claimants, including the M&M Lienholders and Contractor Claimants, have filed numerous notices of maintaining and perfecting liens and motions for relief from stay for the limited purpose of perfecting liens pursuant to § 546(d). To date, not a single one of those notices or motions for relief from stay has been objected to by the Debtors or any other party in interest, and the Court has granted stay relief to perfect liens in every applicable instance. Finally, neither the Debtors nor the Prepetition Lenders have ever sought to invalidate or avoid the liens of the statutory lienholders by commencing an action to determine the extent, validity, and priority of the liens under Rule 7001(2). The validity and extent of the liens are thus prima facie valid.

37. With respect to the priority of the mechanics' and materialmen's liens against the Project vis-à-vis the Prepetition Lenders, the M&M Lienholders and Contractor Claimants are prepared to prove the priority of the statutory lienholders at the hearing to consider the DIP Finance Motion and the Sale Motion. See *Declaration of Clayton Parson of Colasanti Specialty Services, Inc. in Support of the Countermotion by the M&M Lienholders and Contractor*

Claimants for Determination of Lien Claims for Credit Bidding Pursuant to Federal Rule of Bankruptcy Procedure 3012, filed contemporaneously herewith and incorporated herein by reference.

38. The determination of the validity, extent and priority of a lien is made by examining the relevant state law. Travelers Cas. & Sur. Co. of Am. v. PG&E, 549 U.S. 443, 450-51, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007); Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000) (creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code.) The liens created by NRS 108.221 through 108.246 are creatures of Nevada statute and the right to enforce such liens arises from statutory provisions. Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc., 197 P.3d 1032, 1041 (Nev. 2008) (stating that a "contractor has a statutory right to a mechanic lien for the unpaid balance of the price agreed upon for labor, materials, and equipment furnished.")

39. The creation or existence of the lien is determined by NRS 108.222, which provides that "a lien claimant has a lien upon the property, any improvements for which the work, materials and equipment were furnished or to be furnished, and any construction disbursements accounts established pursuant to NRS 108.2403," for either: (a) the unpaid balance of the price agreed upon for such work, material or equipment if the parties had agreed on the price of the work, material, or equipment; or (b) if the parties had not agreed on the price then the lien is for "an amount equal to the fair market value of such work." NRS 108.222.

40. Pursuant to NRS 108.225, mechanics' and materialmen's liens are preferred to:

(a) Any lien, mortgage or other encumbrance which may have attached to the property *after the commencement of construction* of a work of improvement.

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> (b) Any lien, mortgage or other encumbrance of which the lien claimant had no notice and which was unrecorded against the property at the commencement of construction of a work of improvement.

NRS 108.225(1) (emphasis added).

41. The statute further provides:

> Every mortgage or encumbrance imposed upon, or conveyance made of, property affected by the liens provided for in N.R.S. 108.221 to 108.246, inclusive, after the commencement of construction of a work of improvement are ***subordinate and subject to*** the liens provided for in N.R.S. 108.221 to 108.246, inclusive, ***regardless of the date of recording the notices of liens***.

NRS 108.225(2) (emphasis added).

42. In its Complaint against the Prepetition Lenders, Turnberry West Construction ("TWC"), the general contractor of the Project, asserted a lien of $675,260,792.68, excluding interest. D.E. 268 at ¶ 41. In its Complaint, TWC alleged that pursuant to the Construction Contract, that "excavation and other work commenced on the Project in November 2006 and from that time the existence of construction work at the Project was open, notorious and obvious." Id. at 42. The Complaint further alleged that on June 4, 2009, TWC filed and recorded a claim of lien in the public records of Clark County Nevada in accordance with Nevada law, for $668,990,933.27, the vast majority of which constituted amounts owed to various subcontractors who performed work for which they were not paid. Id. at 45.

43. As asserted by TWC in its Complaint, the work on the Project commenced on or about November 2006, significantly before the Prepetition Lenders entered into the June 6, 2007 loans and recorded their Deed of Trust against the Project.[10] Several months before the Prepetition Lenders recorded their Deed of Trust, construction of the Project was visible, open, and notorious. The M&M Lienholders and Contractor Claimants are prepared to prove such

[10] At the hearing on Monday, October 23, 2009, the M&M Lienholders and Contractor Claimants will introduce the Deed of Trust into evidence.

facts at the hearing to consider the DIP Finance Motion and the Sale Motion. Thus, any and all mechanics' liens are superior to the liens granted to the Prepetition Lenders in connection with the June 6, 2007 loans as a matter of law because all of the mechanics' liens relate back to the commencement of construction, regardless of the date on which the mechanics' liens were recorded.

44. Upon admission of the relevant evidence into the record, there can be no dispute that the liens of the mechanics and materialmen are senior in priority to those of the Prepetition Lenders. Though the Term Lender Steering Group and the Debtors have frequently alleged that the priority of the statutory liens is in dispute, careful review of the record will reveal that neither has ever asserted a single good faith legal or factual argument in support of this contention. The only arguments ever made in support of this contention are (i) that the statutory lienholders have not proved their senior priority, which may be resolved expeditiously at the hearing, and (ii) that by slipping language into the various cash collateral orders, the Term Lender Steering Group effectively abrogated the liens of the statutory lienholders (absent an adversary proceeding under Rule 7001(2)), which is a bad faith argument that should be disregarded by this Court.[11]

45. Moreover, the Debtors, as necessity dictated, made every accommodation that the Term Lender Steering Group demanded throughout the pendency of these cases. For example, the Debtors have not operated on more than a week's budget for the last two months, but have been required to provide the Term Lenders with priming liens for the continued use of their cash on a week to week basis. The M&M Lienholders and Contractor Claimants, for their part, have mostly consented to the use of cash collateral on a priming lien basis as an accommodation to the

[11] Even if this argument is accepted, the M&M Lienholders and Contractor Claimants effectively preserved their lien rights by filing their proofs of claim by the deadline set forth in the Third Interim Cash Collateral Order and the Fourth Interim Cash Collateral Order. In addition, the Contractor Claimants filed their adversary complaint against the Term Lenders before the October 15, 2009 deadline.

Term Lenders and the Debtors, despite the continued last minute requests and emergency cash collateral hearings. We recognize that the Debtors have done what they had to do to obtain the continued use of cash collateral for a non-operating business that had no independent source of cash or revenue generation.

