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**DISTRICT COURT
CLARK COUNTY, NEVADA**

CASE NO.: A-16-743298-B
DEPT. NO.: XI

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

SHER DEVELOPMENT, LLC, a Nevada limited liability company; THE PAUL L. GARCELL AND PAMELA HERZ REVOCABLE FAMILY TRUST, Paul Garcell and Pamela Hertz, Trustees; THE JOSEPH D. EYSTAD AND MARY ANN ARMINIO REVOCABLE TRUST DATED 09/03/03, MaryAnn Arminio and Joseph D. Eystad, Trustees; THE FRANK ARMINIO AND MARY ARMINIO REVOCABLE LIVING TRUST, Mary Arminio, Trustee; ANGELO JOHN ARMINIO, an individual; PAULA M. ARMINIO, an individual; ANDREA DEANEAN GLENN, an individual; LINDA JEAN LUND, an individual; THE DONDERO SURVIVOR'S TRUST, Alan G. Dondero, Trustee; TERRY L. BELL IRREVOCABLE TRUST, Terry L. Bell, Trustee; and THE NEWBY 1984 TRUST, Jill M. Colquitt and Donald E. Newby, Trustees,

Plaintiff,

v.

DESERT LAND LOAN ACQUISITION, LLC, a Nevada limited liability company; DESERT LAND, LLC, a Nevada limited liability company; HOWARD BULLOCH, an individual; DAVID GAFFIN, an individual; THE HOWARD AND CHRISTI BULLOCH FAMILY TRUST DATED 09/14/1995; THE HOWARD BULLOCH SEPARATE FAMILY TRUST DATED 03/28/2003; THE CHRISTI BULLOCH SEPARATE PROPERTY TRUST DATED 03/28/2003; THE BULLOCH HERITAGE TRUST; THE GULF STREAM IRREVOCABLE TRUST DATED 06/30/2000; COMPASS INVESTMENTS, LLC, a Nevada limited liability company; DOE INDIVIDUALS AND ROE ENTITIES I through X,

Defendants.

AND RELATED COUNTERCLAIM

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1 This matter having come on for non-jury trial before the Honorable Elizabeth Gonzalez on
2 March 23, 2018;¹ Plaintiffs² and Counterclaim Defendants³ having appeared through their
3 counsel of record Michael Feder and Joel Schwarz of the law firm of DICKINSON WRIGHT
4 (collectively “Plaintiffs”); Defendants and Counterclaimants appearing by and through
5 Defendants⁴ and its counsel of record, Mark A. Hutchison, Jacob A. Reynolds and Robert T.
6 Stewart of the law firm of HUTCHISON & STEFFEN, LLC (collectively “Defendants”); the
7 Court having read and considered the pleadings filed by the parties; having reviewed the evidence
8 admitted during the trial; and having heard and carefully considered the testimony of the
9 witnesses called to testify; having considered the oral and written arguments of counsel, and with
10

11 _____
12 ¹ This matter has been the subject of two prior evidentiary hearings on the “fairness” of offers. Findings of
13 Fact and Conclusions of Law were prepared following each of those prior evidentiary hearings. These two prior
14 hearings and the events leading up to them are referred to as Phase One and Phase Two, respectively. This trial is the
15 Third Phase.

16 ² SHER DEVELOPMENT, LLC; THE PAUL L. GARCELL AND PAMELA HERTZ REVOCABLE FAMILY
17 TRUST, Paul Garcell and Pamela Hertz, Trustees; THE JOSEPH D. EYSTAD AND MARY ANN ARMINIO
18 REVOCABLE TRUST DATED 09/03/03, MaryAnn Arminio, Trustee; THE FRANK ARMINIO AND MARY
19 ARMINIO REVOCABLE LIVING TRUST, Mary Arminio, Trustee; ANGELO JOHN ARMINIO; PAULA M.
20 ARMINIO; ANDREA DEANEAN GLENN; LINDA JEAN LUND; THE DONDERO SURVIVOR’S TRUST, Alan
21 G. Dondero, Trustee; TERRY L. BELL IRREVOCABLE TRUST, Terry L. Bell, Trustee; and THE NEWBY 1984
22 TRUST, Jill M. Colquitt and Donald E. Newby, Trustees (collectively, the “Plaintiffs”).

