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APR 17 2012

**CLERK U.S. BANKRUPTCY COURT
Central District of California
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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re:)	Case No. 2:09-bk-43263-PC
)	
SHALAN ENTERPRISES, LLC,)	Chapter 11
)	
Debtor.)	

In re:)	Case No. 2:09-bk-43499-PC
)	
ALAN RAPOPORT,)	Chapter 11
)	
Debtor.)	Jointly Administered Under
)	Case No. 2:09-bk-43263-PC

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
MOTION OF DEBTORS FOR AN ORDER
TO COMPEL THE PERFORMANCE OF
PERRY AND RITA KLEIN UNDER THE
SETTLEMENT AGREEMENT AND FOR
AN AWARD OF ATTORNEYS' FEES**

Date: February 22, 2012
Time: 9:30 a.m.
Place: United States Bankruptcy Court
Courtroom # 1539
255 East Temple Street
Los Angeles, CA 90012

Alan Rapoport ("Rapoport") and Shalan Enterprises, LLC ("Shalan") (collectively,
"Debtors") seek an award of attorneys' fees and costs incurred enforcing a Compromise and

1 Settlement Agreement (“Settlement”) executed by the Debtors and Perry Klein and Rita Klein
2 (the “Kleins”) on June 21, 2011 and approved by the court on July 11, 2011.¹ The Kleins filed
3 an untimely response in opposition to the Debtors’ Motion; and by an improperly noticed
4 counter-motion seek an award of attorneys’ fees and costs against the Debtors.² The court,
5 having considered the pleadings, evidentiary record,³ and arguments of counsel, makes the
6

7 ¹ On December 14, 2011, the Debtors filed and served their Motion for an Order to Compel the
8 Performance of Perry and Rita Klein Under the Settlement Agreement and for an Award of
9 Attorneys’ Fees (“Debtors’ Motion”) and set the matter for hearing on regular notice for January
4, 2012.

10 ² On December 28, 2011, the Kleins filed and served a 67-page Opposition to Motion of Debtors
11 for an Order to Compel the Performance of Perry and Rita Klein Under the Settlement
12 Agreement and for an Award of Attorneys’ Fees and Counter-Motion for Order to Compel
13 Debtors to Perform Under the Settlement Agreement and for an Award of Attorneys’ Fees and
14 Costs (“Opposition”). Kleins’ Opposition included the Declaration of David J. Winterton and
15 copies of certain documents identified as Exhibits A through H. Pursuant to LBR 9013-1(f), a
16 written response in opposition to the Debtors’ Motion was required to be filed and served on the
Debtors not later than December 21, 2011. “Papers not timely filed and served may be deemed
by the court to be consent to the granting or denial of the motion, as the case may be.” LBR
9013-1(h). The Kleins’ Opposition was not only untimely, but the Debtors were not given
proper notice of the relief sought by counter-motion in the Opposition.

17 ³ Debtors’ Motion was supported by the following declarations: (a) Declaration of Alexis M.
18 McGinness; (b) Declaration of Joseph A. Eisenberg; and (c) Declaration of Shelly Rapoport.
19 Debtors’ Motion stated that “Debtors will file a supplemental declaration concerning the amount
20 of the requested attorneys fees concurrently prior to the hearing on this Motion.” Debtors’
21 Motion 11:8-10. In their late-filed Opposition, the Kleins asserted that they had acted in good
22 faith and that it was, in fact, the Debtors’ fault that the Settlement had not been consummated.
23 On December 29, 2011, Debtors filed and served a reply to the Kleins’ Opposition supported by
24 the Supplemental Declaration of Joseph A. Eisenberg and the Declaration of Mark Ferrario.

25 At the hearing on January 4, 2012, the court considered the Kleins’ late-filed Opposition
26 to the Debtors’ Motion, ordered the necessary relief to permit consummation of the Settlement,
27 and continued the hearing on the Motion to February 22, 2012, solely with respect to the issue of
28 attorneys’ fees. On January 11, 2012, an Amended Order Re: Motion of Debtors for an Order to
Compel the Performance of Perry and Rita Klein Under the Settlement Agreement and for an
Award of Attorneys Fees was entered which required, in pertinent part, that: (a) Debtors’
counsel file and serve a declaration regarding attorneys’ fees and costs incurred in enforcing the
Settlement not later than January 27, 2012; (b) the Kleins file and serve a responsive declaration
not later than February 12, 2012, and (c) the Debtors file and serve a reply not later than
February 17, 2012.

1 following findings of fact and conclusions of law pursuant to F.R.Civ.P. 52(a),⁴ as incorporated
2 into FRBP 7052 and applied to contested matters by FRBP 9014(c); and based thereon, will
3 award the Debtors rents in the amount of \$4,013.65 and attorneys fees and costs in the amount of
4 \$20,000.

5
6
7 On January 27, 2012, Debtors filed the following declarations: (a) Declaration of Joseph
8 A. Eisenberg Regarding Attorneys' Fees and Costs in Support of: Motion of Debtors for an
9 Order to Compel the Performance of Perry and Rita Klein Under the Settlement Agreement and
10 for an Award of Attorneys' Fees ("Eisenberg Declaration"); and (b) Declaration of Mark
11 Ferrario Regarding Attorneys' Fees and Costs in Support of: Motion of Debtors for an Order to
12 Compel the Performance of Perry and Rita Klein Under the Settlement Agreement and for an
13 Award of Attorneys' Fees ("Ferrario Declaration"). On February 10, 2012, the Kleins filed and
14 served the following declarations: (a) Affidavit of Christy Franks in Support of Opposition to
15 the Motion for an Order to Compel the Performance of Perry and Rita Klein Under the
16 Settlement Agreement and for an Award of Attorneys' Fees and in Support of Creditor Rita and
17 Perry Kleins' Counter-Motion for Attorneys' Fees and Costs ("Franks Affidavit"); and (b)
18 Declaration of David J. Winterton in Support of Opposition to the Motion for an Order to
19 Compel the Performance of Perry and Rita Klein Under the Settlement Agreement and for an
20 Award of Attorneys' Fees and in Support of Creditor Rita and Perry Kleins' Counter-Motion for
21 Attorneys' Fees and Costs ("Winterton Declaration"). On February 17, 2012, the Debtors filed a
22 Reply to: Declaration of David J. Winterton and Affidavit of Christy Franks in Support of
23 Opposition to the Motion for an Order to Compel the Performance of Perry and Rita Klein Under
24 the Settlement Agreement and for an Award of Attorneys' Fees and in Support of Creditor Rita
25 and Perry Kleins' Counter-Motion for Attorneys' Fees and Costs ("Debtors' Reply"). In their
26 reply, the Debtors raised 79 specific evidentiary objections to statements contained in the
27 Winterton Declaration and further responded that Winterton's statements were false and
28 misleading. The court grants the Debtors' Motion to Strike "Reply to the Debtor's Opposition to
Rita and Perry Kleins' Countermotion for Attorneys Fees and Costs filed February 22, 2012" as
untimely. The Debtors and the Kleins, having consented to have the matter determined without
an evidentiary hearing, overrules the Debtors' objections to the Winterton Declaration. The
Debtors' objections are directed primarily at the weight and veracity, rather than the
admissibility, of Winterton's testimony. The court has given the Winterton Declaration
appropriate weight in determining the disputed issues raised by the competing motions.

