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Proposed Counsel for Debtor-in-Possession The Falls at Elk Grove, LLC

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re: **THE FALLS AT ELK GROVE, LLC**, a Utah limited liability company, Address: 9067 S 1300 W, #301 West Jordan, UT 84088, Tax I.D. No. 45-2474566, Debtor.	Bankruptcy Case No. 18-25208 Chapter 11 Honorable R. Kimball Mosier [Filed Electronically]

DEBTOR'S OPPOSITION TO iBORROW, L.P.'S MOTION FOR RELIEF FROM STAY WITH IMPOSITION OF BAR ON REFILING OR, IN THE ALTERNATIVE, MOTION TO DISMISS CHAPTER 11 CASE WITH PREJUDICE

Debtor and Debtor-in-Possession The Falls at Elk Grove, LLC (the "**Debtor**"), by and through its proposed counsel of record, hereby files its Opposition (the "**Opposition**") to the *Motion for Relief From Stay with Imposition of Bar on Refiling or, in the Alterative, Motion to*

Dismiss Chapter 11 Case with Prejudice (the "**Motion**"), which was filed by Lender iBorrow, L.P. (the "**Lender**") on August 2, 2018 in Case No. 18-25208 (the "**Elk Grove Case**"). This Opposition is supported by the *Declaration of Brooks Pickering in Opposition to iBorrow's Motion for Relief From Stay with Imposition of Bar on Refiling or, in the Alterative, Motion to Dismiss Chapter 11 Case with Prejudice* (the "**Pickering Decl.**") filed contemporaneously herewith.

Debtor's Response to Lender's Factual Allegations

Pursuant to Local Rule 4001-1, the Debtor hereby responds to the factual allegations set forth in the Lender's Motion:

1. Lender Allegation: *"In July 2014, EFalls Properties Elk Grove CA LLC ("EFalls") and The Falls at St. George, LLC ("Falls St. George and together with EFalls, the "Borrower") executed, among other documents, (i) a Promissory Note Secured by Deed of Trust in favor of Eagle Group Finance, L.P., a California limited partnership ("Eagle Finance"), in the principal amount of $6,175,000.00 (the "Note"); and (ii) a Construction Deed of Trust, Security Agreement, Assignment of Rents and Leases, and Fixture Filing against the real property located at 8280 / 8290 Elk Grove Blvd., Elk Grove, CA 95828 and associated personal property (the "Property") recorded in Sacramento County on July 7, 2014 (Book 2014, Page 714) (the "iBorrow DOT" and collectively with other related documents, the "Loan Documents"). The Note is attached to as Exhibit 1. The iBorrow DOT is attached as Exhibit 2."* The Debtor admits Paragraph 1 of the Motion's factual allegations.

2. Lender Allegation: "*Eagle Finance is now known as iBorrow, L.P. pursuant to the certificate filed with the California Secretary of State on January 25, 2016. Therefore all*

further references herein and in the Loan Documents to Eagle Finance shall mean iBorrow." The Lender did not attach a copy of any certificate filed with the California Secretary of State; accordingly, the Debtor lacks sufficient information to admit or deny the allegation in Paragraph 2 of the Motion's factual allegations that Eagle Finance is now known as iBorrow, L.P.

3. Lender Allegation: *"Pursuant to the Loan Documents, the Borrower borrowed $6.175 million from iBorrow with an original maturity date of July 3, 2016 related to the Property."* The Debtor admits that pursuant to the Loan Documents, the Borrower borrowed $6.175 million from Eagle Finance with an original maturity date of July 3, 2016 related to the Property.

4. Lender Allegation: *"The Borrower's obligations under the Loan Documents are secured by (i) the iBorrow DOT against the Property, (ii) junior lien granted by EFalls Properties Fresno CA, LLC against certain real property parcels located in Fresno County, CA (identified as APN: 507-350-29 and APN: 507-350-26 and 507-350-27), and (iii) junior lien granted by The Falls at St. George, LLC against certain real property parcels located in Washington County, Utah (identified as tax parcel nos. SG-WPP-3 and SG-WPP-6), and are also guaranteed by Steven L. Down, pursuant to a Guaranty of Recourse Obligations (the "Down Guaranty")."* The Debtor admits Paragraph 4 of the Motion's factual allegations.

5. Lender Allegation: *"The Note has matured."* The Debtor admits Paragraph 5 of the Motion's factual allegations.

6. Lender Allegation: *"The Borrower defaulted under the Loan Documents by, among other things, failing to make timely payments when due and by failing to pay its obligations under the Note at maturity."* The Debtor admits that the Borrower defaulted under

the Loan Documents by failing to pay all of its obligations under the Note on the extended maturity date of July 3, 2017.

7. Lender Allegation: *"A Notice of Default relating to the Property was recorded in Sacramento County, California on February 2, 2018."* The Debtor admits Paragraph 7 of the Motion's factual allegations.

8. Lender Allegation: *"As of July 16, 2018, the total payoff amount due under the Loan Documents was not less than $9,108,617. Per diem interest of $4,116.67 (approximately $123,500 per month) continues to accrue. A copy of the itemized payoff is attached hereto as Exhibit 3."* The Debtor admits that a copy of iBorrow's itemized payoff statement is attached as Exhibit 3 to the Motion, but the Debtor denies that the total payoff amount due under the Loan Documents was not less than $9,108,617, and denies that per diem interest of $4,116.76 (approximately $123,500 per month) continues to accrue.

9. Lender Allegation: *"A foreclosure sale was scheduled for May 31, 2018."* The Debtor admits Paragraph 9 of the Motion's factual allegations.

10. Lender Allegation: *"To stop the foreclosure sale, the Debtor sought chapter 11 protection in Sacramento, California on May 30, 2018 (chapter 11 case no. 18-23387-D-11) (the "California Chapter 11 Case")."* The Debtor admits that the California Chapter 11 Case was filed on May 30, 2018, but denies that the California Chapter 11 Case was filed solely to stop the foreclosure sale, asserting that the Debtor had a legitimate reorganization intent for filing the California Chapter 11 Case.