23 ³ JOANNA POLLARD LIVING TRUST, Joanna Pollard, Trustee; VIVIAN A. WEBER LIVING TRUST, Vivian
24 Weber Trustee; THE JOE P. SCHWAN FAMILY TRUST, Joe Schwan, Trustee; WALTER BROELAND AND
25 CAROL BROELAND REVOCABLE TRUST, Walt Broeland, Trustee; MARK E. JONAH; VERONICA C. WOLF
26 TRUST, Veronica Wolf, Trustee; BARON H. WINDHAM JR., IRA; JAMES P. PEABODY and HELEN L.
27 PEABODY; YARG, LLC; PATRICK AND CLARA CARMEN DERMODY FAMILY TRUST, Patrick Dermody,
28 Trustee; MACK CLAYTON and TRACY L. CLAYTON; TERRY WAGNER and CATHERINE WAGNER;
JAMES C. CHACHAS TRUST, James C. Chachas, Trustee; GEORGE CHACHAS; BESSIE CHACHAS;
WILLIAM MARSHALL and JANINE MARSHALL; LEWIS ROY SHER LIVING TRUST, Edward F. Sher,
Trustee; and GREGG S. LAWRENCE SUBTRUST OF CLIFFORD LAWRENCE AND CAROLYN LAWRENCE
REVOCABLE FAMILY TRUST DTD 9/30/96, Gregg S. Lawrence, Trustee (collectively, the “Counterclaim
Defendants”).

⁴ DESERT LAND LOAN ACQUISITION, LLC (“DLLA”), DESERT LAND, LLC (“Desert Land”), HOWARD
BULLOCH (“Bulloch”), DAVID GAFFIN (“Gaffin”), THE HOWARD AND CRISTI BULLOCH FAMILY
TRUST DATED 09/14/1995 (the “Bulloch Family Trust”), THE HOWARD BULLOCH SEPARATE PROPERTY
TRUST DATED 03/28/1993 (the “Howard Bulloch Trust”), THE CRISTI BULLOCH SEPARATE PROPERTY
TRUST DATED 03/28/1993 (the “Cristi Bulloch Trust”), THE BULLOCH HERITAGE TRUST (the “Heritage
Trust”), THE GULFSTREAM IRREVOCABLE TRUST DATED 06/30/2000 (the “Gulfstream Trust”), and
COMPASS INVESTMENTS, LLC (“Compass and collectively with Bulloch, Gaffin, Bulloch Family Trust, Howard
Bulloch Trust, Cristi Bulloch Trust, Heritage Trust, and Gulfstream Trust, the “Guarantors,” and together with DLLA
and Desert Land, the “Defendants”).

1 the intent of rendering a decision on all remaining claims before the Court, pursuant to NRCP
2 52(a) and 58; the Court makes the following findings of fact and conclusions of law:

3 **FINDINGS OF FACT**

- 4 1. NRS 645B *et seq.* governs this case.
- 5 2. Defendants hold more than 51% of the beneficial interests in the Loan as required
6 by NRS 645B.340(1).⁵
- 7 3. DLLA has acquired and retains over 51% of the beneficial interest in the Loan by
8 a deed “selling, transferring or assigning an ownership interest” as specifically authorized by
9 NRS 645B.340(1).
- 10 4. Defendants represent a “Majority of the investors” as defined in NRS
11 645B.01245.⁶
- 12 5. DLLA constitutes a “Majority of the investors” as defined in NRS 645B.01245.

13
14
15 ⁵ That statute provides in part:

16 Except as otherwise provided by law or by agreement between the parties and regardless of the date the interests
17 were created, if the beneficial interest in a loan or the ownership interest in the real property previously securing the
18 loan belongs to more than one person, *the holders of the beneficial interest in a loan whose interests represent 51*
19 *percent or more of the outstanding principal balance of the loan or the holders of 51 percent or more of the*
20 *ownership interest in the real property, as indicated on a trustee’s deed upon sale recorded pursuant to subsection 10*
21 *of NRS 107.080, a deed recorded pursuant to subsection 5 of NRS 40.430 or a deed in lieu of foreclosure, and any*
22 *subsequent deed selling, transferring or assigning an ownership interest, may act on behalf of all the holders of the*
23 *beneficial interests or ownership interests of record on matters which require the action of the holders of the*
24 *beneficial interests in the loan or the ownership interests in the real property, including, without limitation:*

(a) The designation of a mortgage broker or mortgage agent, servicing agent or any other person to act on behalf
of all the holders of the beneficial interests or ownership interests of record;

(b) The foreclosure of the property for which the loan was made;

(c) The subsequent sale, transfer, encumbrance or lease of real property owned by the holders resulting from a
foreclosure or the receipt of a deed in lieu of a foreclosure in full satisfaction of a loan, to a bona fide purchaser or
encumbrancer for value;

(d) The release of any obligation under a loan in return for an interest in equity in the real property or, if the loan
was made to a person other than a natural person, an interest in equity of that entity; and

(e) *The modification or restructuring of any term of the loan, deed of trust or other document relating to the*
25 *loan, including, without limitation, changes to the maturity date, interest rate and the acceptance of payment of less*
26 *than the full amount of the loan and any accrued interest in full satisfaction of the loan.*

27 ⁶ That statute provides:

28 “Majority of the investors” means the investors holding 51 percent or more of the beneficial interests in a loan.