⁴ Unless otherwise indicated, all "Code," "chapter" and "section" references are to the
Bankruptcy Code, 11 U.S.C. §§ 101-1330 after its amendment by the Bankruptcy Abuse
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). "Rule"
references are to the Federal Rules of Bankruptcy Procedure ("FRBP"), which make applicable
certain Federal Rules of Civil Procedure ("F.R.Civ.P."). "LBR" references are to the Local
Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California
("LBR").

I. FINDINGS OF FACT

1
2 1. On June 21, 2011, Debtors filed and served a Motion of Debtors in Possession for an
3 Order Authorizing the Execution and Performance of Settlement Agreement and Compromise of
4 Controversy Pursuant to Bankruptcy Rule 9019 (“Settlement Motion”).

5 2. On June 21, 2011, Debtors filed and served a Notice of Filing of Motion of Debtors in
6 Possession for an Order Authorizing the Execution and Performance of Settlement Agreement
7 and Compromise of Controversy Pursuant to Bankruptcy Rule 9019, and gave 14-days notice to
8 parties in interest of an opportunity to object and request a hearing on the Settlement Motion.

9 3. No creditor or other party in interest filed an objection to the Settlement Motion nor
10 requested a hearing thereon.

11 4. On July 11, 2011, an Order Authorizing the Execution and Performance of Settlement
12 Agreement and Compromise of Controversy Pursuant to Bankruptcy Rule 9019 was entered in
13 the case which granted the Settlement Motion, approved the Settlement, and provided, in
14 pertinent part, that the “Debtors are authorized to execute and perform the terms of the
15 Agreement, including the transfers of property of the estate, the payment of monies and the
16 exchange of releases, as specified in the Agreement.”⁵

17 5. Article 1 of the Settlement entitled “**Incorporation/Settlement Consideration**”
18 requires the Debtors to pay to the Kleins the sum of \$4,750,000 consisting, among other things,
19 of a transfer of 10 parcels of real property and a cash payment of not less than \$500,000, as more
20 particularly set forth therein. Section 1.2.3.2 of the Settlement states, in pertinent part, that the
21 consideration for the Settlement includes “all rents that are received and allocable to periods
22 following the Closing Date” Debtors’ Motion, Ex. 1 at 20

23 6. Section 4.1 of the Settlement entitled “**Closing Date**” provides that: “Unless
24 otherwise agreed by the Parties in writing, or extended by the provisions of section 2.3.6, the
25 Closing of the transaction contemplated by this Agreement (“Closing”) shall occur not later than
26

27
28 ⁵ Order Authorizing the Execution and Performance of Settlement Agreement and Compromise
of Controversy Pursuant to Bankruptcy Rule 9019 entered on July 11, 2011, Dkt # 262, 3:4-6.

1 July 31, 2011.” Id. at 23. However, Section 4.1 did not contemplate a final closing date until
2 November 21, 2011, when the Settlement required the Debtors to “irrevocably transfer to Kleins
3 (i) the remaining Excluded Parcel; or (ii) the Settlement Value of such Excluded Parcel” in
4 accordance with the Settlement. Id. The Debtors were also required to “pay the remaining
5 balance of the Cash Portion” on or before November 21, 2011. Id.

6 7. Section 4.5 of the Settlement entitled “**Conditions to Closing**” states, in pertinent
7 part, that “[c]losing shall be conditioned upon the following . . .

8 4.5.4 **Delivery of Documents by Kleins.** The delivery by Kleins to escrow of
9 all documents and things which this Agreement obligates Kleins to deliver to Escrow,
10 including, but not limited to, the following documents, which shall have no binding effect
11 until [the Debtors] have fully performed their obligations set forth herein, which
performance shall be a condition precedent to the binding effect.

12 4.5.4.1 **Dismissal of Lawsuit.** Such pleadings, duly executed, in form and in
13 substance necessary and appropriate to dismiss the Lawsuit⁶ and any proceedings
14 pending therein and related thereto;

15 4.5.4.2 **Dismissal and Withdrawal of Bankruptcy Court Pleadings.** Such
16 pleadings, duly executed, in form and in substance necessary and appropriate to withdraw
17 any pleadings, claims, demands, and set aside and avoid any orders emanating therefrom,
18 filed by or on behalf of Kleins in the Bankruptcy Case.

19 4.5.4.3 **Release of Security.** The execution and delivery by Kleins to the
20 Escrowholder of (a) a stipulation for the release of all such pledges and for the relief from
21 all orders respecting transfer of assets, and (b) a release and reconveyance of all
22 consensual and judicial liens recorded by Kleins with respect to any and all of [the
23 Debtors’] assets. The Releases shall be deposited into escrow to be released only at
24 Closing. If the Closing shall not occur for any reason, the Releases shall be null and void
25 and of no further effect.

26 4.5.4.4 **Release of Interest in 2 Rue Allard.** Such documents as may be
27 necessary and appropriate to release any interests and any purported interests of Kleins in
28 or to the real property commonly known as 2 Rue Allard, Henderson, Nevada 89011.

⁶ Case No. A478057, styled Klein v. Rapoport, et al., in the District Court, Clark County, Nevada.