11. Lender Allegation: *"The Debtor acquired its interest in the Property, without iBorrow's consent, on the petition date of the California Chapter 11 Case. A certified copy of*

the Grant Deed to the Debtor is attached as Exhibit 4." Debtor admits that a certified copy of the Grant Deed formally transferring legal title to the Property to the Debtor on May 30, 2018, the petition date of the California Chapter 11 Case, is attached as Exhibit 4 to the Motion. The purpose of the Grant Deed was just to recognize a name change and to correct an error in the vesting of the Property, and it was always intended by all parties, including Eagle Finance, that the Debtor would be the owner of the Elk Grove Event Center. Accordingly, the Debtor asserts that the Debtor was the actual owner of the Property at all times, and there was not a transfer of the Property without Eagle Finance's consent.

12. Lender Allegation: *"This transfer of the Property was made by EFalls, an affiliate of the Debtor, in violation of the Loan Documents. See iBorrow DOT Paragraph 13(a) (prohibiting transfer of any interest in the Property)."* The Debtor admits that Paragraph 14(a) of the iBorrow DOT states that the Trustor of the iBorrow DOT, without the prior written consent of Eagle Finance as the Beneficiary of the iBorrow DOT, shall not effect, suffer, or permit any Prohibited Transfer, which is defined as any conveyance, sale, assignment, transfer, lien, pledge, mortgage, security interest or other encumbrance or alienation of the property interests listed in Paragraph 14 of the iBorrow DOT. The Debtor asserts that the purpose of the May 30, 2018 Grant Deed was just to recognize a name change and to correct an error in the vesting of the Property, and it was always intended by all parties, including Eagle Finance, that the Debtor would be the owner of the Property. Accordingly, the Debtor asserts that the Debtor was the actual owner of the Property at all times, and there was no transfer of the Property without Eagle Finance's consent.

13. Lender Allegation: *"The Debtor's Schedules filed in the California Chapter 11 Case state that the Debtor's parent company – The Falls Event Center – holds an unexpired lease for the property. See Schedule G (Schedules attached as Exhibit 5). iBorrow did not consent to the Debtor's assignment of the Borrower's interest in the lease to the Debtor, which also constitutes a violation of the Loan Documents."* The Debtor admits that Schedule G in the California Chapter 11 Case lists a perpetual nonresidential real property lease by the Debtor to The Falls Event Center ("**TFEC**" or "**Debtor TFEC**") of the Debtor's Property (the "**Property**" or the "**Elk Grove Event Center**"). The Debtor admits that Paragraph 14(a) of the iBorrow DOT states that the Trustor of the iBorrow DOT, without the prior written consent of Eagle Finance as the Beneficiary of the iBorrow DOT, shall not effect, suffer, or permit any Prohibited Transfer, which is defined as any conveyance, sale, assignment, transfer, lien, pledge, mortgage, security interest or other encumbrance or alienation of the property interests listed in Paragraph 14 of the iBorrow DOT. Debtor admits that Eagle Finance did not consent to any assignment to the Debtor by the Borrower of the Borrower's interest in the lease of the Elk Grove Event Center to Debtor TFEC.

14. Lender Allegation: *"The Debtor's parent company – The Falls Event Center – is identified on the Debtor's Schedule D in the California Chapter 11 Case as holding a secured interest in the Property pursuant to a Deed of Trust in an unknown amount (the "Falls DOT"). See Schedule D (Schedules attached as Exhibit 5). iBorrow did not consent to the Falls DOT. This encumbrance constitutes a violation and breach of the iBorrow DOT, which prohibited encumbrance of the Property without iBorrow's consent. See iBorrow DOT Paragraph 13(a) (prohibiting any encumbrance on the Property other than the liens or encumbrances benefiting*

iBorrow unless expressly permitted by the Loan Documents)." The Debtor admits Paragraph 14 of the Motion's factual allegations, and asserts that Schedule D in the California Chapter 11 Case states that Debtor TFEC "holds a secured interest in [the P]roperty as agent for convertible secured noteholder investors."

15. Lender Allegation: *"Other than iBorrow and the The Falls Event Center (the Debtor's parent company), the only creditor identified in the Debtor's Schedules filed in the California Chapter 11 Case is Sacramento County for unpaid real property taxes on the Property. See Schedules attached as Exhibit 5."* The Debtor admits that Eagle Finance, Debtor TFEC, and the Sacramento County Tax Collector are the only creditors identified in the Schedules filed in the California Chapter 11 Case.

16. Lender Allegation: *"The Debtor's Schedule B filed in the California Chapter 11 Case states that the Debtor holds $0.00 in cash, financial assets, accounts, or other personal property. See Schedule B (Schedules attached as Exhibit 5."* The Debtor admits Paragraph 16 of the Motion's factual allegations.

17. Lender Allegation: *"The California Chapter 11 Case was dismissed on July 11, 2018. A copy of the California Bankruptcy Court's minute entry regarding the dismissal order is attached hereto as Exhibit 6."* The Debtor admits Paragraph 17 of the Motion's factual allegations.

18. Lender Allegation: *"The Debtor filed a voluntary chapter 11 bankruptcy petition in Utah Bankruptcy Court on July 16, 2018 (the "Petition Date")."* The Debtor admits Paragraph 18 of the Motion's factual allegations.

19. Lender Allegation: *"To date, no substantive filings have been made in this case."* The Debtor asserts that the term "substantive filings" is ambiguous, and further asserts that a number of filings have been made in this Chapter 11 Case; therefore, the Debtor lacks information sufficient to admit or deny Paragraph 19 of the Motion's factual allegations.

20. Lender Allegation: *"The Falls Event Center, LLC (the Debtor's parent company) sought chapter 11 protection in Utah Bankruptcy Court on July 11, 2018 (Case No. 18-25208)."* The Debtor admits Paragraph 20 of the Motion's factual allegations.

21. Lender Allegation: *"iBorrow obtained an appraisal of the Property dated July 27, 2018 (the "Appraisal"). A copy of the Appraisal is attached hereto as Exhibit 7."* The Debtor admits Paragraph 21 of the Motion's factual allegations.

