

## Appendix “5”

SETTLEMENT AGREEMENT

This SETTLEMENT AGREEMENT (the "AGREEMENT") dated August 7, 2009, is made and entered into by and between NEVADA JEND M/T/A, LLC (the "Debtor") and KENNEDY FUNDING, INC. ("Kennedy Funding") (as collectively, the "Parties").

RECITALS

WHEREAS, on June 15, 2008, OneCap Partners 2, LLC (hereinafter "Borrower" or "OneCap") and Kennedy Funding entered into a Loan and Security Agreement ("Loan Agreement"), pursuant to which Kennedy Funding made the Loan to OneCap to facilitate the purchase of real property. A true and correct copy of the Loan Agreement is attached as Exhibit "1";

WHEREAS, the Loan is evidenced by a Promissory Note dated June 15, 2008 in the original principal sum of Twelve Million and 00/100 Dollars (\$12,000,000.00) ("Note"), from Lender to Borrower. A true and correct copy of the Note is attached as Exhibit "2";

WHEREAS, under the Note, OneCap promised to pay Kennedy Funding monthly installments of accrued interest only, at the rate of Eleven and One Half (11 1/2 %) percent per annum, to occur from July 1, 2008 through June 1, 2007, to be paid monthly on the first day of the month prior to when the interest is due;

WHEREAS, under the Note, OneCap promised to pay Kennedy Funding monthly installments of accrued interest only at a rate of Eleven and One Half (11 1/2 %) percent per annum, to occur from July 1, 2007 through the Maturity Date, to be paid monthly commencing August 1, 2007, and continuing on the first day of each month thereafter until the Maturity Date;

WHEREAS, pursuant to the Note, OneCap agreed to pay all principal, interest and other sums due under the Note in full on the Maturity Date. Pursuant to extensions and amendments to the Loan Documents, the Maturity Date is June 30, 2009 (the "Maturity Date");

WHEREAS, the Note provided that in the event of a late payment under the Note, OneCap agreed to pay a late charge equal to ten percent (10%) of the overdue payment;

WHEREAS, the Note provided that in the event of a default, OneCap agreed to pay a default rate of twenty-five percent (25.0%) per annum;

WHEREAS, as further security for the Loan, Borrower executed and delivered to Lender that certain Deed of Trust with Security Agreement, Financing Statement for Future Pledge and Assignment of Rights (the "Deed of Trust") against 78.74+ acres of raw land located in located along Casino Drive and the Colorado River in Laughlin, Nevada 89029, Clark County Assessor Parcel Number 284-25-101-001 and 284-25-201-001 (the "Property"), which Deed of Trust was dated June 15, 2008, and recorded on June 15, 2008, with the Clark County Recorder's Office ("Recorder") as Instrument No. 20080615-0005324. A true and correct copy of the Deed of Trust is attached as Exhibit "3";

WHEREAS, as further security for the Loan, Borrower executed and delivered to Lender that certain Assignment of Leases and Rents on the Property dated June 15, 2008, and recorded on June 15, 2008, with the Recorder as Instrument No. 20080615-

NEVADA JEND M/T/A

KENNEDY FUNDING, INC.



0005325. A true and correct copy of the Assignment of Leases and Rents is attached as Exhibit "4";

WHEREAS, as additional security for the Loan, OneCap executed in favor of Kennedy Funding that certain Assignment of Leases, Certain Prior Subleases, Surveys, Drawings and Report ("Assignment of Leases") dated June 15, 2008. A true and correct copy of the Assignment of Leases is attached as Exhibit "5";

WHEREAS, on April 1, 2008, OneCap defaulted under the Loan and Deed of Trust, including, but not limited to, OneCap's failure to make its monthly payment under the Note in the amount of \$260,000 due April 1, 2008;

WHEREAS, OneCap transferred its interest in the Property to the Debtor, and the Clark County Recorder identifies the Debtor as holding a fee simple interest in the Property;

WHEREAS, on December 26, 2008 ("Petition Date"), three (3) days before the December 29, 2008, for the United States Bankruptcy Court for the District of Nevada, Case No. BK-08-25487-BAM (the "Bankruptcy") (Dkt. No. 1);

WHEREAS, Debtor's bankruptcy case is a single-asset real estate case consisting of the Property;

WHEREAS, as of the date of the Bankruptcy, the outstanding balance Debtor owed to Kennedy Funding under the Loan Agreement and Note was \$15,011,111.02;

WHEREAS, the Debtor maintains control of its affairs as debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code;

WHEREAS, no trustee or examiner has been appointed in this case. As of this writing, no official committee of unsecured creditors (the "Committee") has been appointed by the Office of the United States Trustee (the "U.S. Trustee");

WHEREAS, on March 26, 2009, Debtor filed the Debtor's Disclosure Statement (Dkt. No. 40), and an Amended Disclosure Statement on May 18, 2009 (Dkt. No. 50);

WHEREAS, on March 26, 2009, Debtor filed the Debtor's Plan of Reorganization (Dkt. No. 30);

WHEREAS, on May 27, 2009, Kennedy Funding filed a Motion to Terminate Automatic Stay Pursuant to 11 U.S.C. § 362(d)(1)-(3) and Waiver of the 10-Day Stay Under FRBP 4001(a)(3), or in the alternative, Motion to Convert to Damra Case;

WHEREAS, it is the desire of the Parties to resolve and settle the contested confirmation of the Plan of Reorganization and the Motion to Terminate Stay, both set for hearing on August 18, 2009, at 3:00 p.m.; and

WHEREAS, the Parties have negotiated and reached this Agreement in good faith.