1 6. Plaintiffs do *not* constitute a “Majority of the investors” as defined in NRS
2 645B.01245.

3 7. Pursuant to NRS 645B.340(1) & (2) Howard Bulloch, as manager of DLLA, is
4 appropriately designated to act on behalf of all the holders of the beneficial interest in the loan.
5

6 8. On August 1, 2016, DLLA sent a written notice of its intent to act to modify the
7 Loan (“the First Proposal”).

8 9. On March 1, 2017, the Court found that the transaction detailed in the First
9 Proposal was not fair to the minority interest holders.

10 10. Bulloch testified that title insurance cannot be obtained without the modification
11 set forth in the Third Proposal. No independent evidence of this assertion was presented to the
12 Court in the trial.

13 11. Bulloch and Gaffin testified they reviewed the Court’s September 2017 Findings
14 of Fact and Conclusions of Law, consulted with counsel, and attempted to resolve the Court’s
15 concerns in making the subsequent offer.
16

17 12. The Defendants made the Third Proposal pursuant to NRS 645B on January 25,
18 2018:

19 1. Borrower proposes that the Borrower and Beneficiaries enter into a loan
20 modification agreement (“Loan Modification”) to modify and restructure the Loan,
21 pursuant to NRS 645B.340(1)(e), with the following principal terms:

22 a. As consideration for the Loan Modification, Borrower will pay the Beneficiaries a
23 total of \$50,000 within 30 days of the Court’s approval of the modification, each
24 Beneficiary to receive its pro rata share.

25 b. Borrower will pay the Beneficiaries their pro rata portion of the total of
26 \$13,460,000 (“Offering Price”) within 12 months (the “Term”) of the Court’s approval of
27 this Loan Modification.

28 c. For sake of clarity, upon payment of the Offering Price to the Beneficiaries, the
Borrower and all Loan guarantors will be discharged of any further obligation to the
lender and the Beneficiaries. All Loan documents, without limitation but including the
Promissory Note Secured by Deed of Trust, Deed of Trust, Security Agreement,
Environmental Indemnity Agreement, and Guaranty, all dated July 12, 2007, will be
cancelled, and the Deed of Trust, Assignment of Rents, Security Agreement, and Fixture
Filing dated July 12, 2007 and recorded July 27, 2007, will be reconveyed.

1 d. During the Term, the Borrower will continue to pay all real estate taxes, Strip road
2 assessments, and other taxes for the Property when due, shall maintain appropriate
3 property and liability insurance for the Property, and otherwise maintain the Property in
4 its present condition.

5 e. The Borrower's current defaults are discharged, and the Loan is reinstated to good
6 standing.

7 f. The Beneficiaries will forbear declaring any defaults or exercising any lender
8 remedies during the Term provided Borrower meets its obligations as set forth in the Loan
9 Modification.

10 g. At the time of Payment of the Offering Price, Desert Land, LLC will also pay
11 Beneficiaries six percent (6%) simple interest on the Offering Price. The interest will
12 begin to accrue on the day that the Court approves the Loan Modification and continues
13 during the Term until the Offering Price is paid.

14 2. The costs of the Loan Modification, including escrow, title, transfer taxes, and
15 other closing costs, will be proportionately allocated among all Beneficiaries based on
16 their percentage of the outstanding principal balance. The allocation will include all
17 Beneficiaries—those who consent to the Loan Modification and those who do not consent.
18 DLLA estimates that these costs could total \$209,600.00, or more.

19 3. Beneficiaries who consent to the Loan Modification will execute reconveyances of
20 the Deed of Trust and releases of other Loan Documents as set forth herein.

21 4. Beneficiaries who do not consent to the Loan Modification and who refuse or fail
22 to execute reconveyances of the Deed of Trust and Loan releases (the "Holdout
23 Beneficiaries") will be charged any attorneys' fees and other legal costs associated with
24 legal proceedings to quiet title or otherwise ensure a clear title to the Property in
25 proportion to the percentage of outstanding principal balance each holds as of the date of
26 payment of the Offering Price to the Beneficiaries to the total outstanding principal of all
27 Holdout Beneficiaries.

28 5. No Beneficiary who consents to the Loan Modification by executing the necessary
documents – within thirty (30) days of receiving notice as prescribed in NRS 645B.340 of
the Loan Modification and the Court's approval of DLLA's authority to make the Loan
Modification – will be classified as a Holdout Beneficiary. This means that the
Beneficiaries will not be classified as a Holdout Beneficiary (and thus not required to pay
anything as a Holdout Beneficiary) until 30 days after notice is sent of the Loan
Modification and the Court's order declaring that Defendants have the authority to
effectuate the Loan Modification.