22. Lender Allegation: *"The Appraisal reflects an "as is" market value of the Property as of July 18, 2018 of $6,400,000."* The Debtor admits that the Appraisal dated July 18, 2018 (Exhibit 7 to the Motion), reflects an "as is" market value for the Elk Grove Event Center of $6,400,000; however, the Debtor denies that this is the true market value for the Elk Grove Event Center.

23. Lender Allegation: *"The appraiser maintains that the highest and best use of the Property is not as an event center."* The Debtor admits that the appraiser in the July 18, 2018 Appraisal (Exhibit 7 to the Motion) states that the highest and best use of the Elk Grove Event Center is not as an event center; however, the Debtor denies that this is an accurate statement.

Additional Facts in Opposition to Lender's Motion for Relief From Stay and Motion to Dismiss

24. In June of 2018, Brooks Pickering ("**Pickering**") was appointed as the Chief Restructuring Officer ("**CRO**") for the Debtor's parent company, Debtor TFEC. As part of the

restructuring for TFEC and its subsidiaries, including the Debtor, Pickering was appointed as the new sole Manager of the Debtor. See, Pickering Decl. at ¶ 8.

25. The California Chapter 11 Bankruptcy Case for the Debtor was filed prior to the time that Pickering was appointed as the CRO for TFEC. See, Pickering Decl. at ¶ 9.

26. Pickering determined that a comprehensive approach was needed for the restructuring and reorganization of TFEC and its subsidiaries. Accordingly, Pickering directed that the Chapter 11 case for TFEC be filed with the United States Bankruptcy Court for the District of Utah on July 11, 2018, captioned as In re The Falls Event Center LLC, Case No. 18-25116 (the "**TFEC Case**"). See, Pickering Decl. at ¶ 10.

27. The Elk Grove Event Center is improved with two special purpose event center buildings comprising a total of approximately 27,000 square feet, which are both available for rental to the general public to host wedding receptions and other events. The Elk Grove Event Center is one of eight operating event centers (collectively the "**Event Centers**"). The real property at each of the eight locations is owned by separate entities owned by TFEC. These related entities, including the Debtor, are referred to herein as the "**Subsidiaries**." See, Pickering Decl. at ¶ 12.

28. As part of the operations and management of all of the Subsidiaries, including the Debtor, TFEC handles the bookings for all of the Event Centers, collects the deposits and rental fees, employs the staff for each of the Event Centers, and owns the tables, chairs, linens, audio/visual equipment and other personal property associated with each of the Event Centers. TFEC is also responsible for insuring and maintaining each of the Event Centers, which has historically included servicing the debt obligations and operational expenses associated with

each of the Event Centers, including the Elk Grove Event Center. Accordingly, TFEC has always handled all of the finances associated with each of the Subsidiaries, including the Debtor. See, Pickering Decl. at ¶13.

29. In recognition of how the operations and management of the Subsidiaries and the Event Centers have been handled in the past, and as part of the still developing restructuring and reorganization plans for TFEC and the Subsidiaries, Pickering has determined that it would be best to substantively consolidate all of the Subsidiaries into the TFEC Case. In addition, Pickering is planning to sell the real property for those Event Centers that are not currently being operated, and to pursue refinancing or a sale and leaseback of some or all of the Event Centers that are still operating and can be operated profitably in the future. Refinancing the debts with an institutional lender will provide lower interest rates and better terms, and it will allow the consolidated enterprise to operate profitably. TFEC has already made progress in implementing its plan. TFEC has been successful in selling the Peoria property owned by TFEC's Peoria subsidiary. TFEC is waiting to close on the Fairfield property owned by TFEC's Fairfield subsidiary. TFEC has sold the Centennial property owned by TFEC's Centennial subsidiary. The sale of the Cedar Park property owned by TFEC's Cedar Park subsidiary is pending, and TFEC expects to open escrow within the next 7 days. These sales are significant steps toward a successful reorganization. However, the Elk Grove Event Center is vital to the success of the overall plan, and TFEC and its Subsidiaries, including the Debtor, will not be able to effectively reorganize without the Elk Grove Event Center. See, Pickering Decl. at ¶ 14.

30. An Appraisal Report dated March 26, 2014, for the Elk Grove Event Center located at 8290 and 8280 Elk Grove Boulevard, Elk Grove, California 95828 (the "**2014 Elk**

Grove Event Center Appraisal"), was prepared for Eagle Finance by Ronald K. Owens, Jr., who is an MAI appraiser working for Butler Burgher Group, LLC ("**BBG**"). The 2014 Elk Grove Event Center Appraisal gives an "as is" going concern value as of March 17, 2014, of $13,190,000 for the Elk Grove Event Center, consisting of $11,300,000 for the real estate, $750,000 for the furniture, fixtures and equipment ("**FF&E**"), and $1,140,000 for business value. See, Pickering Decl. at ¶ 15.

31. As outlined above in Paragraph 4, in July of 2014 and January of 2018, the Lender obtained additional collateral for the Loan (the "**Elk Grove Loan**") from two of the other Subsidiaries, a junior lien granted by EFalls Properties Fresno CA, LLC ("**Fresno**") against an Event Center located in Fresno, California (the "**Fresno Event Center**"), and a junior lien granted by The Falls at St. George, LLC ("**St. George**") against an Event Center located in St. George, Utah (the "**St. George Event Center**"). See, Pickering Decl. at ¶ 16.

32. An Appraisal Report dated March 26, 2014, for the St. George Event Center located at 170 South Mall Drive, St. George, Utah 84790 (the "**St. George Event Center Appraisal**"), was prepared for Eagle Finance by Ronald K. Owens, Jr., who is an MAI appraiser working for Butler Burgher Group, LLC ("**BBG**"). The St. George Event Center Appraisal gives an "as is" going concern value as of March 13, 2014, of $2,430,000 for the St. George Event Center, consisting of $2,120,000 for the real estate, $300,000 for the FF&E, and $10,000 for business value. See, Pickering Decl. at ¶ 17.

33. iBorrow holds the second lien on the St. George Event Center. The holder of the first lien on the St. George Event Center is currently owed approximately $750,000. Accordingly, the value of iBorrow's second lien on the St. George Event Center is approximately

$1,680,000 ($2,430,000 value minus $750,000 first lien balance = $1,680,000). See, Pickering Decl. at ¶ 18.