1 Id. at 24-25. Section 4.5 does not state whether the conditions apply to the closing date of July
2 31, 2011, set forth in § 4.1 or one of the other dates – September 21, 2011, October 21, 2011, or
3 November 21, 2011, set forth in §§ 4.1(b) –(d), respectively.

4 8. Section 5.2 of the Settlement entitled “**Rent Collections**” states: “[The Debtors] agree
5 that in the event that the [Debtors] or any affiliate of the [Debtors] receives any rental payment
6 or other payment from any tenant or other occupant or user of any of the Agreed Settlement
7 Parcels for such tenant’s or occupant’s use and occupancy from and after Closing, and with
8 respect to an Excluded Parcel, from and after the date upon which such Excluded Parcel is to be
9 transferred to Kleins, the [Debtors], not later than two (2) business days following receipt of such
10 funds, will deliver such funds to Kleins or Kleins’ designee, with all necessary and proper
11 endorsements.” Id. at 27 (emphasis added).

12 9. Section 1.2.3.2 entitled **Inclusion with Transfer of Settlement Proceeds**, states in
13 pertinent part, that: “The transfer of the Agreed Settlement Parcels shall include . . . all right,
14 title, and interest of the Rapoport Parties as lessor in all leases, licenses, and other agreements to
15 occupy all or any part of an Agreed Settlement Parcel, together with all rents and other sums to
16 become due under such lease, license, and agreement, all rents that are received and allocable to
17 periods following the Closing Date (as hereinafter defined) Id. at 19-20 (emphasis added).

18 10. Section 10.9 of the Settlement entitled “**Attorneys Fees and Costs**” states: “Each of
19 the Parties shall bear its own costs. If any action is commenced to enforce the terms of this
20 Agreement, the prevailing party shall be entitled to recover all of its expenses relating to such
21 action, including without limitation, their reasonable attorney fees and costs.” Id. at 31.

22 11. Seven of the 10 Agreed Settlement Parcels were to be transferred to the Kleins, or
23 their designee, on July 31, 2011, pursuant to the Settlement. The closing did not occur until
24 August 31, 2011.

25 12. The delay in the closing on the first 7 Agreed Settlement Parcels was attributable to
26 action or inaction by both the Debtors and the Kleins.

27 13. According to Winterton’s letter dated August 5, 2011, there were only 2 of the 7
28 properties ready to close on July 31, 2011. Winterton Decl., Ex. T.

1 14. Resolute Property Management, LLC, the Kleins' designee to which the 7 properties
2 were to be transferred at close of escrow, was not registered by the Kleins as a business entity
3 with the State of California until August 11, 2011. Debtors' Reply, Ex. 24 at 34.

4 15. First American Title Company ("First American"), the escrow holder, did not have
5 funds from the Debtors to consummate a timely closing on July 31, 2011. Franks Affidavit, Ex.
6 E. First American did not receive sufficient funds from the Debtors to close escrow on the first 7
7 Agreed Settlement Parcels until August 30, 2011. Id. Ex. O

8 16. Pursuant to § 4.2 of the Settlement, Rapoport demanded a Full Reconveyance of the
9 Kleins' lien on certain real property at 5834 Cape Horn Drive, Agoura Hills, California,
10 identified as an "Excluded Parcel" in § 1.2.5 of the Settlement, in conjunction with close of
11 escrow. This was not one of the 7 Agreed Settlement Parcels in escrow. The Full Reconveyance
12 was not received by First American Title Company until August 31, 2011. Id. Ex. Q.

13 17. Pursuant to § 4.5.4.4 of the Settlement, Rapoport also demanded a Release of Lien
14 from the Kleins releasing their judgment lien on the real property at 2 Rue Allard, Henderson,
15 Nevada. This was not one of the 7 Agreed Settlement Parcels in escrow. The Release of Lien
16 was not received by First American Title Company until August 26, 2011. Id. Ex. K.

17 18. The Kleins began collecting rents from tenants of the first 7 Agreed Settlement
18 Parcels in anticipation of the July 31, 2011, closing date specified in the Settlement. The
19 Debtors dispute that Kleins are entitled to any rents attributable to the first 7 Agreed Settlement
20 Parcels prior to the actual closing date of August 31, 2011.

21 19. By email dated August 29, 2011, Darlene W. Sanders of First American ("Sanders")
22 advised Joseph A. Eisenberg ("Eisenberg") and David J. Winterton ("Winterton"): "PLEASE
23 BE ADVISED THAT THE RENT STATEMENT PROVIDED BY ALAN IN CONNECTION
24 WITH ALL 7 ESCROW'S IS THE BASIS FOR THE RENT PRORATION IN ESCROW. IN
25 THE EVENT WE CLOSE ESCROW 8/31/2011, THERE WILL BE NO RENT PRORATIONS .
26 .. ATTORNEY'S PLEASE DISCUSS THE RENT ISSUES OUTSIDE OF ESCROW AND
27 LET ME KNOW WHEN TO EXPECT THE BALANCE OF FUNDS TO CLOSE OR WHEN
28

1 YOU BOTH ANTICIPATE CLOSING ALL 7 ESCROW. THE DEMANDS WILL BE
2 EXPIRED AFTER 8/31/2011.” Id. Ex. L.

3 20. By email dated August 30, 2011, Sanders advised Eisenberg and Winterton: “I
4 MUST have the balance of funds from Alan TODAY for recording 8/31/11. Alan, please sign
5 and return ALL the estimates that I provided to you for review. I will advise ALL parties when I
6 receive the balance of funds to close, TOGETHER with an email from Alan, authorizing me to
7 close ALL 7 escrow.” Id. Ex. N.

8 21. By email dated August 30, 2011, Eisenberg advised Sanders that “[w]e are a go for
9 closing the 7 escrows [on August 31, 2011]” and that “[Winterton] and I will hand the rents
10 reconciliation post-closing.” Id. Ex. O.

11 22. After closing on the first 7 Agreed Settlement Parcels on August 31, 2011, the
12 Debtors selected the real property at 552 Highview, Newbury Park, California (“Highview
13 Property”), as the “Excluded Parcel” to transfer to the Kleins pursuant to § 4.1(b) of the
14 Settlement, and the Debtors and Kleins sought to timely close escrow on the Highview Property
15 by September 21, 2011. However, the Highview Property did not close until September 30,
16 2011.