46. The Debtors, however, are repeating these overreaching accommodations with regard to the Proposed Stalking Horse. Once again the Debtors are willing to ignore the interests of statutory lienholders and grant priming liens regardless of the Bankruptcy Code's requirement that they provide such lienholders with adequate protection. What the DIP Finance Motion and the Sale Motion reveal is that the Debtors will continue to act as though they are fiduciaries solely to the Prepetition Lenders and their new lender, the Proposed Stalking Horse NVG, to delay and derail the inevitable determination that statutory lienholders, including the M&M Lienholders and the Contractor Claimants, are in first priority position – ahead of the Prepetition Lenders.

47. With respect to the validity of the liens against the Project, Debtors' contention in paragraph 65 of its DIP Finance Motion that "no holder of a Mechanic Lien has proven that it holds a valid security interest in any of the Debtors' assets" is baffling. In the Cash Collateral Motion, Debtors admitted that as of August 17, 2009, Notices of Lien had been filed against the Project asserting mechanics' liens in the aggregate amount of approximately $615 million.[12] D.E. 12 at 28. In addition, the Debtors filed a comprehensive schedule, Schedule 6.02 to the DIP Finance Motion, that catalogues the voluminous mechanics' and materialmens' liens that have been recorded against the Project. See D.E. 996 at pp. 123-146. The Debtors have not challenged a single one of those liens on the basis of validity.

[12] Which amount Debtors asserted does not include the Notice of Lien filed by TWC in the amount of $669 million because such claim encompasses claims of the subcontractors.

48. Moreover, on September 11, 2009, the M&M Lienholders filed a Motion for Modification of the Automatic Stay (D.E. 506), supported by eighteen (18) declarations of the M&M Lienholders establishing at least $105,923,271 in liens against the Project.[13] Finally, the M&M Lienholders filed proofs of claim in these Chapter 11 Cases in the total amount of $217,491,304.70, and the Contractor Claimants filed proofs of claim in these Cases in the total amount of $206,771,745.96, as reflected on the schedule attached hereto as **Exhibit "A."**

49. Debtors have also admitted the validity of the liens. Howard Karawan, the Debtors' representative, asserted in his Declaration filed in support of the Debtors' first day pleadings on or about the Petition Date that approximately $403 million of payables were outstanding in connection with the Project, and that lien claims resulting from these payables could "prime the mortgage liens of existing lenders under Nevada law." D.E. 5, ¶ 27. Further, Debtors' accounts payable report in its *Disclosure Letter to the Asset Purchase Agreement By and Among Fontainebleau Las Vegas Holdings, LLC, Fontainebleau Las Vegas, LLC, Fontainebleau Las Vegas Capital Corp., Fontainebleau Las Vegas Retail Parent, LLC, and Fontainebleau Las Vegas Retail, LLC as Sellers and Nevada Gaming Ventures, Inc. as Purchaser* reflects that Debtors owed TWC $273,249,616.59 for construction costs on or about the Petition Date. D.E. 994, p. 70. What more could be shown to prove the validity of the liens is unclear.

50. The only legitimate dispute that *might* be raised by Debtors or the Prepetition Lenders to the liens of the statutory lienholders is the "extent" of such liens. The Debtors continue to assert that many of the mechanics' liens are overstated. However, as Debtors' own records and admissions reflect, the "extent" of the liens is at least $273,249,616.59. Further, as

[13] At the time of the Motion for Modification of the Automatic Stay, the M&M Lienholders consisted of a substantially smaller group of statutory lienholders.

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set forth above, the M&M Lienholders and the Contractor Claimants have filed proofs of claim setting forth the amount of their liens, which constitute prima facie evidence of the validity and amount of their claims. Fed.R.Bankr.P. 3001(f). No objections have been raised to these claims.

51. Regardless of any dispute about the extent of the liens, it cannot be disputed in good faith that the statutory lienholders are owed far in excess of the DIP Credit Facility of approximately $51.5 million or the NGV Bid of $100 million. For Debtors to suggest that no adequate protection need be provided for a $51.5 million priming lien because the exact amount of the liens against the Project could range anywhere from $273,249,616.59 to $675,260,792.68 is nonsensical.

52. Similarly, Debtors' contention that no adequate protection need be provided because there are varying degrees of priority amongst the statutory lienholders is without support. The Debtors need not concern themselves with the division of the required adequate protection amongst the statutory lienholders, which is a matter for contest, if any, between the statutory lienholders. In fact, the Debtors spill considerable ink trying to obscure the simple issue of the mechanics' and materialmens' lien priority vis-à-vis the Prepetition Lenders by raising the red herring that the priority question could not possibly be answered now because some mechanics' lienholders may not be *pari passu* with other lienholders. Nothing in the Debtors' argument addresses, and therefore implicitly accepts, that the mechanics' lienholders' superior position in relation to the Term Lenders and other subordinate lenders can be determined by the Court now. The Debtors' argument is a mere sleight of hand and, therefore, without merit.

53. Further, though both Debtors and the Term Lender Steering Group have asserted that the liens of the subcontractors are inflated, neither has taken any steps under Bankruptcy

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Rule 7001(2) to attack these liens.[14] Instead, Debtors merely accuse the M&M Lienholders and Contractor Claimants of failing to cooperate with the Debtors' efforts to determine the extent of their liens. This accusation is belied, however, by the Debtors' admission in a footnote as follows:

> On July 14, 2009, Turnberry West Construction commenced an adversary proceeding seeking, among other things, a determination that the Mechanic Liens of Turnberry West Construction and its subcontractors are valid liens, superior to the liens of the Prepetition Lenders (Adv. Pro. 09-01762-AJC). On October 14, 2009, the Contractor Claimants commenced an adversary proceeding seeking a declaration that the statutory liens of construction claimants are superior in validity, priority, and extent to the liens of the term lenders. (Adv. Pro. 09- 02179-AJC). On October 15, 2009, certain other Mechanic Lien claimants filed a complaint to determine the validity, priority and extent of their liens. (Adv. Pro. 09-02187). Moreover, under the Prior Cash Collateral Orders, the Court imposed the deadline of October 15, 2009 for statutory lienholders to file a complaint against the Prepetition Lenders if they contest the validity, priority, extent, or enforceability of the Prepetition Liens and claims, unless they have filed a proof of claim by October 13, 2009, asserting the amount of their statutory lien(s) which they claim to be senior to the liens of the Prepetition Lenders. A number of statutory lienholders filed proofs of claim asserting priority over the liens of the Prepetition Lenders.

