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8 **UNITED STATES BANKRUPTCY COURT**
9 **DISTRICT OF ARIZONA**

10 In re:

11 CONTINENTAL COUNTRY CLUB,
12 INC., an Arizona non-profit corporation,

13 Debtor.

Chapter 11

Case No. 3:21-bk-00956-EPB

**AMENDED DECLARATION OF JON
HELD IN SUPPORT OF DEBTOR'S
MOTION TO REJECT AMENDED
SETTLEMENT AGREEMENT**

15 I, Jon Held, hereby declare under penalty of perjury that the following statements are
16 true and correct to the best of my knowledge.

17 **I. My Professional Background and Capacity to Testify on Behalf of Debtor.**

18 1. I am the immediate past president of Continental Country Club, Inc. ("Debtor")
19 and a current member of Debtor's Board of Directors (the "Board"). I was the President of the
20 Board at the time Debtor made the decision to file the instant bankruptcy case. I am also
21 Debtor's designated representative in this Chapter 11 reorganization case. As such, I have the
22 authority to make this declaration on Debtor's behalf.

23 2. I have executed this Declaration in support of Debtor's *Motion to Reject Amended*
24 *Settlement Agreement* (the "Motion to Reject"). All of the facts set forth in the "Undisputed
25 Material Facts" section of the *Joint Pre-Trial Statement* concerning the Motion to Reject (Dkt.
26 259) (the "Joint Pre-Trial Statement") are incorporated herein by this reference. All capitalized
27 terms not otherwise defined herein have the meaning given in the Joint Pre-Trial Statement.

1 3. I am thoroughly familiar with all aspects and operations of the Debtor and am
2 familiar with its business affairs, assets and liabilities, and its books and records, and I am a
3 custodian of the same.

4 4. Unless otherwise stated, all exhibits referenced herein are business records of the
5 Debtor maintained in the regular course of its business; it was the regular practice of Debtor for
6 an employee or representative with knowledge of the act, event, condition, opinion, or
7 diagnosis, recorded to make the record or to transmit information thereof to be included in such
8 record, and the record was made at or near the time or reasonably soon thereafter.

9 5. I am an experienced business executive, having retired in 2016 after working in
10 executive and management positions in the newspaper publishing industry for more than 20
11 years, including having served as Chief Financial Officer for the Arizona Republic and as
12 Senior Vice President of Finance and Business planning for the entire newspaper division (over
13 100 newspapers and USA Today) of its parent company Gannet Publishing with responsibility
14 for finance and all printing and distribution across the country. I graduated from University of
15 Wisconsin – Whitewater, majoring in accounting. I was a Certified Public Accountant until the
16 time of my retirement.

17 6. I have been a homeowner and member of the Debtor since 2005.

18 7. In November of 2019, I was elected as President of the Debtor and I have since
19 been actively involved in the operations and management of the Association.

20 8. I was President of the Debtor when it authorized counsel to file the Motion to
21 Reject, and I presided over the Board meetings pertaining to those issues.

22 **II. The Lakeside Legionnaires' Complaint Arose Primarily Out of Allegations that**
23 **they Were Misled by the Original Developers of the Development.**

24 9. The Settlement Agreement that is the subject of the Motion to Reject is marked
25 as **Exhibit "1."**

26 10. It is my understanding that the Lakeside Legionnaires assert that Debtor owes a
27 duty to maintain Lake Elaine on Tract D of the Continental Lakeside Acres subdivision in such

1 a manner that it will hold water to an elevation of 6,845 feet above sea level.

2 11. However, this obligation is not imposed on Debtor under any of the documents
3 governing the Debtor or the Continental Lakeside Acres subdivision in particular.

4 12. The subdivision plat for Continental Lakeside Acres is marked as **Exhibit "2."**
5 The plat reflects the boundaries of each lot within the subdivision along with the boundaries of
6 the common areas, which are contained in Tracts A, B, C, D, E, and F. The Dedication section
7 of the plat, on page 1, also sets forth the permitted uses of each of the Tracts. With respect to
8 Tract D, the plat states only that "Tract D is hereby dedicated for the use of the Continental
9 Country Club Homeowners as a water recreational area with limitations per deed restrictions."
10 It does not require that a lake be maintained on Tract D, let alone that any such lake be
11 perpetually filled to any specific elevation.