17 23. The delay in the closing on the 8th property was not necessarily attributable to action
18 or inaction by either the Debtors or the Kleins.

19 24. By email dated September 16, 2011, Sanders advised Rapoport, the Kleins and
20 Winterton: “We will NOT be in a position to close 9/21/11. The Payoff information was
21 provided on Wednesday 9/14/2011 and Wells Fargo Bank informed us that there will be a 7-10
22 day turnaround for the payoff demand.” Id. Ex. V.

23 25. By email dated September 26, 2011, Christy Franks (“Franks”), Winterton’s
24 paralegal, advised Eisenberg: “Per Mr. Winterton, we need the Buyer’s Settlement Statement
25 changed before Perry Klein will sign it. We were supposed to close by the 21st of September,
26 therefore, he wants the rent paid prorated from this date, not 9/29/11 as the statement shows.”
27 Id. Ex. W.
28

1 26. However, Debtors and the Kleins agreed that the Highview Property should close
2 and that the parties would reserve their rights with respect to a reconciliation of the rents
3 collected from the Highview Property for resolution at a later date. Id.

4 27. Debtors “agree that the Kleins are entitled to the prorated rents for the period of
5 September 21, 2011 – September 29, 2011 in the amount of \$690.13. The Kleins received the
6 pro-rated portion of rent for September 30, 2011 as part of the escrow closing.” Debtors’ Reply
7 6:25-7:3.

8 28. After closing on the Highview Property, the Debtors selected the real property at
9 5832 Capehorn, Agoura Hills, California (“Capehorn Property”), as the “Excluded Parcel” to
10 transfer to the Kleins pursuant to § 4.1(c) of the Settlement, and the Debtors and Kleins timely
11 closed on the Capehorn Property by October 21, 2011. The rent on the Capehorn Property was
12 pro-rated to the date of closing.

13 29. The remaining Excluded Parcel to be transferred to the Kleins pursuant to § 4.1(d) of
14 the Settlement was the real property at 166 Walter, Newbury Park, California (“Walter
15 Property”). The Walter Property was to close on or before November 21, 2011.

16 30. By email dated October 21, 2011, Eisenberg advised Winterton that the final transfer
17 would occur on November 21, 2011, and that “[i]n order to effectuate the final transfer, it will be
18 necessary to have in our (or escrow’s) possession a number of documents and pleadings required
19 of Klein, including the withdrawal of the Klein bankruptcy claims, the withdrawal of the Klein
20 plan and disclosure statement and the vacation of the other orders obtained by Klein in the
21 bankruptcy case. Lien relapses and other dismissal documents appertaining to the Nevada
22 litigation and the Nevada judgment are also required . . . ,” as well as “an accounting of rents
23 collected by Klein from the Settlement properties and a reconciliation of who is entitled to which
24 rents.” Debtors’ Motion, Ex. 3 at 45.

25 31. By email to Winterton dated November 1, 2011, Eisenberg specifically enumerated
26 the documents necessary to a closing on November 21, 2011, and a final consummation of the
27 Settlement with the Kleins. Eisenberg stated: “We need:

- 28 1. A pleading withdrawing the Klein proof of claim in the bankruptcy cases.

- 1 2. A pleading withdrawing the Klein plan.
- 2 3. A pleading withdrawing the Klein disclosure statement.
- 3 4. A pleading dismissing the Nevada state court action.
- 4 5. A satisfaction of judgment with respect to the Nevada litigation.
- 5 6. Whatever is necessary to release and expunge any liens arising from the Nevada
- 6 litigation and the judgment which issued therefrom.
- 7 7. An accounting of rents collected and dates of such collections by Klein from the
- 8 Settlement Houses.” Id. Ex. 4 at 46.

9 Eisenberg further stated: “Obviously, there may be additional information and documentation to
10 bring closure to this matter. Please do not delay providing the necessary documents and
11 pleadings (which will be held in trust) and the accounting (without which the final cash payment
12 cannot be determined). Id. at 47.

13 32. On November 2, 2011, Winterton sent an email to Eisenberg, stating:

14 We are working on our final accounting to give you. We hope to have it completed by
15 Friday. Once that accounting issue is done, we will go ahead with all of the other issues.
16 We have already prepared the satisfaction of judgment. We had prepared a withdraw of
17 the disclosure statement and plan. The satisfaction of judgment will release any and all
18 liens that should be out there. I know the issue is going to be with rent. According to the
19 tenants, they paid Alan. We have had to start eviction proceeding against two tenant for
20 not paying anything. I will have the accounting to you this week. Have a good day.

21 Id. at 46.

22 33. By email dated November 10, 2011, Sanders advised Franks: “I have an email
23 indicating that the November rents have been collected! I am waiting on the revised Rent Roll?”
24 Franks Affidavit, Ex. GG.

25 34. By email dated November 11, 2011, Rapoport advised Franks and Sanders: “Until
26 all rents from ALL 10 houses are reconciled Christy’s comments below are not to be answered.
27 FAT has nothing to do with ANY of the needed legal documents rents, releases, liens lifted,
28 court docs required ect ect. Christy you are just a small fish in a big pond on this closing.
Darlene please do not respond on any questions from Christy on any issues until DW has met all
the required paperwork that JMBM has requested. Thx A.” Id.

1 35. By email dated November 18, 2011, Eisenberg advised Winterton:

2 David: Once again we are the last minute and we have not heard from you nor have we
3 received the requisite documents and information. Among other things, we have not
4 received:

- 5 1. The accounting of rents collected by Klein;
- 6 2. The withdrawal of the various Klein pleadings in the bankruptcy cases;
- 7 3. The dismissal of the Nevada State court action, satisfaction of judgment and
8 release of all liens in connection therewith.

9 Debtors' Motion, Ex. 5 at 48.

10 36. On November 16, 2011, Debtors filed their Amended Joint Chapter 11 Plan Dated
11 November 1, 2011 [Dkt. # 325] and Amended Disclosure Statement Re Joint Chapter 11 Plan
12 Dated November 1, 2011 [Dkt. # 326] in the case.

13 37. By letter dated November 18, 2011, Eisenberg sent Winterton the solicitation
14 package regarding Debtors' Amended Joint Chapter 11 Plan of Reorganization ("Plan") which
15 included notice of the confirmation hearing on January 4, 2012, the deadline of December 21,
16 2011, to file an objection to confirmation, and a ballot either accepting or rejecting the proposed
17 Plan. Id. Ex. 6 at 49-52.