34. An Appraisal Report dated August 11, 2014, for the Fresno Event Center located at 4105, 4125, 4145 and 4165 West Figarden Drive, Fresno, California 93722 (the "**Fresno Event Center Appraisal**"), was prepared for Eagle Finance by Ronald K. Owens, Jr., working for BBG. The Fresno Event Center Appraisal gives an "as completed" value as of June 1, 2015, of $6,510,000 for the Fresno Event Center, and an "as completed and stabilized" value as of June 1, 2018, of $11,940,000. See, Pickering Decl. at ¶ 19.

35. iBorrow holds the second lien on the Fresno Event Center. The holder of the first lien on the Fresno Event Center is currently owed approximately $3,100,000. Accordingly, the value of iBorrow's second lien on the Fresno Event Center would be approximately $3,410,000 based upon the "as completed" June 1, 2015 value ($6,510,000 "as completed" June 1, 2015 value minus $3,100,000 first lien balance = $3,410,000), or approximately $8,840,000 based upon the "as completed and stabilized" June 1, 2018 value ($11,940,000 "as completed and stabilized" June 1, 2018 value minus $3,100,000 first lien balance = $8,840,000). See, Pickering Decl. at ¶ 20.

36. iBorrow's latest appraisal of the Elk Grove Event Center (Exhibit 7 to the Motion) was prepared by Scott Beebe, an MAI appraiser working for BBG, Inc., Northern California. Ronald K. Owens, Jr., MAI, the appraiser who prepared the 2014 Elk Grove Appraisal, the St. George Appraisal, and the Fresno Appraisal, is currently still employed by BBG, Inc., according to the internet search results for Mr. Owens' Appraisal Institute Member Profile. Accordingly, Scott Beebe, the appraiser for iBorrow's latest appraisal, and Ronald K.

Owens, Jr., the appraiser for the 2014 Elk Grove Appraisal, the St. George Appraisal, and the Fresno Appraisal, are colleagues who work for the same appraisal firm. See, Pickering Decl. at ¶ 21.

A. ARGUMENT

1. Relief From Stay Statutory Requirements

11 U.S.C. § 362(d)(1) provides that relief from the automatic stay can be granted for "cause," while 11 U.S.C. § 362(d)(2) provides a two-pronged standard for relief from the automatic stay, as follows:

> (d) On request of a party in interest and after notice and hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –
>
> (1) **for cause**, including the lack of adequate protection of an interest in property of such party in interest;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if –
>
> (A) the debtor does not have an **equity** in such property; and
>
> (B) such property is **not necessary to an effective reorganization.**

11 U.S.C. § 362(d) (emphasis added).

iBorrow, the secured creditor, as the moving party, has the burden of proof on the debtor's equity in the debtor's property that is at issue. 11 U.S.C. § 362(g)(1). The Debtor has the burden of proof on all other issues. 11 U.S.C. § 362(g)(2).

2. The Debtor has Equity in the Elk Grove Event Center

A debtor has no equity in property when the debts secured by liens on the property exceed the value of the property. The Tenth Circuit has stated: "In the context of stay relief, 'equity' exists if the value of the property exceeds all claims secured by such property, whether those claims belong to the moving creditor or others." *In re Gindi*, 642 F.3d 865, 875 (10th Cir. 2011), *quoting Jordan v. Kroneberger (In re Jordan),* 392 B.R. 428, 447 (Bankr. D. Idaho 2009) (*Gindi* overruled in part on other grounds by *TW Telecom Holding Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011)).

iBorrow has failed to meet its burden of proof that the Debtor does not have any equity in the Elk Grove Event Center. iBorrow's latest appraisal is suspect and fatally flawed because it dismisses out of hand any prospect that a successful event center business can be conducted at the Elk Grove Event Center, and instead insists upon a costly ($1,600,000) renovation of the Elk Grove Event Center into office space.

iBorrow gives no explanation for how the Elk Grove Event Center could have declined in value over a period of four years by $6,790,000, a shocking collapse in value. iBorrow's current (July 27, 2018) appraisal asserts a value for the Elk Grove Event Center of $6,400,000, which is only 48.5% of the Elk Grove Event Center's "as is" going concern value of $13,190,000 as of March 17, 2014. There has not been any recession or major business disruption in those four years, and there is no evidence that the wedding reception business and the market for the hosting of other similar events in Elk Grove, California, has dramatically declined during that four year period. This decline in value cannot even be explained by a change in appraisal firms, since iBorrow used the same appraisal firm for its most current appraisal.

The valuation of $13,190,000 under the 2014 Elk Grove Appraisal is more credible than iBorrow's most recent appraisal. Under the valuation stated in the 2014 Elk Grove Appraisal, there is equity in the Elk Grove Event Center for the Debtor, even if iBorrow's assertion that it is owed $9,108,617.31 on the Elk Grove Loan (which is significantly overstated, as outlined below) is accepted by the Court. Under the $13,190,000 valuation, the Debtor has equity of approximately $3,700,000 in the Elk Grove Event Center ($13,190,000 value minus iBorrow's claim for $9,108,617.31 minus unpaid real property taxes of $333,000 = $3,748,382.69).

As stated above, iBorrow's new appraisal for the Elk Grove Event Center for $6,400,000 was done by the same appraisal company (BBG, Inc. f/k/a Butler Burgher Group, LLC) that prepared the 2014 Elk Grove Appraisal in March of 2014, which gave a going concern value of $13,190,000. BBG's appraiser who worked on the 2014 Elk Grove Appraisal, Ronald K. Owens, Jr. (who is an MAI appraiser and has a California appraisal license), is still employed by BBG. The most recent BBG appraiser, Scott Beebe, who is also an MAI appraiser, asserts that the event center business at the Elk Grove Event Center has not been profitable, and dismisses out of hand any idea that the event center business could make a profit at the Elk Grove Event Center. Instead, BBG, through Scott Beebe, now concludes that the highest and best use of the Elk Grove Event Center is to convert it into office buildings (with a cost to convert of $1,600,000, which is deducted from the value of the Elk Grove Event Center).