12 13. The original declaration of restrictions for the Continental Lakeside Acres
13 subdivision is marked as **Exhibit "3."** Those restrictions have since been superseded by the
14 CC&Rs. *See Exhibit "15"* at p.1 ("Additionally, by recording this Amended and Unified
15 Declaration of Restrictions, the Association hereby consolidates and replaces all of the prior
16 recorded Amended and Unified Declarations of Restrictions listed in Exhibit D attached
17 hereto").

18 14. However, even when they were operative, the deed restrictions did not impose
19 any obligation on Debtor to maintain a lake. The only mention of a lake in those deed
20 restrictions is in § 18(3) (on pages 10-11), which provides for an easement in favor of *the*
21 *developer*, as the party benefitted thereby.

22 15. Additionally, § 27 of the deed restrictions (page 12) expressly states that "These
23 Restrictions **shall not be applicable to any Tracts** in the subdivision." That would include
24 Tract D, on which Lake Elaine was originally constructed.

25 16. In 1987, the Lakeside Legionnaires' filed a class action complaint in Coconino
26 County Superior Court against both the Debtor and the original developers of the Development.
27 A copy of the Amended Complaint is marked as **Exhibit "7."**

1 17. The complaint was not exclusively based upon allegations that Debtor had a duty
2 under the deed restrictions to maintain a lake on Tract D (which it did not). Rather, the primary
3 allegations were that the developers had misrepresented to prospective purchasers that they
4 “were purchasing lots adjacent to a lake which was purported to be, when completed, a beautiful
5 and picturesque lake suited for limited recreational purposes,” despite the developers’
6 knowledge that due to the “very construction and engineering of Lake Elaine” and their use of
7 the water in the lake to irrigate the golf course, they “created a circumstance completely
8 opposite from the beautiful and picturesque lake suitable for limited recreation that was
9 represented to Plaintiffs.” See Exhibit 7 at ¶¶ 37-41 (pages 12-14).

10 18. The Settlement Agreement was not the result of a judicial resolution on the merits,
11 but a negotiated compromise of the Lakeside Legionnaires’ claims. Thus, although it was
12 expressed in a stipulated judgment approved by the Coconino County Superior Court, it was a
13 negotiated, contractual agreement between the parties.

14 **III. The Settlement Agreement Imposes Continuing Obligations on Both Debtor and**
15 **the Lakeside Legionnaires.**

16 19. The Settlement Agreement imposes a “continuing duty” on Debtor to maintain
17 Lake Elaine. While the Settlement Agreement references the deed restrictions for Continental
18 Lakeside Acres as one possible source of this duty, it also references the developers’ alleged
19 misrepresentations to prospective purchasers as a primary source of the duty. Specifically, ¶ 2
20 of the Settlement Agreement says:

21 The Court finds that Defendants, and each of them, *are subject to a continuing*
22 *duty* and are hereby ordered to restore Lake Elaine and, thereafter, to maintain it
23 in good condition as described more specifically in paragraph 5 below. The
24 continuing obligation exists by virtue of the Covenants, Declaration of
25 Subdivision, the Declaration of Restrictions set forth in the instruments of
26 conveyance, *the representations and numerous regulatory documents made*
27 *and filed by Defendants and their predecessors.*

(emphasis added).

20. The Court adopted a plan for the restoration of Lake Elaine proposed by
consultants Steven W. Carothers, Ph.D. and J. Harlan Glenn, P.E “as a proper plan for

1 rehabilitation and operation of Lake Elaine.” See Exhibit 1 at ¶¶ 3-4. That plan, along with the
2 1991 supplement thereto (collectively, the “Consultants’ Plan”), is marked as Exhibit “4.”

3 21. The Settlement Agreement acknowledged that Lake Elaine was subject to
4 changing conditions outside of either of the parties’ control that could impact the practicality
5 and feasibility of the Consultants’ Plan. Therefore, the Settlement Agreement also imposed on
6 both parties a continuing duty to cooperate in good faith to modify the plan as necessary to take
7 these changed conditions into account while still accomplishing the reasonably achievable
8 objectives of the original plan. Specifically, ¶ 5 of the Settlement Agreement states:

9 The objectives of the Consultants’ Plan to restore and maintain Lake Elaine are
10 adopted and incorporated herein. *The parties* stipulate that, although the
11 Consultants’ Plan represents their best efforts to realize those objectives, the
12 Consultants’ Plan may have to be modified in the future to accommodate
13 changing conditions. **Should such modification be necessary, *the parties*, Dr. Carothers and J. Harlan Glenn agree to modify the Consultants’ Plan as needed and to take such other steps as are necessary** so that Lake Elaine may
14 be operated and maintained consistent with the objectives outlined therein.