18 38. By email to Winterton dated November 20, 2011, Eisenberg stated:

19 David: It is the day before we are scheduled to close the Klein settlement and I have still
20 not received the necessary documents and pleadings from you. In fact, your recent radio
21 silence makes it impossible to understand how you intend to bring this matter to closure.
I again ask that you provide me with the materials necessary to finalize this matter.

22 Id. Ex. 7 at 53.

23 39. By email to Eisenberg dated November 21, 2011, Winterton responded that the only
24 issue was rent, stating "[w]e have signed all closing documents and sent it back to escrow." Id.
25 Ex. 8 at 54.

26 40. By email to Winterton dated November 21, 2011, Eisenberg replied that "[w]e have
27 confirmed with escrow that, although it is prepared to close on the final property, they have not
28 received from you any of the pleadings and documents due from your side to close the

1 settlement. As we have not received the documents either, it is your side that is precluding the
2 consummation of the arrangement.” Id.

3 41. By email to Sanders dated November 21, 2011, Franks stated: “Mr. Winterton wants
4 to know if we are going to close today.” Franks Affidavit, Ex. JJ.

5 42. By email to Franks dated November 21, 2011, Sanders responded: “NO! I have
6 instructions from the Seller not to close until he gives me permission.” Id.

7 43. On November 22, 2011, Franks emailed a letter to Alexis M. McGinness
8 (“McGinness”) enclosing the following:

- 9 a. A pleading withdrawing the Kleins’ proof of claim.
- 10 b. A pleading withdrawing the Kleins’ plan
- 11 c. A pleading withdrawing the Kleins’ disclosure statement.
- 12 d. A pleading dismissing the Nevada state court action.
- 13 e. A satisfaction of judgment with respect to the Nevada litigation.
- 14 f. A release and expunge of any liens
- 15 g. An accounting of the rents.

16 Debtors’ Motion, Ex. 9 at 59-60.

17 44. On November 22, 2011, the Kleins filed the following documents in the bankruptcy
18 case: (a) Withdrawal of the Klein’s Disclosure Statement [Dkt. # 333]; (b) Withdrawal of the
19 Klein’s Plan of Reorganization [Dkt. # 334]; and (c) Withdrawal of Hearing to Consider
20 Adequacy of Disclosure Statement [Dkt. # 335].

21 45. By letter dated November 22, 2011, Winterton transmitted the “Klein Rent
22 Accounting” to Eisenberg. The Klein Rent Adjustment reflects adjustments attributable to 10
23 properties between August 21, 2011 and November 21, 2011, aggregating in the sum of
24 \$5,753.72: (a) \$4,974.69 in prorated rent attributable to a 10-day delay in the closing of escrow
25 on 7 properties in August 2011; (b) \$690.03 in prorated rent attributable to a 9-day delay in
26 closing of escrow on 1 property September 2011; and (c) \$89.00 in fees incurred by tenants and
27 deducted from September rent payable to the Kleins after the tenants stopped payment of
28

1 September rent checks initially sent to the Debtors on three properties that closed on August 31,
2 2011. Id. at 63.

3 46. By letter dated November 23, 2011, Eisenberg advised Winterton that the Debtors
4 were ready, willing and able to close on November 21, 2011, but that the Settlement could not be
5 finally consummated because the documents requested of the Kleins as early as October 21,
6 2011, had not been provided. Eisenberg notified Winterton of the Debtors' specific objections to
7 the Kleins' rent reconciliation delivered on November 22, 2011. Eisenberg also advised
8 Winterton of the need to submit a further reconveyance of the Deed of Trust and Assignment of
9 Rents and Request for Special Notice encumbering 5883 Capehorn Drive, Agoura Hills,
10 California, due to an incorrect street address, and that the Debtors' Nevada counsel, Mark
11 Ferrario ("Ferrario"), would be sending him a revised satisfaction of judgment due to problems
12 with the form of satisfaction provided by the Kleins. Id. Ex. 10 at 74-77.

13 47. In the letter dated November 23, 2011, Eisenberg claimed that the Kleins were not
14 entitled to any prorated rent for the 7 properties that closed on August 31, 2011, stating that the
15 "cause for the delay was partially as a result of the Klein's failure to deliver appropriate releases
16 to the appropriate escrow agent." Id. at 74 (emphasis added). Eisenberg also stated that "Fees
17 for 'stopping payments' are not payable to the Kleins," adding that "[s]hould any tenant assert
18 that he/she has a claim for reimbursement of such an expense, that tenant is entitled to submit a
19 request to this office for reimbursement." Id. at 75. Eisenberg stated that the Debtors had no
20 dispute as to the remaining 3 properties, and calculated that the rent due to the Kleins for all
21 properties as of November 28, 2011, was (\$1,248.07). Id. at 76.

22 48. By email dated November 29, 2011, Eisenberg advised Winterton that the
23 Satisfaction of Judgment provided by the Kleins was defective and that Ferrario would be
24 sending him a revised satisfaction of judgment and proposed dismissal order. Id. Ex. 11 at 79.

25 49. By email dated December 2, 2011, Mark Ferrario sent Winterton the following
26 documents: (a) Stipulation and Order for Dismissal of Defendants Alan Rapoport and Shelley
27 Rapoport, Individually and as Trustees of the Alan and Shelley Rapoport Family Trust Dated
28

1 October 15, 1999; Ashley Rapoport, and Shalan Enterprises, LLC, With Prejudice (“Dismissal
2 Order”); and (b) Satisfaction of Judgment. Id. Ex. 2 at 38-43.

3 50. On December 2, 2011, the Kleins filed the following documents in the bankruptcy
4 case: (a) Notice of Breach of Settlement Agreement with Kleins [Dkt. # 337]; and (b) Objection
5 to Confirmation of Amended Joint Plan of Reorganization Dated November 21, 2011 [Dkt. #
6 338].