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NEVADA JEND M/T/A

THE AGREEMENT

NOW, THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:

1.01 TERMINATION OF AUTOMATIC STAY AS TO KENNEDY FUNDING:

The automatic stay shall terminate as to Kennedy Funding if no sale or payoff in six (6) months.

(a) In the event the Property is not sold within six (6) months of the entry of the Order approving this Settlement Agreement, or in the event Kennedy Funding is not paid within six (6) months of the entry of the Order approving this Settlement in an amount equal to or greater than Kennedy Funding's secured claim or a lesser amount agreed to by Kennedy Funding, which amount Kennedy Funding alleges is currently at an outstanding balance of \$16,049,147.65 as of July 24, 2008, consisting of principal in the amount of \$12,000,000.00, \$3,988,000.00 in accrued interest, \$18,000.00 in late fees, \$29,046.50 in foreclosure costs and appraisal fees, and \$3,019.15 in attorney's fees and costs, accruing interest at the rate of 3.3333% per annum, subject to final calculation, the Debtor hereby agrees to the termination of the automatic stay as to Kennedy Funding without further hearing.

(b) Debtor shall not transfer title to the Property absent payment in full to Kennedy Funding of its outstanding obligation.

(c) Debtor shall not change the name of the Debtor with the Nevada Secretary of State or otherwise obtain payment in full to Kennedy Funding of Debtor's outstanding obligation.

(d) The Bankruptcy Court shall enter an Order immediately terminating the automatic stay as to Kennedy Funding without need for further hearing upon the filing of an Affidavit of No Sale of the Property submitted by Kennedy Funding with the Bankruptcy Court, at the expiration of six (6) months after the entry of the Order approving this Settlement Agreement.

(e) Upon termination of the automatic stay pursuant to this Settlement Agreement, the Parties agree that Kennedy Funding may take the necessary steps to allow for foreclosure on the Property immediately after the entry of the Order of Terminating the Stay, and the Parties agree to waive the 10-day stay under Rule 4001(a)(2), including but not limited to, publishing and recording the Notice of Trustee's Sale any time after termination of the automatic stay.

(f) Kennedy Funding agrees to give Debtor up through and until six (6) months after entry of the Order approving this Settlement Agreement (the "Deadline") to pay off Kennedy Funding in full before Kennedy Funding forecloses on the Property.

(g) The Parties agree that this Settlement Agreement shall not preclude, limit or abridge Kennedy Funding's rights to pursue any deficiency actions against the Guarantors of Debtor's obligations owing to Kennedy Funding.

(h) The Parties agree that the August 14, 2009, discovery deadline shall be stayed, and the hearings set for continuation of the Plan of Reorganization and the Motion to Terminate Stay, both set for August 18, 2008, at 3:00

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p.m., shall be taken off calendar and reset for hearing pending Bankruptcy Court approval of the Motion to Approve Settlement Agreement, and that the hearing on the confirmation of the Plan of Reorganization be continued to a date set by the Court six (6) months after entry of the Order approving this Settlement.

1.02 KENNEDY FUNDING'S REPRESENTATIONS. Kennedy Funding warrants to Debtor as follows:

(a) That it has entered into this AGREEMENT in good faith and may expect to perform under this AGREEMENT to the best of its ability.

(b) That no promise or inducement has been offered except as set forth herein.

(c) That this AGREEMENT has been carefully read in its entirety by Kennedy Funding, which has had the benefit and advice of counsel of its choosing.

(d) That in entering into this AGREEMENT and the settlement contained herein, Kennedy Funding is acting freely and voluntarily, without influence, compulsion or duress of any kind, from any source, including but not limited to, any other party or parties, their attorneys' representatives or anyone acting or purporting to act on behalf of any party.

1.03 DEBTOR'S REPRESENTATIONS. Debtor represents and warrants to Kennedy Funding:

(a) That it has entered into this AGREEMENT in good faith and fully expects to perform under this AGREEMENT to the best of its ability.

(b) That it is competent to sign this AGREEMENT.

(c) That no promise or inducement has been offered except as set forth herein.

(d) That this AGREEMENT contained herein has been carefully read in its entirety by Debtor, which has had the benefit and advice of counsel of its choosing.

(e) That in entering into this AGREEMENT and the settlement contained herein, Debtor is acting freely and voluntarily, without influence, compulsion or duress of any kind, from any source, including but not limited to, any other party or parties, their attorneys' representatives or anyone acting or purporting to act on behalf of any party.

2.01 ATTORNEY FEES. If any action is commenced to enforce the terms of this AGREEMENT, the prevailing party shall be entitled to recover all of its expenses relating to such action, including without limitation, its reasonable attorneys' fees and costs.