15 (emphasis added).

16 22. This continuing obligation on all of the parties to make such modifications of the
17 Consultants’ Plan and to take such other steps as are necessary to accommodate changing
18 conditions is a material and essential term of the Settlement Agreement.

19 23. The Consultants’ Plan itself acknowledges that there are “many unknowns” that
20 may affect the long-term viability of the plan, including the integrity of the liner covering the
21 lakebed, the effect of erosion and other geological and environmental forces, and the
22 availability of a supply of reclaimed water to replace water that is lost due to seepage and
23 evaporation. For example, the plan states that:

24 The unanswered questions are how long will the membrane continue to perform
25 and what can be done if it fails

26 Because of the many unknowns, the consultants could not mutually provide a
27 realistic cost for removing the membrane liner and filling an unknown number of
cavities of unpredictable size. In addition, the cost of refilling lakes would depend
on the allocation of reclaimed water which varies considerably with the total
amount used.

It is hoped, of course, that such a repair will never be necessary.

1
2 See Exhibit 4 at pp.47-49.¹

3 24. The discovery of leaks shortly after the plan was issued in January 1990 quickly
4 resulted in an "Update and Modification" to the plan in August 1991. Among those
5 modifications were the adjustment of the lake operating water level from the original proposal
6 of a 6,847 foot to a 6,845 elevation, the removal of the concrete collar above the 6,845 foot
7 level, and the re-contouring and re-landscaping of the lake edge. These modifications were
8 "deemed required by the joint consultants in order to successfully implement rehabilitation of
9 Lake Elaine." See Exhibit 4 at pp.60, 62.

10 25. In August 1994, the consultants issued a "Final Report on Lake Elaine
11 Rehabilitation," a copy of which is marked as Exhibit "5."

12 26. The Final Report concluded that the objectives of the Consultants' Plan had been
13 fulfilled. However, the Final Report also acknowledged the potential that changing structural,
14 environmental, and ecological conditions would require further modifications. For example, the
15 Final Report noted a sustained decrease in the water level of the lake, which was driven
16 primarily by two factors: "evaporation and seepage." Average evaporation losses were noted to
17 be 57.9 inches per year, while average seepage losses for a lake with a "contractor-guaranteed
18 new liner were 91.3 inches per year. See Exhibit 5 at p.2. Thus, even under the best conditions,
19 the consultants estimated a water loss of over 12 feet per year.

20 27. The Final Report also noted the difficulty in "[m]easurement of lake levels and
21 assessment of possible leakage." They acknowledged that they "heard rumors of excessive
22 leakage," discovered that "water pumps were rendering much less water into the lake than was
23 thought," and that "the information regarding lake levels and possible leakage that the
24 consultants find to be reliable [is] quite limited." See Exhibit 5 at p.3.

25 28. More recent years have seen even more drastic changes in conditions.
26

27 ¹ Page references are to the page number of the PDF file marked as an exhibit, which may
be different than the page number displayed on the original document.

1 29. In May 2016, the civil engineering firm Natural Channel Design, Inc. (Arizona
2 State Board of Technical Registration No. 15602) prepared an assessment and feasibility report
3 concerning various options for restoring or decommissioning Lake Elaine. A copy of the report
4 is marked as **Exhibit “11.”**

5 30. The report noted the following conditions, all of which render compliance with
6 the terms of the original Consultants’ Plan infeasible, if not impossible:

- 7 • The geology of the lakebed has caused excessive seepage of water. In particular, the
8 lakebed foundation material “is well documented to include extensive fracture, fault
9 lines and joint systems that have a virtual limitless capacity to absorb water and carry it
10 deep into the earth.” Additionally, “there have been collapses of solution caverns or other
11 voids immediately beneath the lake floor that have resulted in the loss of a significant
12 amount of the lake volume and required expensive repairs.” *See* Exhibit 11 at p.9.
- 13 • The clay soils that “provided a natural seal” over the lakebed prior to the construction of
14 the lake have been depleted to the point that they now cover “only a portion of the total
15 lakebed area.” *Id.*
- 16 • The synthetic PVC liner that was installed in 1981 was damaged through exposure to
17 the atmosphere and sunlight, “causing accelerated deterioration and early formation of
18 cracks and tears.” Moreover, such liners “typically only provide a 20 year service life
19 and the current liner has been in place for 35 years [now 40 years].” The resulting
20 “seepage losses will likely continue to rise as the PVC liner further deteriorates. Greater
21 losses may result in even lower lake levels, further exposing the liner to deterioration
22 and even more seepage.” *Id.*