7 51. By letter dated and emailed on December 5, 2011, Eisenberg responded to
8 Winterton’s letter dated December 1, 2011, reiterating that a final closing and consummation of
9 the Settlement hinged upon receipt from the Kleins of (a) a Full Reconveyance of the deed of
10 trust encumbering 5883 Capehorn Drive, Agoura Hills, California; (b) execution of the
11 Satisfaction of Judgment and Dismissal Order sent by Ferrario to Winterton on December 2,
12 2011; and (c) resolution of the rent issue. Id. Ex. 12 at 81-83.

13 52. By letter dated and emailed on December 8, 2011, Eisenberg again advised
14 Winterton that the Debtors were ready, willing and able to close on the final property subject to
15 receiving the following: (a) the Full Reconveyance of the deed of trust encumbering 5883
16 Capehorn Drive, Agoura Hills, California; (b) execution of the Satisfaction of Judgment and
17 Dismissal Order sent by Ferrario to Winterton on December 2, 2011; (c) resolution of the rent
18 issue; (d) Kleins’ sign-off on the December rent roll; and (e) withdrawal of the objection to
19 confirmation filed on December 2, 2011. Id. Ex. 13 at 86-87. Eisenberg concluded by stating:
20 “Please prepare and execute a Withdrawal of the Objection and return the Withdrawal to me, to
21 be held in trust pending the transfer of the 10th house and remaining cash portion of the
22 settlement consideration.” Id. at 87.

23 53. Debtors’ Motion was filed on December 14, 2011, and set the matter for hearing on
24 January 4, 2012, in conjunction with the hearing on confirmation of Debtors’ Plan.

25 54. The executed Satisfaction of Judgment for the Lawsuit was delivered to Ferrario on
26 December 16, 2011.

27 55. The executed Dismissal Order was delivered to Ferrario on December 16, 2011.

28 56. Kleins voted to reject the Debtors’ Plan.

1 57. At a hearing on January 4, 2012, the court overruled the Kleins' objection to the
2 Debtors' Plan noting that: (a) the Kleins' objection did not allege that the Plan failed to comply
3 with any specific confirmation requirement of § 1129; (b) the Kleins' objection did not allege
4 nor establish that the Plan violated, or sought to modify, the terms of the Settlement; (c) the
5 Kleins' objection did not otherwise question the treatment of Kleins' claim in Class 9; and (d)
6 the Kleins' objection did not question the feasibility of the plan.

7 58. On January 5, 2012, an Order Confirming Amended Joint Chapter 11 Plan of
8 Reorganization Dated November 1, 2011 was entered in the case. [Dkt. # 350].

9 59. On January 9, 2012, an Amended Order Re: Motion of Debtors for an Order to
10 Compel the Performance of Perry and Rita Klein Under Settlement Agreement and for an Award
11 of Attorneys' Fees was entered in the case which provided, in pertinent part, that:

12 a. No later than January 11, 2012, or within three (3) days of entry of this Order,
13 whichever is later, Debtor will transfer to the Kleins or the Kleins' designee, through the
14 pending escrow at First American Title Company (the "Escrow"), the property identified
15 as 166 Walter Avenue, Agoura Hills, California (the "Walter Ave. Property") and the
16 balance of the Cash Portion of the Total Settlement Consideration (less the Reserve) due
17 the Kleins under the Settlement Agreement, plus the January rent pro-rated as of the date
18 of closing for the Walter Ave. Property, provided, however, the escrow holder shall
19 withhold, retain and not distribute to the Kleins the amount of \$30,000 of the funds
20 heretofore deposited therein by Debtors (the "Reserve").

21 b. The Reserve shall remain in Escrow pending further order of this Court.

22 c. The Kleins' deed of trust encumbering the real property located at 5883 Capehorn,
23 Agoura Hills, California is hereby released, and Debtor is authorized to record the Full
24 Reconveyance.

25 d. Upon the transfer of the Walter Ave. Property and the balance of the Cash Portion,
26 Debtor is hereby authorized to file and, as appropriate record, the (1) Satisfaction of
27 Judgment and (2) Stipulation and Order of Dismissal of the State Court Action.

28 [Dkt. # 352]. The court continued the Debtors' Motion to February 22, 2012, for a hearing "to
determine whether and to whom (1) outstanding rents are due and (2) attorneys' fees and costs
may be awarded."

60. The Settlement is fully consummated, except for (a) the issue of the rent
reconciliation and (b) the issue of attorneys' fees and costs.

1 61. The rent dispute between the Debtors and the Kleins centers on the pro-ration of rent
2 for the first 7 Agreed Settlement Parcels that were transferred at closing on August 31, 2011.

3 62. At the hearing on January 4, 2012, the Kleins asserted that the total rents due by the
4 Debtors for all properties is \$5,732.72 based upon the original Rent Reconciliation dated
5 November 22, 2011.

6 63. Debtors objected to the Kleins' original Rent Reconciliation on November 23, 2011,
7 claiming that the Kleins were not entitled to any proration of rent attributable to the first 7
8 Agreed Settlement Parcels, and that they were entitled to reimbursement from the Kleins for
9 \$2,100 in August rent paid to the Kleins on 13 Marty Court, Newbury Park, California. Debtors
10 conceded that the Kleins were entitled to \$690.03 in pro-rated rent on the Highview Property,
11 and \$161.80 in pro-rated rent for the Walter Property based on an anticipated closing date of
12 November 28, 2011. Debtors claimed that the total rents due to the Kleins for all properties as of
13 November 28, 2011, was (\$1,248.07). Debtors' Motion, Ex. 10 at 75.

14 64. At the hearing on January 4, 2012, the Debtors asserted that Shalan, rather than the
15 Kleins, is due the sum of \$4,013.65 based upon a Rent Reconciliation prepared by Shelley
16 Rapoport and attached as Exhibit 15 to the Debtors' Motion. In Exhibit 15, the Debtors claimed
17 that the following pro-rated rent was due from the Kleins on the first 7 Agreed Settlement
18 Parcels for the month of August 2011 totaling \$4,703.68 -- \$2,032.26 in rent for 13 Marty
19 Court, Newbury Park, California; \$2,177.42 in rent for 30865 Overfall, Westlake Village,
20 California; and \$494.00 for 21981 Sundowners, Lake Forest, California.