DIP Finance Motion, p.10, n.8. Moreover, throughout the case, the Debtors have taken affirmative steps to deny statutory lienholders the opportunity to obtain the inevitable determination that they are in first lien position under Nevada Law. The Debtors conveniently forget to remind the Court that when the Contractor Claimants moved to intervene in the TWC adversary against the Prepetition Lenders, in order to assert the Contractor Claimants superior lien position vis-à-vis the Prepetition Lenders, the Debtors objected to the Motion to Intervene. Instead of allowing the Contractor Claimants and TWC to prosecute the adversary and put the

[14] The M&M Lienholders and Contractor Claimants recognize that Bankruptcy Rule 7001(2) mandates that "a proceeding to determine the validity, priority, or extent of a lien or other interest in property…" must be pursued as an adversary proceeding. FED.R.BANKR.P. 7001(2). In recognition of this requirement, the Contractor Claimants timely filed an adversary proceeding to challenge the Prepetition Lenders asserted liens. In this instance, however, the Court should decide the priority issue on an expedited basis because the possibility of competing bids, including credit bids, will be severely limited if the bid procedures are allowed to stand as proposed, and Rule 3012 permits estimation of the claims for limited purposes.

Prepetition Lenders firmly behind all similarly-situated lienholders, the Debtors moved to block intervention and stay the adversary proceeding. See D.E. 13, 20, and 29. Adv. Proc. 09-01762-AJC. For their part, the Contractor Claimants are attempting to expedite the determination of priority, and the inevitability of establishing priority cannot be further delayed despite the Debtors' best efforts to do so.

…

…

1. Debtors Cannot Satisfy Their Burden to Show That The M&M Lienholders And Contractor Claimants Are Adequately Protected

54. The M&M Lienholders and Contractor Claimants have more than sufficiently established their prima facie entitlement to adequate protection under Section 363(p). Debtors thus are required to establish that the statutory lienholders are adequately protected in order to prime their liens. 11 U.S.C. §364(d)(2) (in any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection); see RTC v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.), 16 F.3d 552, 564 (3d Cir. 1994) (holding that bankruptcy court had to find that mortgagee's interests were adequately protected in order to approve post-petition financing on a super-priority basis); see, e.g., In re Eagle Creek Subdivision, LLC, 2008 WL 2761302, **2-3, 2008 Bankr.LEXIS 2412 at *8 (Bankr. E.D.N.C. 2008) ("The court cannot authorize a priming lien unless the debtors have shown that each lienholder whose rights would be impaired by the proposed priming lien are (sic) adequately protected."); In re Colad Group, Inc., 324 B.R. 208, 223 (Bankr. W.D.N.Y. 2005) (stating "in order to grant a priming lien, the court must make a finding of adequate protection of all senior or equal interests").

55. Debtors cannot meet their burden. It is patently obvious now that the M&M Lienholders and Contractor Claimants are undersecured, and there is no equity cushion in the

Project to provide adequate protection. Consequently, each dollar of any priming lien granted to the Proposed Stalking Horse reduces the value of their interests in the value of the collateral by the same amount. Therefore, the M&M Lienholders and Contractor Claimants and the other statutory lienholders are entitled to adequate protection.

56. Debtors argue that the use of the funds proposed under the DIP Finance Motion "constitute the 'reasonable, necessary costs and expenses of preserving, or disposing of' the Project. The Agreed Budget provides for expenditures that are necessary to preserve the value of the Project until the Sale can be completed and all those claiming a security interest in the Project benefit therefrom." The funds devoted to the proposed Stabilization budget, however, constitute a mere $10.7 million of the total $51.5 million proposed DIP facility. The lions' share of the DIP Credit Facility will be devoted to paying back the Prepetition Lenders for the use of their cash collateral, professional fees to the tune of $8.154 million, $4,614,100 of which is for the Debtors' professionals and $1,500,000 of which is for Penn National Gaming's fees, closing costs of more than $2 million, and DIP financing fees of $1,775,000 – none of which benefits or preserves the value of the underlying Project. All of these excessive costs damage the statutory lienholders in the form of a $51.5 million priming lien.

57. However, regardless of the truth or falsity of the Debtors' contention that the Proposed DIP Credit Facility preserves the Project and thus adequately protects the M&M Lienholders and Contractor Claimants and other statutory lien claimants, it is legally insufficient. Adequate protection must provide a prepetition secured creditor with the same protection it would have if the "authorized transaction" had not occurred. In re Swedeland, 16 F.3d at 564. The Debtors have offered no authority for the proposition that a priming lien granted for

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payment of attorneys fees and other administrative costs provides statutory lienholders with the same protection they would have if the priming lien was not granted.

58. The proposition that preserving or possibly increasing the value of property constitutes adequate protection has been soundly rejected by numerous courts. In Swedeland, for example, the Third Circuit rejected the notion that "development property is increased in value simply because a debtor may continue with construction which might or might not prove to be profitable." Swedeland, 16 F.3d at 566. The Third Circuit's decision in Swedeland establishes that allowing superpriority liens for speculative gains is akin to offering the subordinated lienholder an opportunity to recoup dependent upon the success of a business with inherently risky prospects. In re Swedeland Development Group, Inc., 16 F.3d 552, 567 (3d Cir.1994) (*en banc*). The statutory lienholders, who are prepetition secured creditors, are thus not being provided "with the same level of protection [they] would have had if there had not been post-petition superpriority financing." Id.

59. A bankruptcy court may not grant a lien which primes a pre-existing undersecured creditor without providing *new* collateral as adequate protection. See, e.g. St. Petersburg Hotel Assoc., Ltd., 44 B.R. 944 (Bankr. M.D.Fla. 1984) (denying debtors request to approve financing secured by priming lien absent compensatory measures to assure the preexisting secured creditor's position because "…to permit the Debtors to saddle this property with an additional encumbrance which is superior to the interest of the Mortgagee would clearly operate to further deteriorate the position of the Mortgagee…"); In re Strug-Division LLC, 380 B.R. 505 (Bankr. N.D.Ill. 2008); In re Windsor Hotel, LLC, 295 B.R. 307 (Bankr. C.D. Ill. 2003) (where debtor could not show that property securing creditors' claims had value in excess of the claims and

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debtor had no other unencumbered assets with which to provide creditors a replacement lien, debtor's request for leave to borrow on superpriority basis denied).