The two appraisals by the same appraisal firm simply cannot be reconciled. In 2014, BBG, through Ronald K. Owens, Jr., went to great lengths to build a model for a profitable event center business at the Elk Grove Event Center that would support a valuation of $13,190,000. However, four years later, BBG, through Scott Beebe, made no effort whatsoever to determine if

an event center business for this special purpose location could be successful, and if so, what profits that business would generate. The current iBorrow appraisal is improperly driving down the value of the Elk Grove Event Center by assuming that the owner of the Elk Grove Event Center should shift to another use through a costly remodel of these special purpose facilities. The $13,190,000 valuation from the 2014 Elk Grove Appraisal is the only genuine indicator of the true value for the purposes for which the Elk Grove Event Center was constructed.

While it may be true that the former managers of TFEC were not successful in operating a profitable business at the Elk Grove Event Center, the same could be said of almost every Chapter 11 business that falls on hard times and seeks a "time out" to regroup and reorganize. The failure of a particular management group to run a profitable business at a particular location does not automatically mean that some other "highest and best use" of the location needs to be investigated when valuing that location. The current iBorrow appraisal's out of hand rejection that a profitable event center business could be operated at the Elk Grove Event Center, without explanation, means that the current iBorrow appraisal is not credible.

Accordingly, under the $13,190,000 valuation from the 2014 Elk Grove Appraisal, the Debtor has an equity cushion of approximately $3,700,000 in the Elk Grove Event Center. That $3,700,000 equity cushion is 40.62% of the $9,108,617 balance on the Elk Grove Loan claimed by iBorrow. Moreover, iBorrow wisely arranged for additional protection for its position by obtaining junior liens on the St. George Event Center and the Fresno Event Center. iBorrow's total equity in all three properties ranges from **$8,790,000** (i.e., the $3,700,000 equity in the Elk Grove Event Center + $3,410,000 equity in the Fresno Event Center under the "as completed"

June 1, 2015 value + $1,680,000 equity in the St. George Event Center = $8,790,000)[1] to **$14,220,000** (i.e., the $3,700,000 equity in the Elk Grove Event Center + $8,840,000 equity in the Fresno Event Center under the "as completed and stabilized" June 1, 2018 value + $1,680,000 equity in the St. George Event Center = $14,220,000)[2]. Obviously, iBorrow's position is more than adequately protected at this time, since it prudently protected itself by requesting and receiving additional collateral for the repayment of the Elk Grove Loan.

The Ninth Circuit in *Pistole v. Mellor (In re Mellor),* 734 F.2d 1396 (9th Cir. 1984), affirmed that the existence of an equity cushion "is the classic form of [adequate] protection for a secured debt justifying the restraint of lien enforcement by a bankruptcy court. In fact, it has been held that the existence of an equity cushion, standing alone, can provide adequate protection." *Id.* at 1400. In the *Mellor* case, an equity cushion of approximately 20% of the total value of the property was sufficient to provide adequate protection to defeat the senior creditor's motion for relief from the under Section 362(d)(1). *Id.* at 1401. Under the *Mellor* case, iBorrow's lien on the Elk Grove Event Center is more than adequately protected by the equity cushion, ranging from 40.62% (based only on the Elk Grove Event Center) to a range of 96.5% to 156% (adding in iBorrow's second liens on the St. George Event Center and the Fresno Event Center), and relief from the automatic stay is not warranted under Section 362(d)(1).

3. The Amount of iBorrow's Claim is Significantly Overstated.

It also appears to the Debtor that iBorrow's claim that it is owed $9,108,617.31 on the Elk Grove Loan is seriously overstated. iBorrow asserts a payoff amount of $9,108,617.31 as of

[1] The $8,790,000 equity cushion would be **96.5%** of the $9,108,617 balance claimed by iBorrow.

[2] The $14,220,000 equity cushion would be **156%** of the $9,108,617 balance claimed by iBorrow.

July 16, 2018, with interest accruing at $4,116.67 per day (approximately $123,500 per month). See, Exhibit 3 to the Motion, which itemizes the payoff amount for the Elk Grove Loan as follows: (1) principal due of $6,175,000, (2) interest due of $2,070,168.36, (3) default fee on principal (10%) of $617,500.00 (which is 10% of the unpaid principal balance that was due on the extended maturity date of the Note), (4) default fees on unpaid interest (10%) of $207,016.84 (which is 10% of the amounts of various unpaid interest payments), (5) Lender's legal fees of $15,755.01, (6) estimated foreclosure costs of $15,177.01, and (7) an appraisal fee of $8,000.

However, there are several issues with the iBorrow payoff calculations. Paragraph 9.6 of the Lender's Note (the "**Note**") (Exhibit 1 to the Motion) specifically provides that "the usury laws applicable to the indebtedness evidenced by this Note, and secured by the Deed of Trust and the other Loan Documents shall be the usury laws of the State of California and it is the intention of the parties to comply strictly with the same." The interest rate under the Note prior to a default is 12.00%, while the default interest rate under the Note is 24.00%. See, Note, Sections 2.1 and 2.1 (Exhibit 1 to the Motion). The California Constitution provisions on Usury are found in Section 1 of Article XV of the California Constitution. Under Section 1, subpart 2, the rate for any loan that is not for a primarily personal, family or household purpose is not to exceed the higher of ten percent (10%) or five percent (5%) per annum plus the rate prevailing on the 25th day of the month preceding the earlier of (i) the date of execution of the contract to make the loan or forbearance, or (ii) the date of making the loan or forbearance established by the Federal Reserve Bank of San Francisco on advances to member banks under Sections 13 and 13a of the Federal Reserve Act (i.e., the Federal Reserve Bank "discount rate"). The Federal Reserve discount rate in July of 2014 was 0.75% for "primary credit" and 1.25% for "secondary

credit" to member banks (making the additional 5% for the usury calculation equal to 5.75% to 6.25%), so it was the 10% maximum usury rate that was in effect in July of 2014.