21 65. Debtors seek an award of attorneys' fees in the amount of \$30,919.50 for 72.70 hours
22 of legal services rendered by Jeffer Mangels Butler & Mitchell LLP ("JMBM"), through its
23 attorneys Eisenberg and McGinnis, between October 21, 2011 and January 11, 2012, in its
24 efforts to compel the Kleins to perform under the Settlement. The legal services for which
25 JMBM seeks compensation are documented by a statement included as Exhibit 20 to the
26 Eisenberg Declaration. Exhibit 20 reflects the work performed by JMBM on behalf of the
27 Debtors documented by (a) the date the service was performed; (b) the attorney who performed
28 the service; (c) a description of the task performed; and (d) the time expended in performing the

1 service recorded in increments of 1/10th of an hour. Exhibit 20 does not reflect the hourly rate
2 of either Eisenberg or McGinnis. Debtors seek an additional award of \$6,000 in estimated
3 attorneys' fees incurred by JMBM through a hearing on the Debtors' Motion and \$900 in
4 attorneys' fees incurred by Ferrario preparing the Satisfaction and Dismissal Order, for a total of
5 \$37,819.50.

6 66. The Kleins seek an award of attorneys' fees in the amount of \$53,670.00 for 145.55
7 hours of legal services rendered by David J. Winterton & Associates, Ltd. between August 2,
8 2011 and December 15, 2012, in their efforts to compel the Debtors to perform under the
9 Settlement. The legal services for which the Winterton firm seeks compensation are documented
10 by a statement included as Exhibit EE to the Winterton Declaration. Exhibit EE reflects the
11 work performed by Winterton on behalf of the Kleins at an hourly rate of \$400 per hour
12 documented by (a) the date the service was performed; (b) the attorney who performed the
13 service; (c) a description of the task performed; and (d) the time expended in performing the
14 service recorded in increments of 1/10th of an hour. The Kleins also seek an award of costs
15 itemized in Exhibit EE in the amount of \$1,438.87 and an additional award of \$5,000 in
16 estimated attorneys' fees incurred by Winterton through a hearing on the Debtors' Motion, for a
17 total of \$60,108.87.

18 II. CONCLUSIONS OF LAW

19 1. The court has jurisdiction to hear and consider the Debtors' Motion pursuant to 28
20 U.S.C. § 1334.

21 2. Debtors' Motion is a core proceeding under 28 U.S.C. § 157(b)(2)(A) & (O).

22 3. Venue is appropriate in this court.

23 4. The court has inherent power to enforce a settlement agreement between the parties in
24 a pending case. Dacanay v. Mendoza, 573 F.2d 1075, 1078 (9th Cir. 1978). "A bankruptcy
25 court, as a court of equity, likewise possesses the power to summarily enforce settlements." In re
26 City Equities Anaheim Ltd., 22 F.3d 954, 958 (9th Cir. 1994) (citing In re Springpark Assocs.,
27 623 F.2d 1377, 1380-81 (9th Cir.), cert. denied, 449 U.S. 956 (1980)).
28

1 5. “In the United States, the prevailing litigant is ordinarily not entitled to collect a
2 reasonable attorneys’ fee from the loser.” Alyeska Pipeline Serv. Co. v. Wilderness Soc’y., 421
3 U.S. 240, 247 (1975). “Without some statutory or other exception to the American Rule,
4 prevailing parties generally do not recover attorneys’ fees.” Cann v. Carpenters’ Pension Trust
5 for N. Cal., 989 F.2d 313, 315 (9th Cir. 1993).

6 6. “When a bankruptcy court adjudicates a dispute arising from a contract claim, it must
7 apply state law unless the bankruptcy code provides otherwise.” In re New England Fish Co.,
8 749 F.2d 1277, 1280 (9th Cir. 1984) (citing Matter of Sparkman, 703 F.2d 1097, 1099 (9th
9 Cir.1983)). California Civil Code § 1717(a) provides:

10 In any action on a contract, where the contract specifically provides that attorney’s
11 fees and costs, which are incurred to enforce that contract, shall be awarded either
12 to one of the parties or to the prevailing party, then the party who is determined to
13 be the party prevailing on the contract, whether he or she is the party specified in
the contract or not, shall be entitled to reasonable attorney’s fees in addition to
other costs.

14 C.C. § 1717(a). Under § 1717(b), “[t]he court may also determine that there is no party
15 prevailing on the contract for purposes of this section.” C.C. § 1717(b) (emphasis added).
16 “Typically, a determination of no prevailing party results when both parties seek relief, but
17 neither prevails, or when the ostensibly prevailing party receives only a part of the relief sought.”
18 Deane Gardenhome Assn. v. Denktas, 13 Cal.App.4th 1394, 1398 (1993). “In other words, the
19 judgment is considered good news and bad news as to each of the parties.” Id. (internal citations
20 and quotations omitted).

21 7. “By contrast, when the results of the litigation on the contract claims are not mixed—
22 that is, when the decision on the litigated contract claims is purely good news for one party and
23 bad news for the other—the Courts of Appeal have recognized that a trial court has no discretion
24 to deny attorney fees to the successful litigant.” Hsu v. Abbara, 9 Cal.4th 863, 875-76 (1995).
25 “Thus, when a defendant defeats recovery by the plaintiff on the only contract claim in the
26 action, the defendant is the party prevailing on the contract under section 1717 as a matter of
27 law.” Id. at 876 (citations omitted).
28

1 8. With respect to the rent reconciliation, the Debtors and the Kleins dispute each others'
2 calculations on the first 7 Agreed Settlement Parcels. Kleins claim they are entitled to rents from
3 the closing date of July 31, 2011 set forth in § 4.1 of the Settlement. Debtors claim that the
4 Kleins are not entitled to rent prior to the actual closing date of August 31, 2011. The Debtors,
5 not the Kleins, were the owners of each of the 7 Agreed Settlement Parcels prior to an actual
6 closing under the Settlement, and responsible for taxes, insurance, maintenance and other
7 expenses attributable to each of the properties prior to a closing.

8 9. Each party blames the other for the delay in close of escrow until August 31, 2011.
9 However, the delay was attributable to the action or inaction of both the Kleins and the Debtors.
10 Section 4.1 expressly states that the closing shall occur no later than July 31, 2011, “[u]nless
11 otherwise agreed by the Parties in writing.” Neither party declared a breach of the Settlement on
12 July 31, 2011, and walked the deal. The evidentiary record is replete with evidence that the
13 Debtors and the Kleins at least tacitly consented to move forward, notwithstanding the delay in
14 closing, and worked to consummate a closing by August 31, 2011. Under the Settlement, the
15 Kleins were not entitled to rents from the first 7 Agreed Settlement Parcels until the actual
16 closing on August 31, 2011. Debtors had no obligation under the Settlement to turn over rents
17 before an actual closing. There is no credible evidence in the record that the Kleins had authority
18 to collect rents attributable to those properties prior to August 31, 2011.