60. Because a priming lien "displaces liens on which creditors having relied in extending credit, a court that is asked to authorize such financing must be particularly cautious when assessing whether the creditors so displaced are adequately protected." In re Mosello, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996) (*citing* In re First South Saving Assn., 820 F.2d 700, 710 (5th Cir. 1987)). As stated by Collier on Bankruptcy:

> The ability to prime an existing lien is extraordinary, and in addition to the requirement that the trustee be unable to otherwise obtain the credit, the trustee must provide adequate protection for the interest of the holder of the existing lien…In most cases, adequate protection is provided by condition or limited the borrowing in order to maintain a sufficient equity in the subject property to protect the existing lienholder.

COLLIER ON BANKRUPTCY, Vol. 3, § 364.05 (15th ed. Rev. 2002). See also Chrysler Credit Corp. v. Ruggiere (In re George Ruggiere Chrysler-Plymouth, Inc., 727 F.2d 1017, 1019-1020 (11th Cir. 1984); In re Mosello, 195 B.R. at 288 ("The goal of adequate protection is to safeguard the secured creditor from diminution in the value of *its interest* during the Chapter 11 reorganization") (*quoting* In re 495 Central Park Avenue Corp., 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992) (emphasis added)); In re Martin, 761 F.2d 472, 474 (8th Cir. 1985) ("The concept of adequate protection was designed to '*insure* that the secured creditor receives the *value* for which he bargained'") (quoting S.Rep. No. 989, 95th Cong., 2d Sess. 53, *reprinted* in 1978 U.S.Code Cong. & Ad.News 5787, 5839 (emphasis in original)). Simply put, the amorphous concept of preserving collateral or preventing its deterioration is insufficient to provide adequate protection to creditors for a priming lien.

B) THE PROPOSED REPAYMENT OF THE PREPETITION LENDERS' CASH COLLATERAL MUST BE DENIED, IN PART

61. The Debtors' DIP Finance Motion proposes to utilize new financing provided by the Proposed Stalking Horse to repay to the Prepetition Lenders all of the cash collateral used to date, totaling approximately $18.2 million. To the extent the DIP Finance Motion is otherwise granted, repayment of the Prepetition Lenders must be denied with respect to the First Interim Cash Collateral Order, the Second Interim Cash Collateral Order, the Third Interim Cash Collateral Order, the Fourth Interim Cash Collateral Order, and the First Nonconsensual Order, along with the First Supplemental Order and Second Supplemental Order thereto. The M&M Lienholders and Contractor Claimants do not object to repayment of the cash collateral used pursuant to the Consensual Cash Collateral Orders, totaling approximately $1,379,053.[15]

62. First, the Prepetition Lenders did not seek and were not given priming liens in exchange for the use of cash collateral pursuant to the First Interim Cash Collateral Order and the Second Interim Cash Collateral Order, but were given replacement liens and superpriority administrative expense claims. The Cash Collateral Motion provided in part that the "validity, priority and extent of any mechanic lien is unaffected by this Motion or the Interim Cash Collateral Order." D.E. 12, n.9 (emphasis added).

63. In the First Supplement, Debtors sought an extension of the "Termination Date" with respect to their use of cash collateral, but did not otherwise modify the relief sought in the Cash Collateral Motion. Thus, Debtors again did not seek to alter the priorities of liens against the Project. Priming liens were proposed for the first time in the Second Supplement, and granted for the first time in the Third Interim Cash Collateral Order. To permit the Prepetition Lenders to recover the cash collateral used pursuant to the First Interim Cash Collateral Order and the Second Interim Cash Collateral Order ahead of the M&M Lienholders and Statutory

[15] Additionally, the Court approved the *Seventh Emergency Motion for Interim and Final Orders (I) Authorizing Use of Cash Collateral and (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 362, 363, and 364 of the Bankruptcy Code* (D.E. 1006) on the date of this Objection.

Lienholders would effectively grant the Prepetition Lenders a retroactive priming lien which they did not request and were not granted.

64. Second, as determined by the District Court in its oral ruling, the cash collateral orders are not final orders until a priority determination vis-à-vis the statutory lienholders and the Prepetition Lenders has been made. Thus, the award of priming liens to the Prepetition Lenders pursuant to the Third Interim Cash Collateral Order, the Fourth Interim Cash Collateral Order, and the Nonconsensual Cash Collateral Order continue to be subject to appeal by the M&M Lienholders and Contractor Claimants. The Prepetition Lenders should not be paid on account of priming liens which are subject to invalidation on appeal.

C) THE PROPOSED TRANSACTION MAY NOT BE APPROVED OVER THE OBJECTION OF THE STATUTORY LIENHOLDERS

65. Debtors' proposed transaction would sell the Project to the Proposed Stalking Horse for the Credit Bid of approximately $51.5 million, representing the total dollar value of the DIP Credit Facility, and an additional Closing Cash Payment of approximately $50 million which may be reduced substantially prior to the sale.[16] The total maximum price of approximately $100 million begs the question of why these Chapter 11 Cases should continue. The only evidence as to the value of the Project ever adduced by Debtors in this case is set forth in footnote 17 of the Cash Collateral Motion, which states:

> …The Prepetition Agent, however, did submit to the Court an appraisal performed by Cushman & Wakefield establishing the market value of the Project at **$318.7 million** as of May 11, 2009 (the "Prepetition Agent's Appraisal"). See Exhibit 29 Part I to Declaration of Henry Yu [Adv. Pro. 09-1621-AJC, Dkt. No. 103-36]…

[16] The Closing Cash Payment may be reduced by the Remediation Amount, discussed in Section 2.5 of the Asset Purchase Agreement. Upon information and belief, the purchase price may be reduced to between $35 million and $40 million depending on the final Remediation figure.

D.E. 528 at 23, n.17 (emphasis added). At the hearing held on July 27, 2009, the Debtors argued that the value of the Project was in fact worth a "lot more" than $318 million. See Transcript of July 27, 2009 Hearing, p. 89, lines 5-10. However, five months later, the value appears to be only $100 million.

66. Thus, despite Debtors' repeated contention that each expenditure of cash collateral was necessary to preserve the value of the Project in order to obtain a higher sale price, it is clear that the Debtors have done nothing more than squander hundreds of millions of dollars of the Project's value over the course of more than five months, all in an effort to put together a woefully underwhelming sale, which provides minimal benefit to the estate or the secured creditors, but instead appears to primarily benefit the Debtors', the Stalking Horse's, and the Term Lender Steering Group's professionals.

67. Moreover, the NGV Bid may not be approved at a final hearing. A sale free and clear of liens, claims, and encumbrances pursuant to Section 363(f) may only be approved if one of five conditions is met. Section 363(f) provides as follows:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if -
>
> (1) applicable non-bankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a monetary satisfaction of such interest.