The Debtor recognizes that there are some exceptions to the usury limitations in Section 1 of Article XV of the California Constitution.[3] However, the Debtor does not know enough about Eagle Finance or the making of the original Elk Grove Loan to know if any of those exceptions to the California usury limitations would apply to Eagle Finance, or would apply to iBorrow (if iBorrow is an assignee or successor to Eagle Finance rather than just a name change). In any event, it is iBorrow's burden to demonstrate that there is an applicable exemption to the California usury limitations that would apply to the Elk Grove Loan transaction and would authorize Eagle Finance and iBorrow to charge 12.00% for pre-default interest and 24.00% for default interest. If iBorrow does not meet that burden, then iBorrow's claim to interest in the amount of $2,070,168.36 as well as default fees on unpaid interest of $207,016.84 would be pared back significantly (assuming that iBorrow would be entitled to any unpaid interest if it were determined to be in violation of the California Constitution's usury limitations).[4]

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[3] For example, in Cal.Civ.Code 1916.1, it provides: "The restrictions upon rates of interest contained in Section 1 of Article XV of the California Constitution shall not apply to any loan or forbearance made or arranged by any person licensed as a real estate broker by the State of California, and secured, directly or collaterally, in whole or in part by liens on real property." There is no allegation in the Motion that this or any other exemption to the California usury limitations apply to the Elk Grove Loan.

[4] The Debtor may determine after additional investigation that it has additional offsetting claims that it can assert against iBorrow. However, at the relief from stay stage, the bankruptcy court is required to take into account only those defenses that strike at the heart of the creditor's lien or that deal with the debtor's equity in the property. *In re Utah Aircraft Alliance*, 342 B.R. 327 (10th Cir. BAP 2006).

iBorrow's claim to $617,500 as the default fee on the unpaid principal balance of the Note that was due on the extended maturity date of the Note is also unwarranted. Section 4.4 of the Note (Exhibit 1 to the Motion) provides the following:

> "4.4 ***Late Charge***. If any payment of interest or principal due hereunder is not made within five (5) days after such payment is due in accordance with the terms hereof, then, in addition to the payment of the amount so due, Borrower shall pay to Lender a "late charge" of ten cents for each whole dollar so overdue to defray part of the cost of collection and handling such late payment. Borrower agrees that the damages to be sustained by the holder hereof for the detriment caused by any late payment are extremely difficult and impractical to ascertain, and that the amount of ten cents ($.10) for each one dollar ($1.00) due is a reasonable estimate of such damages, does not constitute interest, and is not a penalty."

Section 4.4 of the Note does not specifically state that the 10% late charge applies to the principal balance of the Note if not paid at the maturity date of the Note. Instead, Section 4.4 states that the late charge is applied "to defray part of the cost of collection and handling such late payment," that it is "extremely difficult and impractical to ascertain" what the damages would be to the Lender because of the late payment, and that the 10% late charge is a reasonable estimate of the damages and is not a penalty. This make perfect sense for late installment payments of interest, but it is a real stretch of the imagination to argue that a late charge of $617,500 will only "defray part of the cost of collection and handling" a late payment of the unpaid principal, or that $617,500 has to be applied as a reasonable estimate of the damages to the Lender from a late payment of the unpaid principal because it is "extremely difficult and impractical to ascertain" what the Lender's damages would be. The Lender can quite easily ascertain its opportunity costs for not having the unpaid principal amount to redeploy to another loan at the time of the extended maturity of the Elk Grove Loan (after offsetting the accruing default interest under the Note, assuming that such default interest is not usurious). The Debtor

contends that the language of Section 4.4 does not match an unpaid principal amount at the maturity of an interest only loan, and therefore iBorrow is overreaching by attempting to collect a late charge of $617,500 to which it is not entitled by the language of the Note.

The Debtor also asserts that iBorrow's imposition of the 24.00% default interest rate under the Note was premature. Section 3.1 of the Note (Exhibit 1 to the Motion) provides the Borrower with the option to extend the maturity of the Note to July 3, 2017 upon payment of an extension fee of $61,750.00. iBorrow's payoff statement (Exhibit 3 to the Motion) discloses that iBorrow received the extension fee of $61,750.00 by wire on June 7, 2016; nevertheless, the payoff statement states that the Loan was in default as of July 1, 2016 (which is prior to the original maturity date of July 3, 2016). If iBorrow accepted the extension fee, then it must be deemed to have agreed to extend the maturity date to July 3, 2017, even if iBorrow now contends (apparently after the fact) that there were other defaults at the time of the extension. To rule otherwise would allow iBorrow to enrich itself by accepting the hefty extension fee and then deny the Borrower the benefit of the extension, an inequitable result that should not be permitted by this Court. Accordingly, the 24.00% default interest rate should not have gone into effect until, at the earliest, the extended maturity date of July 3, 2017, which means that iBorrow's interest due calculation is overstated by no less than $741,000.00 ($6,175,000.00 principal balance x the extra 12.00% added to the non-default rate of 12.00% = $741,000.00), and iBorrow's 10.0% late charge claim for unpaid interest payments is overstated by no less than $74,100.00 (10% of the overstated default interest calculation).

Even assuming that the 12.00% non-default interest rate and the 24.00% default interest rate are not usurious under California law, iBorrow has overstated the amount of its claim under the Elk Grove Loan by at least $1,432,600, as shown below:

	Amount Claimed by iBorrow	Adjusted Amount Calculated by Debtor
Principal Balance:	$6,175,000.00	$6,175,000.00
Interest Due:	$2,070,168.36	$1,329,168.36
Default Fee on Principal:	$617,500.00	$ 0.00
Default Fees on Unpaid Interest:	$207,016.84	$ 132,916.87
Lender's Legal Fees:	$ 15,755.01	$ 15,755.01
Estimated Foreclosure Costs:	$ 15,177.01	$ 15,177.01
Appraisal Fee:	$ 8,000.00	$ 8,000.00
Totals:	$9,108,617.00	$7,676,017.00 (reduction of $1,432,600)

4. The Elk Grove Event Center is Essential to the Effective Reorganization of TFEC and its Subsidiaries (Including the Debtor).