23 31. While reclaimed water was plentiful and readily available at the time the
24 Consultants’ Report was issued, severe and persistent drought conditions coupled with
25 significant population growth have substantially increased the demand for reclaimed water, and
26 the cost of obtaining water to fill Lake Elaine has increased exponentially.

27 32. As civil engineering firm Natural Channel Design wrote in a report to Debtor,

1 marked as **Exhibit "13,"** when the Settlement Agreement was entered in 1990, the cost of water
2 to fill Lake Elaine was about \$13,000 per year for up to 365 million gallons (about 3.5 cents
3 per 1,000 gallons). *See Exhibit "13"* at p.9, third and fourth bullet points. In comparison, the
4 cost of water in 2020 was \$1.65 per 1,000 gallons. *Id.* at p.10.

5 33. Not only will the cost of water continue to rise in the future, Debtor has no
6 assurance that there will be any continued supply of reclaimed water to fill Lake Elaine.

7 34. Debtor obtains water for Lake Elaine under a Reclaimed Water Agreement with
8 the City of Flagstaff signed in February 2019, a copy of which is marked as **Exhibit "6."**

9 35. The duration of the Water Agreement is five years, after which the continued
10 supply of water is "is within the City's sole discretion." *See Exhibit 6* at §§ 8-9. Additionally,
11 the Water Agreement provides that "the City may be required to permanently or temporarily
12 terminate, in whole or in part, delivery of reclaimed water to the Buyer for any number of
13 reasons, including, but not limited to emergency conditions, water quality or other regulatory
14 issues, peak demands, insufficient water supply, or planned system maintenance." In such an
15 event, the City is only required to provide "two (2) weeks' notice of the need to completely
16 cease reclaimed water usage, or to reduce the volume of reclaimed water used at the Property."

17 *Id.* at § 10.

18 36. As Natural Channel Design stated in its report to Debtor, reclaimed water to fill
19 Lake Elaine will become increasingly scarcer and, if it can be obtained at all, more costly:

20 In summary, the cost and availability of water for Lake Elaine has evolved
21 relatively rapidly during the history of the lake. Because of rapid growth in the
22 area, the increased demand, and the rapid change in technology to treat reclaimed
23 water to increasingly better quality, the value of the resource has changed from
24 basically free for the taking to values that are more in line with the relative
25 scarcity of water in the Southwest. The rate of this increase in value is currently
26 unknown, however the trend is towards more value and higher demand.
27 Assuming that this trend continues, it will mean that large quantities of reclaimed
water will be increasingly expensive with reduced availability to users such as
Continental Country Club.

26 Exhibit 13 at pp.11-12.

27 37. The combined effect of all of the foregoing is that operation of Lake Elaine in

1 conformity with the original Consultants Plan is no longer physically possible without
2 demolishing much of the existing improvements and reconstructing a new lake at a cost
3 estimated in the millions of dollars. And, to the extent it would even be possible to maintain the
4 lake to an elevation of 6,845 feet, it is not economically feasible.

5 38. The drastic change in conditions between the time the Settlement Agreement was
6 entered and the present further highlights the importance of the Settlement Agreement's
7 requirement that both the Debtor and the Lakeside Legionnaires cooperate in good faith to
8 modify the plan for maintaining Lake Elaine to take these changed conditions into account.

9 39. Because the Settlement Agreement imposes continuing obligations on both
10 parties, and performance is due by both sides, the Settlement Agreement is an executory
11 contract.