11 U.S.C. §363(f).

Subsections (f)(1) and (f)(2)

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68. Section 363(f)(1) is rarely invoked and almost never successfully utilized for stripping interests off estate property through a sale conducted under Section 363. This appears to be due to the fact that examples of nonbankruptcy law permitting sales of real estate free of a lien are rare. See John Colen, *What do the Subsections of Section 363(f) Really Mean? A Primer on Selling Free and Clear of Interests*, 6 J. Bankr. L. & Prac. 563 (1997).

69. In the case of Compass Bank v. Investment Company of the Southwest, Inc. (In re Investment Co. of the Southwest, Inc.), the court held: "Section 363(f)(1) states that property of the estate may be sold free and clear of any interest only if applicable law allows such a sale. We are unaware of any nonbankruptcy law allowing the sale of real property securing a lien to be sold free and clear of that lien in exchange for the lien holder's payment of less than all of the net sale proceeds. Thus, the debtor's proposed sale of the Known Lots could not have been approved under § 363(f)(1)." 302 B.R. 112 (Table), 2003 WL 22900480 (10th Cir. BAP 2003).

70. Similarly here, no applicable nonbankruptcy law permits the sale of the Project free and clear of the statutory liens, and the M&M Lienholders and Contractor Claimants do not consent to the sale. Subsections (1) and (2) thus are not satisfied.

Subsection (f)(3)

71. Subsection (3) likewise cannot be satisfied. Under subsection (3), a sale free and clear of liens may only take place outside of a plan confirmation if the sale price is greater than the face value of the liens against the property. Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25 (9th Cir. BAP 2008) (*citing* Richardson v. Pitt County (In re Stroud Wholesale, Inc.), 47 B.R. 999, 1002 (E.D.N.C. 1985), *aff'd mem.*, 983 F.2d 1057 (4th Cir. 1986); Scherer v. Fed. Nat'l Mortgage Ass'n (In re Terrace Chalet Apartments, Ltd.), 159 B.R. 821 (N.D. Ill. 1993); In re Perroncello, 170 B.R. 189 (Bankr. D.Mass. 1994); In re Feinstein Family

Partnership, 247 B.R. 502 (Bankr. M.D.Fla. 2000); In re Canonigo, 276 B.R. 257 (Bankr. N.D.Cal. 2002); Criimi Mae Servs. Ltd. P'Ship v. WDH Howell, LLC (In re WDH Howell, LLC), 298 B.R. 527 (D.N.J. 2003); In re Healthco Int'l Inc., 174 B.R. 174 (Bankr.D.Mass.1994); 3 COLLIER ON BANKRUPTCY ¶ 363.06[4][a] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008)).

72. Though some courts have interpreted subsection (3) as permitting a free and clear sale of liens that are not supported by the value of the collateral on the grounds that the "the aggregate value of all liens on such property" can never exceed the value of the collateral, see, e.g. In re Beker Indus. Corp., 63 B.R. 474 (Bankr. S.D.N.Y. 1986), this reading makes nonsense of subsection (3). In the case of overencumbered property, the sale price will always be *equal to*, rather than *greater than*, the aggregate economic value of the liens on the property. See In re Canonigo, 276 B.R. at 262-263; In re PW, LLC, 291 B.R. at 40.

73. This interpretation of subsection (f)(3) is also consistent with the leading bankruptcy treatises. Collier on Bankruptcy describes the "face amount" approach as "consistent with the legislative history and the plain language of the statute." In re Canonigo, 276 B.R. at 259-60 (citing 3 COLLIER ON BANKRUPTCY, ¶363.06[4][a] at 363-47 (15th ed. 2001)). Collier's further states that the contrary interpretation would make section 363(f)(3) a "loophole," permitting a trustee or debtor to avoid the requirements of section 363(f)(5) through the use of subsection 363(f)(3). Id. The Canonigo court further noted that the Epstein Treatise similarly endorses a "face value" approach to subsection (f)(3). Id. at 260 (*citing* David G. Epstein, et al., Bankruptcy § 4-7 at 402 (West Publishing Co. 1992)).

74. As noted by the court in Stroud Wholesale, the interpretation of subsection (f)(3) requiring that the sale price exceed the face value of all liens against the subject property is

consistent with the "well-established rule that the bankruptcy court should not order the sale of property free and clear of interests and liens unless the court is satisfied that the sale proceeds will fully compensate the secured lienholders and produce some equity for the estate." In re Stroud Wholesale, 47 B.R. 999, 1002 (E.D.N.C. 1985) (*citing* Matter of Riverside Investment Partnership, 674 F.2d 634 (7th Cir. 1982); 2 COLLIER'S ON BANKRUPTCY, ¶ 363.07, at 363-27 (15th ed. 1980)). In other words, the estate has no business selling property over the objection of a secured creditor when it is the secured creditor, and not the estate, that has an interest in the proceeds of the sale.

…

Subsection (f)(4)

75. Subsection (4), which provides for a sale free and clear of an interest if that interest is in bona fide dispute, is also inapplicable. A "bona fide dispute" requires a *meritorious*, existing conflict. Bethlehem Steel Corp. v. Atlas Machine & Iron Works, Inc. (In re Atlas Machine & Iron Works, Inc.), 986 F.2d 709, 715 (4th Cir. 1993) (citations omitted). A "bona fide" dispute exists if "there is an objective basis for either a factual or a legal dispute as to the validity of the debt" or if "there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts." In re Gulf States Steel, Inc. of Alabama, 285 B.R. 497, 507 (Bankr. N.D.Ala. 2002) (*citing* In re Busick, 831 F.2d 745, 750 (7th Cir. 1987, In re Leach, 92 B.R. 483, 487 (Bankr. D.Kan. 1988), In re Ramm Industries, Inc., 83 B.R. 815, 823 (Bankr. M.D.Fla. 1988)).