If there is no equity in a debtor's property under § 362(d)(2), then the debtor has the burden of "not merely showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization *that is in prospect*. This means . . . that there must be a reasonable possibility of a successful reorganization within a reasonable time." *In re Gindi*, 642 F.3d 865 (10th Cir. 2011), *quoting United Sav. Assoc. of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 375-76, 108 S. Ct. 626 (1988) (*Gindi* overruled in part on other grounds by *TW Telecom Holding Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011)). The Supreme Court recognized in the *Timbers* case that a less detailed showing that the debtor has a reasonable possibility of a successful reorganization within a reasonable time is required during the initial four months that a debtor is given the exclusive right to put together a plan of reorganization. *United Sav. Assoc.*

of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 376, 108 S. Ct. 626, 633 (1988).

As stated above, the Debtor has equity in the Elk Grove Event Center, so the burden does not shift to the Debtor to demonstrate the merits of its reorganization plans for the Elk Grove Event Center in the context of the larger picture of the reorganization of TFEC and all of its Subsidiaries, including the Debtor. Nevertheless, even if the Court rules that there is no equity in the Elk Grove Event Center, and also rules that iBorrow is not adequately protected by the additional equity in its second liens against the St. George Event Center and the Fresno Event Center, the Debtor contends that at this very early stage of this Chapter 11 case, the Elk Grove Event Center is essential for an effective reorganization that is in progress.

iBorrow's Motion was filed on August 2, 2018, only 17 days after this Chapter 11 Case was filed. Even in that short period of time, significant progress was made towards a successful reorganization. The Debtor notes that the current management of the Debtor, headed by Brooks Pickering as CRO, came on board in June of 2018, just prior to the filing of the TFEC Case. At that time, the prior management of TFEC and its Subsidiaries (including the Debtor), headed by Steve Down, agreed to withdraw from any further involvement with TFEC and its Subsidiaries. Obviously there were significant pre-petition problems with the management of TFEC and its Subsidiaries (including the Debtor). But the relevant issue *now* that this Court must assess is how effective Pickering as CRO and the current new management have been to pick up the pieces and streamline the operations of TFEC and its Subsidiaries (including the Debtor) in such a way as to maximize the benefit to creditors of the bankruptcy estate of TFEC and the creditors of its Subsidiaries (including the Debtor) going forward.

Pickering as CRO and his team have invested substantial time and resources in understanding the operations and business dealings of TFEC and its Subsidiaries (including the Debtor), protecting their assets, improving their processes, creating a plan for their joint reorganization in bankruptcy, and maximizing the eventual recovery for all creditors of these related entities. While the eventual plan is still in its infancy, due to the short period of time since the filing of this Chapter 11 Case and the filing of TFEC's Chapter 11 Case and the need to focus first on the initial administrative requirements of both of the Chapter 11 Cases (i.e., preparing and filing Statements and Schedules and other initial stage requirements for Chapter 11 filings), Pickering and his team have concluded that the reorganized Debtor needs to mirror how TFEC and its Subsidiaries were operated from the very beginning; i.e., as a consolidated business operation. There were undoubtedly various legal reasons for vesting title to the various Event Centers in separate Subsidiaries that held no other assets, but the reality is that TFEC ran all of the business operations on a consolidated basis from the very beginning. Accordingly, the plan is to file a motion for substantive consolidation of TFEC and its Subsidiaries, while at the same time selling off the properties that are no longer operating, streamlining the postpetition operations of the remaining operating Event Centers, and investigating the refinancing of the debts encumbering the operating Event Centers or the negotiation of sale and leaseback transactions for some of the operating Event Centers. Refinancing the debts with an institutional lender will provide lower interest rates and better terms, and it will allow the consolidated enterprise to operate profitably. TFEC has already made progress in implementing its plan. TFEC has been successful in selling the Peoria property owned by TFEC's Peoria subsidiary. TFEC is waiting to close on the Fairfield property owned by TFEC's Fairfield property. TFEC

has sold the Centennial property owned by TFEC's Centennial Subsidiary. The sale of the Cedar Park property owned by TFEC's Cedar Park Subsidiary is pending, and TFEC expects to open escrow within the next 7 days. These sales are significant steps toward a successful reorganization. However, the Elk Grove Event Center is vital to the success of the overall plan, and TFEC and its Subsidiaries, including the Debtor, will not be able to effectively reorganize without the Elk Grove Event Center.

6. iBorrow is not Entitled to Relief from the Stay for "Cause" Pursuant to Section 362(d)(1).

As outlined above, Section 362(d)(1) provides that relief from stay should be granted for cause, including the lack of adequate protection of an interest in property of such party in interest. 11 U.S.C. § 362(d)(1). The Supreme Court has stated "that the 'interest in property' referred to by § 362(d)(1) includes the right of a secured creditor to have the security applied in payment of the debt upon completion of the reorganization; and that that interest is not adequately protected if the security is depreciating during the term of the [automatic] stay." *United Sav. Assoc. of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370, 108 S. Ct. 626, 630 (1988). Therefore, if the Elk Grove Event Center were depreciating in value, then the Debtor would be obligated to provide adequate protection for depreciating collateral (such as a motor vehicle). However, there is no showing that the Elk Grove Event Center is currently depreciating in value, and the equity cushion outlined above is more than adequate to adequately protect iBorrow's position. The Supreme Court also ruled in the *Timbers* case that a secured creditor's right (suspended by the automatic stay) to take immediate possession of its collateral and apply it in payment of its debtor is not a property interest that had to be adequately protected. *Id.*

iBorrow asserts that "cause" exists for relief from the automatic stay because of its assertion that this Chapter 11 Case and the California Chapter 11 Case were both filed in bad faith. However, it is not bad faith for the Debtor to act to protect the equity in the Elk Grove Event Center that exists for the benefit of the creditors of TFEC and its Subsidiaries, especially when iBorrow has such a large equity cushion with a senior lien and two junior liens against three of the Event Centers.

This is not a case of a deeply underwater borrower that is just postponing the inevitable by filing a series of futile bankruptcy petitions to hold up an undersecured creditor from realizing on its collateral. TFEC and its Subsidiaries, including the Debtor, have viable business operations and a promising business model that just need some breathing space and expert restructuring assistance to get back on their feet. In the meantime, the Debtor has a vital interest in protecting the equity cushion in the Elk Grove Event Center, which will not only enhance the reorganization prospects for TFEC and its Subsidiaries, but will also provide either a source of funds or a valuable operating business that will enhance the recovery to the other creditors of TFEC and its Subsidiaries.