12 **IV. Debtor Undertook Considerable Analysis to Inform Itself of the Costs and Risks of**
13 **Various Options for Maintaining or Decommissioning Lake Elaine and Held Over**
14 **100 Meetings to Discuss the Issues and Solicit the Views of Homeowners.**

15 40. Since 2016, Debtor has conducted over 100 meetings to discuss the costs and
16 difficulties of complying with the Consultants' Plan, the need for modifications to the plan to
17 address the changed conditions, the various options to rehabilitate or decommission Lake Elaine
18 and the costs associated with each option, and the opinions and concerns of homeowners. A
19 summary of those meetings is marked as **Exhibit "9."** Summaries of certain of the executive
20 session minutes and meetings between Board members and their counsel have been redacted to
21 preserve attorney-client privilege.

22 41. Copies of the minutes of the meetings themselves are attached as **Exhibit "10,"**
23 with the executive session minutes and notes of meetings with counsel intentionally removed
24 to preserve privilege and confidentiality.

25 42. Debtor considered at least ten separate potential options related to Lake Elaine.
26 One option, the use of a chemical soil dispersant such as ESS-13 to fill cracks in the liner, was
27 ruled out in the Natural Channel Design report as being too costly and unlikely to prevent

1 seepage. See Exhibit "11" at p.23, 25. The eight options presented in the original Natural
2 Channel Design report are:

- 3 1. Do nothing – maintain status quo.
- 4 2. Repair the liner to the stipulated judgement elevation.
- 5 3. Keep the lake level near the current elevation and restore the shoreline.
- 6 4. Repair the liner to the level where the existing lake is being maintained and
7 restore the shoreline.
- 8 5. Reduce the lake footprint, reline the lake and restore exposed valley slopes.
- 9 6. Drain the lake and fill the valley with soil.
- 10 7. Drain the lake, partially fill the valley to restore the valley floor, create a natural
11 channel and revegetate the valley side slopes.
- 12 8. Drain the lake, create a natural channel in the exposed valley bottom and
13 revegetate the valley side slopes.

14 Exhibit 11 at pp.23-24.

15 43. Natural Channel Design subsequently presented a ninth option, labeled
16 "Restoration of Valley Floor without Water Feature," as shown in the report marked as Exhibit
17 "12."

18 **V. Filling the Lake to 6,845 Feet in Accordance with the Superior Court's Ruling
19 Would be Extraordinarily Costly, Risky, and May Not Even Be Possible.**

20 44. The Coconino Superior Court found, in an unsigned minute entry marked as
21 Exhibit "8," that "the lake is to be filled at a level of 68 & 45 feet [sic, presumably intended to
22 be 6,845 feet]," and held that Debtor would be fined \$700 per day that it failed to achieve this
23 objective, although that fine could be reduced to \$500 per day "once the water starts flowing."

24 45. The only option presented by Natural Channel Design that would comply with
25 this ruling is Option 2—repair the liner to the stipulated judgement elevation.

26 46. The report noted that Option 2 was "the highest initial cost and highest risk option
27 going forward." While theoretically possible to achieve with the installation of a new lakebed
liner, it "should also be recognized that a new liner will have a limited lifespan, and given the
site conditions, require additional expense for repair and replacement in the future." See Exhibit
11 at p.10.

47. Moreover, there is no guaranty that the installation of a new liner would prevent
the excessive water loss that has plagued Lake Elaine for the past 50 years. The report noted

1 that “*due to the site’s underlying geology (fractured limestone along a fault line), failure of*
2 *the lining system could be experienced at any point in time which would lead to the loss of*
3 *all or portion the lake and trigger the need for expensive repairs or replacement.* Exactly
4 quantifying the risk of failure of the liner due to geologic activity or development of solution
5 cavities within the foundation bedrock is not possible to predict, but *the locale is prone to the*
6 *types of geologic activity that could lead to future liner failure.”* See Exhibit 11 at p.10
7 (emphasis added).

8 48. The May 2016 Natural Channel Design report gave three separate estimates for
9 Option 2, which varied based upon the thickness and quality of the liner to be installed. Those
10 estimates ranged from about \$2.8 million to \$3.4 million. See Exhibit 11 at pp.36-38.

11 49. The report noted that in addition to these initial construction costs, Debtor would
12 incur substantial annual maintenance costs and would need to build up a reserve for the eventual
13 repair or replacement of the new liner. “Even if a new liner were to achieve zero seepage losses,
14 offsetting evaporation losses will continue to require an annual supplement of approximately
15 34M gallons of water at a cost of approximately \$45,000 at current rates. Also, any synthetic
16 liner installed will have a limited service life, and the HOA will need to plan for a replacement
17 again in approximately 20 years. Other ongoing costs of maintenance include, but are not
18 limited to, the aeration system, stocking and maintenance of aquatic wildlife, and state required
19 maintenance and inspection of the dam.” Exhibit 11 at p.31.