76. As discussed above, though the Debtors have made unsubstantiated allegations that the statutory liens are inflated, Debtors have never taken any steps to avoid the liens or otherwise attempt to make any showing that the liens are invalid or should be reduced. And

though the M&M Lienholders and Contractor Claimants have filed claims asserting the validity, extent, and priority of their liens, Debtors have not objected to the claims. As this Court knows, Rule 3001(f) provides that a proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim. Additionally, this Court has ruled that "Pursuant to Bankruptcy Rule 3001(f), the filing by the [creditor]of a proper claim constitutes prima facie evidence of the validity and the amount of the claim. While the burden of proof is on the [creditor], the debtors have the burden of going forward to meet or overcome the prima facie effect given to the claims filed. See In re Brickell Inv. Corp., 85 B.R. 164 (Bankr. S.D.Fla. 1988). Therefore, the filed proofs of claim by both the M&M Lienholders and the Contractor Claimants constitute prima facie evidence of the validity of those claims, unless rebutted by the filing on an objection. Moreover, neither the Debtors nor the Prepetition Lenders have ever commenced the required adversary proceeding under Rule 7001(2) to attack the extent, validity, or priority of the liens. Thus, while there may be some dispute about the liens, such dispute is not "bona fide." Further, as discussed above, the Debtors' own records establish that the amount of the liens far exceed the NGV Bid, and thus any dispute about the amount of the liens above and beyond that amount is not relevant to whether the NGV Bid should be approved.

77. Finally, even if the distribution of the proceeds of the sale is in dispute, a dispute regarding the proper distribution of the proceeds of a sale does not constitute a "bona fide dispute" about the validity of a lien sufficient to support a free and clear sale. See Stroud Wholesale, 47 B.R. at 1002 (*citing* Coulter v. Blieden, 104 F.2d 29 (8th Cir. 1939), *cert. denied*, 308 U.S. 583, 60 S.Ct. 106, 84 L.Ed. 488 (1940)). The purpose of subsection (f)(4) is to permit the trustee to sell property free of liens pending final resolution of any bona fide dispute over the

validity of such liens - not to effectively eliminate the liens. In re Smith Materials Corp., 108 B.R. 784, 786 (Bankr. M.D.Fla. 1989) (stating that subsection (f)(4) was "not intended to permit the sale of property when such sale results in over 90% of the purchase price going to third parties, thus making available only approximately 10% of the purchase price to the potential lienholder.")

Subsection (f)(5)

78. Debtors further argue that a free and clear sale may be had under Section 363(f)(5), which provides that:

> (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest

79. The questions to be resolved by the Court under this subsection of the statute are: (i) what amount of money is necessary to satisfy the lienholders' interests in the Debtor's assets; and (ii) if the lienholders can be compelled to accept money in satisfaction of their interests in the Debtor's assets, under what kind of 'legal or equitable proceeding' can this be satisfaction be compelled?

80. Statutory interpretation requires a detailed examination of the context of the statute, See, e.g., Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), and thus §363(f)(5) cannot be construed either in isolation, nor in a vacuum. Section 363(f)(3) already allows the sale of property free and clear of liens if the amount of the sale proceeds is sufficient to satisfy the liens encumbering the property, so the Debtor will undoubtedly argue that, under §363(f)(5), the liens of the M&M Lienholders and Contractor Claimants may be extinguished without fully satisfying their secured indebtedness.

81. The real question, then, under §363(f)(5) is under what kind of legal or equitable proceeding could the lienholders be compelled to accept an amount of money that is less than the value of their liens, satisfaction of their interests in the Debtor's property? In Clear Channel Outdoor v. Nancy Knupfer (In re PW, LLC), the bankruptcy court approved a sale of real property free and clear of liens based solely on 363(f)(5). 391 B.R. 25, 45-46 (9th Cir. BAP 2008) At the sale, the highest and best bidder was a creditor holding a first priority lien on the property for sale, whose bid consisted solely of a credit bid. Under 363(f)(5), the bankruptcy court approved the sale free and clear of nonconsenting junior lienholders. The Ninth Circuit Bankruptcy Appellate Panel reversed the bankruptcy court, finding that Section 363(f)(5) did not provide a basis for the sale free and clear of the junior liens.

82. The Clear Channel court analyzed the reasoning of several courts that have held that because a lienholder's position can be modified through the 'cramdown' process of Section 1129(b)(2), property may be sold free of that lienholders' lien under Section 363(f)(5). This analysis of Section 363(f)(5), however, has been rejected by most courts, including the Clear Channel court, which cited to COLLIER ON BANKRUPTCY in holding that

> In addition, this reasoning undercuts the required showing of a separate proceeding. For example, it is correct that § 1129(b)(2) permits a cramdown of a lien to the value of the collateral, but it does so only in the context of plan confirmation. To isolate and separate the cramdown from the checks and balances inherent in the plan process undermines the entire confirmation process, and courts have been leery of using § 363(b) to gut plan confirmation or render it superfluous.

83. Application of Section 1129(b)(2) to the "legal or equitable proceeding" requirement of (f)(5) also ignores the significant rights that the lienholders would have in a contested confirmation proceeding under Section 1111(b). While the application of Section 1111(b) is not appropriate where property is being sold under Section 363(f), it bears analysis if

the Debtor is going to argue that a 'cramdown' proceeding is a "legal or equitable proceeding" for purposes of Section 363(f)(5). Notwithstanding the Debtor's ability to strip down a secured claim, and to modify the interest and payments terms thereunder as part of a cramdown, the secured creditor, nonetheless, has the right to elect to have its claim treated as fully secured under Section 1111(b) of the Bankruptcy Code. While there are certain exclusions for election under Section 1111(b), if a creditor elects treatment under 1111(b), then it is entitled to receive the indubitable equivalent of its claim. Payments under 1111(b) may be present or deferred and they must equal the entire amount of the claim. Additionally, the present value of those payments should not be less than the value of the collateral.

84. While the application of subsection (f)(5) is narrow, it does have its place, as pointed out by the Clear Channel court, in the overall statutory scheme of Section 363(f)(5). However, it is the Debtor's burden to demonstrate specifically the basis to compel acceptance by lienholders of less than full monetary satisfaction in a legal or equitable proceeding. The Clear Channel court held that "the bankruptcy court must make a finding of the existence of such a mechanism and the trustee must demonstrate how satisfaction of the lien "could be compelled." The Clear Channel Court provided the following examples of when a sale under subsection (f)(5) is proper:

> One might be a buy-out arrangement among partners, in which the controlling partnership agreement provides for a valuation procedure that yields something less than market value of the interest being bought out. See, e.g., De Anza Enters. v. Johnson, 104 Cal.App.4th 1307, 128 Cal.Rptr.2d 749 (2002) (joint venturer may compel specific performance of buyout of other venturer's interest pursuant to joint venture agreement); Oliker v. Gershunoff, 195 Cal.App.3d 1288, 241 Cal.Rptr. 415 (1987) (statute provided that partnership could compel buyout of withdrawing partner for a fair price to be determined by several factors). Another might be a case in which specific performance might normally be granted, but the presence of a liquidated-damages clause allows a court to satisfy the claim of a nonbreaching party in cash instead of a forced transfer of property. See, e.g., O'Shield v. Lakeside Bank, 335 Ill.App.3d 834, 269 Ill.Dec.