6. In the event of a legal challenge to the Loan Modification by any Beneficiary who
does not consent to or who does not execute the reconveyance to the Deed of Trust and
other releases, the attorneys' fees, appeal costs, and other legal costs to enforce the Loan
Modification will be allocated jointly and severally to such Holdout Beneficiary(ies).
DLLA estimates that the costs will total as much as \$750,000.00, and possibly more. The
proceeds to the Holdout Beneficiaries will be held in escrow pending all final appeals and
court actions.

13. The terms identified in the Third Proposal are sufficient to satisfy the requirements

1 of fairness and good faith between these parties.⁷

2 14. The Court has previously found that the most reasonable current value of the real
3 property securing the Loan is \$13,460,000.⁸ Although Mr. Lubawy testified that the property
4 value had increased since his original appraisal based on current comparables, the Court finds that
5 the \$13,460,000 remains within the range of reasonable value.
6

7 15. The Third Proposal is a fair modification.

8 16. With respect to the First Proposal, the Court has previously found that Defendants
9 did not act fairly or in good faith.

10 17. Plaintiffs and Counterclaim Defendants sustained damages as a result of the failure
11 to act fairly or in good faith.

12 18. Plaintiffs and Counterclaim Defendants incurred reasonable attorneys' fees
13 totaling \$453,101.59 during Phase One.
14

15 19. Plaintiffs and Counterclaim Defendants incurred reasonable attorneys' fees
16 totaling \$120,728.73 during Phase Two.

17 20. Plaintiffs and Counterclaim Defendants incurred reasonable attorneys' fees
18 totaling \$89,555.50 during Phase Three through February 28, 2018.

19 21. If any findings of fact are properly conclusions of law, they shall be treated as if
20 appropriately identified and designated.
21

22 **CONCLUSIONS OF LAW**

23 22. NRS 645B has no "disinterested" requirement for the sales and transfers
24 specifically contemplated under NRS 645B.340(1).
25

26 ⁷ Defendants stated at the trial that the attorney's fees referenced in Paragraph 6 is the upper range and the
27 attorney's fees are subject to Court approval prior to imposition upon any Holdout Beneficiary.

28 ⁸ All experts agreed that property values continue to increase although the rate of increase is declining.

1 23. Every contract in the state of Nevada has an implied covenant of good faith and
2 fair dealing. The Loan Agreement and the Loan Servicing Agreement between the parties are
3 both contracts which require each side to act in good faith towards the other.

4 24. The Third Proposal is fair to the minority of the beneficial interest holders.

5 25. The Third Proposal adequately factors in the fair market value of the Property, the
6 available assets of Desert Land and the Guarantors, and Desert Land's ownership of adjacent
7 parcels to the Property.

8 26. The "Offering Price" for the Third Proposal is within the current range of fair
9 market value of the Property.

10 27. Defendants have met their burden of proving that the Third Proposal is fair and
11 commercially reasonable.

12 28. Attorneys' fees may be considered as an element of damages arising from tortious
13 conduct (i.e., tortious breach of the implied covenant of good faith and fair dealing, civil
14 conspiracy) or a breach of contract (i.e., contractual breach of the covenant of good faith and fair
15 dealing) if they are the natural and proximate consequence of the injurious conduct. *See Sandy*
16 *Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 957, 35 P.3d 964, 969 (2001)
17 35 P.3d 964, 970 (2001) (clarified on other grounds by *Horgan v. Felton*, 123 Nev. 577, 170 P.3d
18 982 (2007)). In addition, a declaratory relief action may involve claims for attorneys' fees as
19 damages when the action was necessitated by the opposing party's bad faith conduct. *Sandy*
20 *Valley*, 117 Nev. at 958.

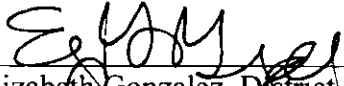
21 29. Plaintiffs and Counterclaim Defendants therefore are awarded attorneys' fees of
22 \$453,101.59 and costs of \$91,972.79 relating to Phase One pursuant to *Sandy Valley*.

23 30. If any Conclusions of Law are properly Findings of Fact, they shall be treated as
24 though appropriately identified and designated.

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IT IS ORDERED that Defendants may finalize the Transaction as outlined in the Third Proposal.

DATED this 27th day of March, 2018.


Elizabeth Gonzalez, District Court Judge

Certificate of Service

I hereby certify that on or about the date filed, this Order was served through Odyssey File & Serve to the parties identified on the e-service list, a copy of this Order was placed in the attorney's folder on the 1st Floor of the RJC or mailed to the proper party as follows:

Michael N Feder, Esq. (Dickinson Wright)

Mark A Hutchison, Esq. (Hutchison & Steffen)


Dan Kutinac