20 50. In December 2019, after Lake Elaine was drained and it was possible to obtain
21 additional geotechnical data, Natural Channel Design prepared a supplement to its report, a
22 copy of which is marked as **Exhibit “13.”**

23 51. Among other things, the supplement to the report estimated that Option 2 would
24 cost between \$2.85 million to \$3.62 million, with annual maintenance costs between \$91,000
25 to \$109,000. See Exhibit 13 at p.18.

26 52. A slightly less expensive “Option 2(d)” for partial replacement of the liner was
27 considered a “temporary fix” and “not recommended.” *Id.* at p.14. However, in an effort to

1 follow up on this proposal and give fair consideration to all potentially viable options, Debtor
2 also obtained an estimate from Terracon Consultants to provide engineering services for that
3 option. Their estimate is marked as **Exhibit "14."** Terracon estimated that their services would
4 cost an additional \$278,000, and that it would take approximately 9 ½ months from the start
5 date before Lake Elaine could even begin to be filled back up with water. The amount of time
6 necessary to complete filling Lake Elaine to 6,835 feet was unknown and dependent upon the
7 availability of water upon completion of construction. *See* Exhibit 14 at pp.8-9. For the reasons
8 set forth in Natural Channel Design's report, Debtor concluded that it would be prudent to
9 further pursue Option 2(d).

10 53. In addition to the costs of construction and engineering, it would also be
11 necessary for Debtor to engage a general contractor, make repairs to the dam, and fix an existing
12 sinkhole. Moreover, due to inflation, increased demand for construction services, supply chain
13 disruptions, and other economic forces, Debtor anticipates that the cost of completing Option 2
14 would be substantially greater than the estimates in Natural Channel Design's 2019
15 supplemental report.

16 54. Debtor's estimate of the total project cost, taking all of the foregoing factors into
17 consideration, is marked as **Exhibit "24."** Debtor estimates that the project would cost between
18 \$4.59 million to \$5.59 million to complete, exclusive of annual maintenance costs. Notably,
19 although bids for the entire project have not been obtained, a bid was received for the removal
20 of the concrete collar and that cost was 3 times higher than the Natural Channel Design estimate.
21 Bids on partial repairs of the dam reflected a cost of about \$250,000.

22 55. Debtor also does not have any assurance that it could obtain the required permits
23 from the Arizona Department of Water Resources (ADWR) to complete the work necessary to
24 replace the liner and refill Lake Elaine.

25 56. In its September 8, 2021, dam safety inspection report, marked as **Exhibit "16,"**
26 ADWR advised Debtor that "ADWR's approval for any work proposed to mitigate the issues
27 is required prior to implementation." *See* Exhibit 16 at pp.1-2.

1 57. In prior meetings between ADWR, Debtor, and Terracon, ADWR representatives
2 had expressed concern as to how the conditions in the lake geology could impact the safety of
3 the dam. In an e-mail sent to Debtor on September 10, 2021, marked as **Exhibit "19,"** one of
4 ADWR's engineers requested a certified opinion from a professional engineer to support
5 Terracon's opinion that "the dam is safe if the dam reservoir is operated at or below the
6 recommended reservoir level of 6,836 feet."

7 58. Based upon these communications with ADWR, Debtor has substantial concern
8 that it would be unable to obtain approval from ADWR to complete the construction work
9 necessary to refill Lake Elaine to a 6,845 foot water level and to fill and maintain the water to
10 that level.

11 **VI. Debtor Exercised Reasonable Business Judgment In Determining to Reject the**
12 **Settlement Agreement.**

13 59. In weighing the decision to reject the Settlement Agreement, Debtor took all of
14 the foregoing factors into consideration, including:

15 a. the competing viewpoints and opinions of the homeowners and
16 community members who would be impacted the Debtor's decisions, including the
17 opinions expressed by both the members of the Lakeside Legionnaires and the
18 substantially larger number of homeowners who do not own property on or near the
19 lakefront;

20 b. the up-front construction costs and ongoing annual maintenance costs that
21 would be required to comply with the original Consultants' Plan, which the Board
22 believes would be prohibitively expensive at a time when Debtor is already experiencing
23 cash flow problems that have resulted in the need for a restructuring;