19 10. The Debtors rent reconciliation attached as Exhibit 15 to the Debtors’ Motion is an
20 accurate reconciliation of rents due from the Kleins to the Debtors under the terms of the
21 Settlement. Debtors are entitled to rents from the Kleins in the amount of \$4,013.65.

22 11. With respect to the issue of attorneys’ fees and costs, the court is not sympathetic
23 with either the Debtors or the Kleins. Although neither party was ready to close on the first 7
24 Agreed Settlement Parcels prior to August 31, 2011, the Debtors and the Kleins allowed their
25 bickering over a few thousand dollars in prorated rent and “stopped payment” fees to
26 substantially delay a closing of the 10th and final Agreed Settlement Parcel, jeopardize an
27 effective reorganization, nearly destroy a compromise that took months to craft and approve, and
28 expose each other to substantial liability for attorneys’ fees and costs.

1 12. In the final analysis, however, the Debtors had cause to file their motion to compel
2 performance of the Settlement given the Kleins' failure to timely deliver the documents and
3 things identified in Eisenberg's repeated emails and letters to Winterton commencing as early as
4 October 21, 2011, which were necessary to a timely closing of escrow on the Walter Property by
5 November 21, 2011. The rent reconciliation, which was at the heart of the rift between the
6 Kleins and the Debtors after the closing of the first 7 Agreed Settlement Parcels on August 31,
7 2011, was not delivered to the Debtors until November 22, 2011. Debtors specifically requested
8 a rent reconciliation from the Kleins in Eisenberg's email to Winterton a month earlier on
9 October 21, 2011, but the Kleins inexplicably failed to deliver the documents, including their
10 rent reconciliation, to the Debtors until one day after the November 21st closing date
11 contemplated by the Settlement. Even then, the documents provided by the Kleins were either
12 incorrect or insufficient to permit a closing in November.

13 13. Rather than cooperate to consummate the Settlement in December, the Kleins instead
14 voted against the Debtors' plan and unsuccessfully attacked confirmation of the plan – further
15 delaying a closing on the Walter Property.

16 14. The Settlement would not have consummated absent the Debtors' Motion and this
17 court's Amended Order Re: Motion of Debtors for an Order to Compel the Performance of Perry
18 and Rita Klein Under Settlement Agreement and for an Award of Attorneys' Fees entered in this
19 case on January 9, 2012.

20 15. Therefore, the court finds that the Debtors' Motion was an "action commenced to
21 enforce the terms of [the] Agreement" within the scope of § 10.9 of the Settlement, and that the
22 Debtors are the prevailing party entitled to recover reasonable attorneys fees and costs.

23 16. Given the facts and circumstances of the dispute between the Debtors and the Kleins
24 and having considered the Eisenberg Declaration and Ferrario Declaration in the context of that
25 dispute, the court finds that Debtors are entitled to recover from the Kleins reasonable attorneys'
26 fees and costs in the amount of \$20,000.

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: MOTION OF DEBTORS FOR AN ORDER TO COMPEL THE PERFORMANCE OF PERRY AND RITA KLEIN UNDER THE SETTLEMENT AGREEMENT AND FOR AN AWARD OF ATTORNEYS' FEES was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of 4-17-2012, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

- Gregory J Babcock bknotice@mccarthyholthus.com, gbabcockecf@hotmail.com
- Robert D Bass rbass@greenbass.com
- Jared D Bissell efcacb@piteduncan.com
- Steven Casselberry scasselberry@mrlp.com, fbaig@mrlp.com;jjacobs@mrlp.com
- Leslie A Cohen leslie@lesliecohenlaw.com, jaimel@lesliecohenlaw.com;Brian@lesliecohenlaw.com
- Caroline Djang crd@jmbm.com
- Joseph A Eisenberg jae@jmbm.com
- Laleh Ensafi lensafi@yahoo.com, cmartin@pralc.com
- Mark S Faulkner marksfaulkner@cox.net, fbaig@mrlp.com;jjacobs@mrlp.com
- Thomas M Geher tmg@jmbm.com
- Jeffrey J Hagen jeff@hagenhagenlaw.com
- Anne W Hamann ahamann@piteduncan.com, efcacb@piteduncan.com
- James Andrew Hinds jhinds@jhindslaw.com
- Hye Jin Jang hjang@jhindslaw.com
- Sheri Kanesaka sheri.kanesaka@bryancave.com, theresa.macaulay@bryancave.com
- Erin L Laney efcacb@piteduncan.com
- Kenneth G Lau kenneth.g.lau@usdoj.gov
- Steven M Lawrence generalmailaswlawoffice.com@alvaradoca.com, vaguirre@alvaradoca.com
- Charles Liu cliu@mrlp.com, ecfmarshackhays@gmail.com
- Christopher M McDermott efcacb@piteduncan.com
- Alexis M McGinness amm@jmbm.com, vr@jmbm.com;fc3@jmbm.com
- Brian A Paino efcacb@piteduncan.com
- Lee S Raphael cmartin@pprlaw.net
- Paul R Shankman pshankman@jhindslaw.com
- Michael W Tan michael.w.tan@irscounsel.treas.gov
- United States Trustee (LA) ustpregion16.la.ecf@usdoj.gov
- Catherine T Vinh efcacb@piteduncan.com
- David J Williams dwilliams@mrlp.com, fbaig@mrlp.com;jjacobs@mrlp.com

Service information continued on attached page

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or

1 order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or
entity(ies) at the address(es) indicated below:

2 Greenberg Traurig, LLP
3 Mark E. Ferrario, Esq.
4 3773 Howard Hughes Parkway
Suite 400 North
5 Las Vegas, NV 89169

6 on attached page

Service information continued

7
8 **III. TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment
9 or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete
10 copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a
proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es),
facsimile transmission number(s), and/or email address(es) indicated below:

11 on attached page

Service information continued