> 924, 781 N.E.2d 1114 (2002). Yet another might be satisfaction of obligations related to a conveyance of real estate that normally would be specifically performed but for which the parties have agreed to a damage remedy. S. Motor Co. v. Carter-Pritchett-Hodges, Inc. (In re MMH Automotive Group, LLC), 385 B.R. 347 (Bankr.S.D.Fla.2008). In these cases, a court could arguably compel the holders of the interest to take less than what their interest is worth.

D) THE REQUESTED BREAK-UP FEE SHOULD NOT BE AUTHORIZED

85. Breakup fees are not supposed to provide a windfall to the stalking horse bidder, but instead should represent a reimbursement for costs and expenses that the stalking horse bidder reasonably incurs in formulating its offer or the bid process. See In re Jon J. Peterson, Inc., 411 B.R. 131, 137 (Bankr. W.D.N.Y. 2009). The Debtors bear the burden of proof that the breakup fee is a reasonable and necessary expenditure of estate assets. Id.

86. The breakup fee proposed by the Debtors of 3% of the total NGV Bid, comprised of both the Proposed Stalking Horse's $51.5 million credit bid and the actual cash sales price, amounts to approximately $3,000,000, which may be slightly less if the sales price is reduced due to the Remediation. This breakup fee appears to be designed solely to chill the bidding process and provide a substantial windfall to the Proposed Stalking Horse. Under the DIP Credit Facility, the Proposed Stalking Horse is already entitled to a 2% "Upfront Fee" a 3% "Exit Fee" and payment of its professional fees in the amount of $1.5 million and $900,000 in payment of inspection fees. Specifically, the DIP Finance Motion provides as follows:

> In addition, the DIP Credit Agreement requires the payment, by making of Loans under the DIP Credit Facility, of (a) an Upfront Fee of 2% of the aggregate amount of the Commitments due and payable on the Closing Date; (b) Commitment Fees in an amount equal to .50% per annum of the Available Unused Commitment of each Lender assessed on the last day of each month for the preceding month or on the date upon which the commitments of all DIP Lenders terminate; and (c) all reasonable out-of-pocket expenses (including reasonable fees, charges and disbursements of Wachtell, Lipton, Rosen & Katz and any local counsel to the DIP Agent) of the DIP Agent, and after the occurrence of an Event of Default, the DIP Lenders, as required to be reimbursed or paid under any DIP Document. In addition, the DIP Credit Agreement

> provides for an Exit Fee in an amount equal to 5% of the total Commitments outstanding at the Termination Date however, the Exit Fee is not provided for under the Agreed Budget and no Loans shall be made to pay the Exit Fee.

87. What this means, of course, is that in addition to having to repay the entire DIP Credit Facility, which includes all of the Proposed Stalking Horse's "reasonable out-of-pocket expenses," accrued interest, and the 2% "Upfront Fee," any bidder will also be required to pay 5% of the DIP Credit Facility, or approximately $2,575,000, as the price of admission, before the breakup fee is even taken into account.

88. The Proposed Stalking Horse is thus entitled to receive under the Proposed DIP Credit Facility all of the costs which a breakup fee is designed to compensate, including the $1,500,000 in attorneys' fees incurred by the Proposed Stalking Horse and $900,000 for the cost of inspections. Presuming a final sale price to the Proposed Stalking Horse (excluding any reductions for remediation) of $100 million, a bidder will be required to pay approximately $5,575,000 to the Proposed Stalking Horse for the privilege of making a competing bid. Because the breakup fee serves no independent purpose, but is designed solely to chill the bidding process, it should be disallowed in full.

E) COUNTERMOTION FOR DETERMINATION OF LIEN CLAIMS FOR CREDIT BIDDING PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 3012

89. Section 363(k) of the Bankruptcy Code provides as follows:

> At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

11 U.S.C. § 363(k).

90. A purchase of assets via a credit bid "is the equivalent of a cash purchase." Spillman Inv. Group, Ltd. v. American Bank of Texas (In re Spillman Dev. Group, Ltd.), 401 B.R. 240, 253 (Bankr. W.D. Tex. 2009) (*citing* Lexington Coal Co., LLC v. Miller, Buckfire, Lewis Ying & Co., LLC (In re HNRC Dissolution Co.), 340 B.R. 818, 824-25 (Bankr. E.D. Ky. 2006)). As explained by the Court in Lexington Coal, "[c]learly 11 U.S.C. § 363(k) treats credit bids as a method of payment--the same as if the secured creditor has paid cash and then immediately reclaimed that cash in payment of the secured debt. In this case, the credit bid was consistently treated as payment." 340 B.R. at 824-25.

91. Section 363(k) of the Bankruptcy Code allows a credit bidder to offset the total amount of its secured claim from the sale price, not simply the value of the property sold. See In re SunCruz Casinos, LLC, 298 B.R. 833, 839 (Bankr. S.D. Fla. 2003); In re Midway Invs., Ltd., 187 B.R. 382, 391 n.12 (Bankr. S.D. Fla. 1995).

92. As described above, the validity and priority of the M&M Lienholders' and Contractor Claimants' liens are not subject to bona fide dispute. The only matter which may be subject to any good faith dispute is the extent of each of the liens, and even then the Debtors' own admissions and records reflect that the amount of the lien claims can be no less than $273,249,616.59.

93. To the extent any bona fide dispute exists as to the extent of the liens, the M&M Lienholders and Contractor Claimants seek an expedited hearing to estimate the extent of the liens for the purpose of facilitating a credit bid by the M&M Lienholders and Contractor Claimants.

Courts Fashion Expedited Remedies To Avoid Prejudicing Credit Bid Rights

94. Court have fashioned remedies to allow a secured creditor to exercise its credit bid rights. For example, in The Official Committee of Unsecured Creditors of Radnor Holdings Corp. v. Tennenbaum Capital Partners, LLC (In re Radnor Holdings Corp.), the court overruled an objection of the creditors' committee to proposed bidding and sale procedures that authorized the secured creditor to credit bid at an auction of substantially all of the debtors' assets. 353 B.R. 820, 827 (Bankr. D. Del. 2006). Soon after the bidding and sale procedures were filed, the committee filed its objection and also commenced an adversary proceeding seeking to, among other things, equitably subordinate and recharacterize the secured creditor's claim, in addition to disallowing the proofs of claim previously filed by the secured creditor. Id. As part of the objection, the committee asserted that the secured creditor was precluded from credit bidding because the claims of the secured creditor were not "allowed claims." Id. at 845-46.