24 c. the risk that any new liner would ultimately fail due to circumstances
25 beyond Debtor's control, thereby placing Debtor back into the same position of alleged
26 non-compliance with the Settlement Agreement despite Debtor's expenditure of
27 millions of dollars;

1 d. the lack of an assured water supply to keep Lake Elaine filled to an
2 elevation of 6,845 feet;

3 e. the amount of time necessary to complete the construction work, assuming
4 the required permits could even be obtained;

5 f. the futility of attempting to raise annual assessments or to impose special
6 assessments on homeowners that would be necessary to cover the extraordinary up-front
7 capital expenditures and ongoing maintenance costs, given that an increase in dues or
8 the levy of a special assessment would require have to be approved by a 2/3 majority of
9 homeowners under § 17 of the CC&Rs (*see* Exhibit "15" at pp.9-10); the opposition
10 expressed by homeowners that do not own property on or near Lake Elaine to a
11 substantial increase in dues, given that the increased dues would support a project that
12 will disproportionately benefit the Lakeside Legionnaires at their expense, and the fact
13 that additional funds are needed to cover Debtor's other anticipated expenses;

14 g. the availability of reasonable and feasible alternatives to compliance with
15 the original Consultants' Plan, which will preserve the aesthetics and value of the
16 Continental Lakeside Acres and the Development as a whole without placing undue
17 strain on Debtor's finances or an undue burden on homeowners; and

18 h. the risks of rejecting the Settlement Agreement, including the possibility
19 of a substantial rejection damages claim by the Lakeside Legionnaires.

20 60. Ultimately, after exhaustive consideration to all of these issues, the Board
21 determined that rejection of the Settlement Agreement would be in the best interests of the
22 bankruptcy estate and would promote the best overall outcome for all homeowners within the
23 Development and the community at large.

24 61. While rejection of the Settlement Agreement *may* result in the Lakeside
25 Legionnaires having a substantial rejection damages claim, that result is hardly assured. The
26 Lakeside Legionnaires have not yet produced any current, admissible evidence of the extent of
27 their potential damages claim.

1 62. While they have cited a 30-year old opinion of the difference in value between
2 homes bordering on a lake and those not on a lake, that opinion has little or no relevance to the
3 value of the Lakeside Legionnaires' property today, and does not take into consideration all of
4 the conditions that make the maintenance of a lake infeasible or impossible.

5 63. Even if the Lakeside Legionnaires were to be allowed a large rejection damages
6 claim, Debtor could still confirm a plan of reorganization that provides for payments to
7 creditors with a present value that is at least equal to the liquidation value of Debtor's estimates.
8 In Debtor's opinion, that liquidation value is substantially lower than the projected costs of
9 continued compliance with the Settlement Agreement (at least in the manner that the Lakeside
10 Legionnaires have interpreted it).

11 64. The alternative to rejection of the Settlement Agreement is assumption, which
12 would require the expenditure of millions of dollars that Debtor does not have and likely would
13 be unable to raise, and which bears a considerable risk of failure even if Debtor did somehow
14 obtain the necessary capital.

15 65. Debtor believes that the inevitable result would be inability to maintain
16 compliance, leading to a forced liquidation of Debtor's assets. Such a result would have a
17 potentially disastrous impact on homeowners as a whole, who would lose ownership and
18 control of the many amenities that induced them to buy a home within the Development in the
19 first place, and who would lose an association capable of meeting the needs of the many
20 homeowners that compose the Debtor's membership.

21 66. While rejection of the Settlement Agreement may have a negative impact on the
22 Lakeside Legionnaires, Debtor did not make its decision to reject on the basis of any animus or
23 ill-will against them. Debtor takes seriously its mission to promote the welfare of all of its
24 members, including the Lakeside Legionnaires. But, given all of the circumstances discussed
25 above, Debtor believes that rejection will best promote the Debtor's ability to successfully
26 reorganize and to continue serving the needs of all of its members, without unfairly favoring or
27 burdening any particular group of homeowners over any other.

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67. In view of the foregoing, it is my opinion and belief that in making the decision to reject the Settlement Agreement, Debtor acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate.

DATED this 18th day of January 2022.

Jon Held
Jon Held (Jan 18, 2022 14:06 MST)
Jon Held