While it may be understandable for iBorrow to aggressively pursue relief from the stay at this time, this Court should also recognize that by filing its Motion, iBorrow is seeking to complete its foreclosure and appropriate the excess equity over the current balance of the amount owed to iBorrow (whether $9,108,617 or $7,676,017 as asserted by the Debtor above or some other amount determined by the Court) as a windfall to iBorrow, without regard to the legitimate interests and concerns of the creditors of TFEC and its Subsidiaries to maximize the value of all of the assets of TFEC and its Subsidiaries (including the Debtor). As the Ninth Circuit stated in

the *Mellor* case, ruling in a similar case against a senior creditor seeking relief from the stay in order to foreclose a senior lien for which there was an equity cushion, "[t]he purpose of adequate protection under § 361 is to insure that the secured creditor receives in value essentially what he bargained for, not a windfall." *Id.* While it is understandable that iBorrow is looking out for its own interests and wants to immediately complete its foreclosure sale, fortunately the Court is in a position to weigh the best interests of all of the creditors.

7. There was no Scheme to Delay, Hinder or Defraud Creditors for Stay Relief Under Section 362(d)(4).

iBorrow also asserts that it is entitled to relief from the automatic stay under Section 362(d)(4) of the Bankruptcy Code because there was a scheme to delay, hinder or defraud creditors that involved either the transfer of real property without the consent of the secured creditor or court approval, or multiple bankruptcy filings affecting such real property. However, there is no evidence of any such scheme to delay, hinder or defraud iBorrow. As shown above, iBorrow is significantly over-collateralized and is more than adequately protected by a significant equity cushion in the form of a first priority lien and two second priority liens against the value of three Event Centers. While it is true that there will be some delay before iBorrow's liens are satisfied, that delay is inherent in the legitimate bankruptcy process, and actions taken to protect the Debtor's genuine and significant equity position in the Elk Grove Event Center for the benefit of other creditors can hardly be classified as an action to defraud iBorrow. Accordingly, the Debtor respectfully requests that iBorrow's request for relief from the automatic stay be denied.

8. There was No Bad Faith Filing to Support iBorrow's Alternative Motion to Dismiss this Chapter 11 Bankruptcy Case with Prejudice.

Lender asserts, as an alternative form of relief, that it is entitled to the dismissal of this Chapter 11 Case with prejudice under Section 1112(b)(4) because of a "lack of good faith in order to prevent abuse of the chapter 11 process or in response to misconduct that is incompatible with the functioning of the bankruptcy system." See, Motion at p. 13 (quoting 7 COLLIER ON BANKRUPTCY ¶ 1112.07[1], at 1112-48). Lender cites the Tenth Circuit's decision in *Udall & Lawrence v. FDIC (In re Nursery Land Dev., Inc.)*, 91 F.3d 1414 (10th Cir. 1996) to support its contention that this Chapter 11 Case was filed in bad faith.

The *Nursery Land* case involved a single-asset real estate Chapter 11 bankruptcy filing that clearly had no realistic prospects for reorganization. While it is appropriate for the Court to act to protect the integrity of the bankruptcy system when it is confronted with a situation involving a deeply underwater borrower that is just postponing the inevitable by filing a series of futile bankruptcy petitions to hold up an undersecured creditor from realizing on its collateral, that is not the case in this Chapter 11 filing. The big picture amply demonstrates that this Chapter 11 Case is distinguishable from the ill-fated Chapter 11 filing in the *Nursery Land* case. The Debtor and TFEC have a legitimate interest in protecting the equity in the Elk Grove Event Center for the benefit of other creditors and to support the reorganization plans for TFEC and all of its Subsidiaries. iBorrow will not be harmed by the continued effect of the automatic stay because it is protected by a significant equity cushion in three different Event Centers.

The current managers of TFEC and its Subsidiaries now recognize that an isolated Chapter 11 case for a Subsidiary as a single asset real estate bankruptcy case can be misconstrued, when the reality is that TFEC and its Subsidiaries have always operated as a single economic unit, and their reorganization under bankruptcy protection should proceed through a

single consolidated bankruptcy case that addresses all of the issues associated with this consolidated business operation. For that reason, the current plan is to file a motion for substantive consolidation of TFEC and its Subsidiaries, which will address many of the concerns raised by iBorrow under its Section 362(d)(4) arguments and in its alternative Motion to Dismiss. The factors listed in the *Nursery Land* case will not apply to the consolidated group, which will have multiple assets, multiple creditors, a viable ongoing business with multiple employees, and a reasonable possibility of reorganization. Accordingly, the Debtor respectfully requests that iBorrow's alternative Motion to Dismiss be denied.

9. There is No Basis for Waiving the Requirements of Bankruptcy Rule 4001(a)(3).

iBorrow asserts that not only is it entitled to relief from the automatic stay under Section 362(d), but the 14 day stay period under Bankruptcy Rule 4001(a)(3) should also be waived because of the alleged "delay tactics" of Debtor TFEC and Debtor Elk Grove. See, Motion at p. 12. However, as shown above, iBorrow is significantly over-collateralized and is more than adequately protected by a significant equity cushion in the value of three Event Centers. While it is true that there will be some delay before iBorrow's liens are satisfied, that delay is inherent in the legitimate bankruptcy process, and actions taken to protect the Debtor's genuine and significant equity position in the Elk Grove Event Center for the benefit of other creditors can hardly be classified as unjustified "delay tactics." There is no basis for any waiver of any of the requirements of Bankruptcy Rule 4001(a)(3).

B. CONCLUSION

For the reasons set forth above, the Debtor respectfully submits that iBorrow's Motion for Relief from the Automatic Stay, and its alternative Motion to Dismiss with Prejudice, should both be denied.

DATED this 22nd day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2018, a true and correct copy of the foregoing document was electronically filed and therefore served via ECF on all parties that have entered an electronic appearance in this case.