95. In order to resolve the issue prior to the auction and circumvent any prejudice to the secured creditor's right to credit bid, the court conducted an expedited hearing to determine whether the secured creditor's claims were actually allowed claims. Id. at 826. The expedited action taken by the Court in Radnor avoided prejudice to the secured creditor by allowing for expedited hearing on the allegations raised by the Committee. Id. at 826 (setting forth the timing of the debtor's bankruptcy filing, bid procedures order, committee's complaint, and trial).

96. In Miami General Hospital, Inc., an unsuccessful bidder appealed the bankruptcy court's order approving a sale of the debtor's assets to the mortgagee. 81 B.R. 682, 685 (S.D. Fla. 1988). Prior to the sale, the bankruptcy court approved bidding procedures, which, among other things, permitted the mortgagee to credit bid for the assets. Id. Moreover, the bidding procedures ratified a stipulation between the Chapter 11 trustee and the mortgagee, whereby the right of the mortgagee to credit bid was without prejudice to the trustee to later challenge the

validity, priority or extent of the mortgagee's liens. Id. According to the stipulation, in the event that the trustee successfully challenged the liens of the mortgagee, the mortgagee would be required to pay the trustee the amount of the mortgagee's credit bid in cash. Id. At the auction, the mortgagee and another party engaged in competitive bidding, with the mortgagee eventually submitting what the trustee deemed to be the highest and best offer. Id.

97. On appeal, the second highest bidder argued that the mortgagee should not have been allowed to credit bid because the bankruptcy court had not adjudicated the validity of the mortgagee's liens. Id. at 687. In affirming the bankruptcy court's decision to allow the mortgagee to credit bid, the court noted that a remedy was in place by virtue of the stipulation between the trustee and the mortgagee. Id. at 687-88. The court further observed that, ideally, the validity of the mortgagee's liens would have been adjudicated prior to the sale. Id. at 688. However, because the debtor was hemorrhaging funds and was in jeopardy of losing a significant asset unless a sale was immediately consummated, the court found that the bankruptcy court's decision was appropriate as an emergency remedy. Id. Therefore, the court upheld the bankruptcy court's decision to allow the mortgagee to credit bid, subject to the trustee's right to subsequently contest the validity of the mortgagee's lien. Id.

98. Accordingly, the Court should hold an expedited hearing, subject to an accelerated discovery schedule, that determines the extent of the statutory lienholders' first priority liens for the purpose of fostering competitive credit bidding.

IV. CONCLUSION

For the foregoing reasons, the M&M Lienholders' and Contractor Claimants' Joint Objection to the DIP Finance Motion and Sale Motion should be sustained, and the Motions should be denied on their present terms. Moreover, the Court should approve DIP financing and

a sale only on such terms that provide a concrete benefit to the estate and protect the interests of first priority statutory lienholders, including the right to credit bid their first priority liens.

Dated November 20, 2009

Respectfully Submitted,

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Ex. “A”

M&M LIENHOLDERS:

Lienholder	**Claim No(s).**	**Total Amount of Claim(s)**
Architectural Materials, Inc. d/b/a AMI Hospitality, Inc. and its subsidiary Peregrine Installation Co.	353, 356, 357, 358, 359, 434, 435, 436, 437, 440	$11,935,748.95
Rinker Materials West LLC d/b/a Cemex Construction Materials Pacific LLC	327	$1,152,877.40
Collings Interiors, LLC	365	$653,312.71
Commercial Roofers, Inc.	323	$4,336,563.88
Conti Electric, Inc.	781	$34,747,082.00
Desert Plumbing & Heating Co.	368	$42,038,562.00
Door-Ko, Inc.	409	$961,059.28
Eberhard Southwest Roofing, Inc.	801	$1,456,458.87
EIDS Steel Company, LLC	782	$8,191,332.31
Gallagher-Kaiser Corporation	423	$30,718,438.99
Geo Cell Solutions, Inc.	547	$321,611.22
George M. Raymond Co.	257, 258, 259	$13,245,728.73
Inncom International, Inc.	143	$526,612.24
J.F. Duncan Industries, Inc., d/b/a Duray	784	$11,026,569.00
J.S.&S., Inc.	420	$921,690.65
L.A. Nevada, Inc., d/b/a G&G Systems	433	$163,115.00
Lally Steel, Inc.	27	$627,195.50
LVI Environmental of Nevada, Inc.	493	$3,172,460.40
Marnell Masonry, Inc.	424	$2,049,168.89
Midwest Drywall Co., Inc.	807	$8,567,868.39
Midwest Pro Painting, Inc.	489	$2,883,513.03
Mechanical Insulation Specialists	865	$3,186,522.84

Lienholder	Claim No(s).	Total Amount of Claim(s)
Modernfold of Nevada, LLC	421	$1,269,606.97
Paramount Management Enterprises	866	$143,103.80
The PENTA Building Group	222	$465,001.00
Ram Construction Services of Michigan, Inc.	223	$1,185,482.45
Southern Nevada Paving, Inc.	867	$3,160,674.37
Universal Piping, Inc.	419	$3,496,537.95
West Edna & Associates, d/b/a Mojave Electric	806	$715,560.01
W&W Steel, LLC of Nevada	802	$24,171,845.87
		$217,491,304.70

CONTRACTOR CLAIMANTS:

Lienholder	Claim No(s).	Total Amount of Claim(s)
Absocold Corporation d/b/a Econ Appliance	883	$453,554.03
Austin General Contracting, Inc.	876	$5,783,502.20
Bombard Mechanical, LLC	879	$9,525,710.25
Bombard Electric, LLC	881	$163,903,675.60
Desert Fire Protection, a Nevada Limited Partnership	882	$17,086,377.00
Powell Cabinet and Fixture Co.	901	$1,855,801.00
Safe Electronics, Inc.	900	$4,304,174.37
Warner Enterprises, Inc. d/b/a/ Sun Valley Electric Supply Co.	877	$551,769.52
SAMFET	880	$2,495,081.40
Union Erectors	878	$812,100.59
		$206,771,745.96