2.02 INTEGRATION AND AMENDMENT. This AGREEMENT represents the full and complete integration of the AGREEMENT between the parties and is the complete expression thereof.

2.03 AMENDMENTS. This AGREEMENT may not be modified or amended except in writing signed by the Parties.

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2.04 SEVERABILITY. If any portion of this AGREEMENT or the application thereof to any person or circumstance shall be deemed invalid, illegal or unenforceable in any court, the remainder of this AGREEMENT and the application thereof shall not be affected and shall be enforceable to the fullest extent permitted by law.

2.05 GOVERNING LAW. This Settlement Agreement shall be governed by and construed in accordance with the laws of the State of Nevada, except as such laws may be preempted or superseded by the laws of the United States.

2.06 SETTLEMENT AGREEMENT AS DEFENSE TO FUTURE ACTIONS. This Settlement Agreement may be pled as a full and complete defense to, and the Parties hereby consent that it may be used as the basis for, an injunction against any action, suit, or other proceeding based on the claims released by this Settlement Agreement.

2.07 COUNTERPARTS. This Settlement Agreement may be executed in one or more counterparts, confirmed by electronic signatures transmitted by telephone, each of which shall be deemed a duplicate original, but all of which together shall constitute but one and the same instrument. A facsimile signature shall also constitute an original signature of this Settlement Agreement.

2.08 HEADINGS FOR CONVENIENCE ONLY. The Parties acknowledge that the paragraph headings contained herein are only for the convenience of the Parties. The substance and provisions hereof control without regard to the headings.

2.09 PREPARATION OF SETTLEMENT AGREEMENT. The Parties acknowledge that this Settlement Agreement has been negotiated and prepared in an arms-length transaction and that all Parties are deemed to have drafted the Settlement Agreement and this Settlement Agreement shall not be interpreted against any Party as the drafter.

2.10 AUTHORITY TO EXECUTE SETTLEMENT AGREEMENT. Each Party represents and warrants that it has the authority to execute this Settlement Agreement and that it has not assigned such right, or any of its claims requested herein, to any other Party by way of explicit assignment, subrogation, operation of law, or otherwise.

2.11 OTHER ACTS AND DOCUMENTS. The Parties agree to undertake such other acts and execute such other documents as may be reasonably necessary to effect the purpose and intent of this Settlement Agreement.

2.12 SUCCESSORS AND ASSIGNS. This AGREEMENT shall be binding upon and shall inure to the benefit of the parties hereto and their respective personal representatives, successors or assigns, such as the case may be.

2.13 WAIVER OF BREACH. The waiver by any party of any breach of this Agreement by the other party will not be deemed a waiver of a future breach of the same provision, or a waiver of any other provision of this Agreement.

2.14 CONTINUED OF ENTIRE AGREEMENT. This Agreement supersedes any and all other agreements and contains the entire Agreement of the parties except as otherwise provided for herein. This Agreement is not subject to any condition precedent with respect to formation or performance, written, oral or otherwise implied not specifically set forth herein.

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RENEE MOULTON & THOMPSON  
SDW

2.15 AGREEMENT VOLUNTARILY AND CLEARLY UNDERSTOOD. Each party to this agreement acknowledges and declares that it:

(a) Is fully and completely informed as to the facts relating to the subject matter of this Agreement and as to the rights, duties and liabilities of all parties.

(b) Enters into this Agreement voluntarily, free from undue influence, coercion or duress of any kind.

(c) Has given careful thought to the making of this Agreement.

(d) Has carefully read each of the provisions of this Agreement.

(e) Fully and completely understands each provision of this Agreement.

2.16 REPRESENTATION BY COUNSEL. The Parties each warrant and acknowledge that (i) they have read and understood the terms of this Settlement Agreement; (ii) they have had the opportunity to retain legal counsel of their choice throughout the negotiations which preceded the signing of this Settlement Agreement and rely solely on their counsel's representations.

IN WITNESS WHEREOF, the Parties execute this Settlement Agreement as of the day and year first written above.

Dated this 7th day of August, 2009.

RENEE MOULTON & THOMPSON  
SDW  
KENDRY PUNING, INC.  
By: [Signature]  
President

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CERTIFICATE OF SERVICE

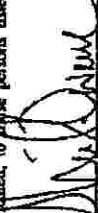
I hereby certify that I am an employee of Samaro, Driggs, Welch, Kearney, Holley & Thompson, and that on the 19<sup>th</sup> day of August, 2009, I caused to be served a true and correct copy of MOTION TO APPROVE COMPROMISE AND SETTLEMENT PURSUANT TO BANKRUPTCY RULE 9019 WITH CERTIFICATE OF SERVICE in the following manner:

☒ (ELECTRONIC SERVICE) Under Administrative Order 02-1 (Rev. 3-31-04) of the United States Bankruptcy Court for the District of Nevada, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by that Court's facilities.

☐ (UNITED STATES MAIL) By depositing a copy of the above-referenced document for mailing in the United States Mail, first class postage prepaid, at Las Vegas, Nevada, to the parties listed on the attached service list, at their last known mailing addresses, on the date above written.

☐ (OVERNIGHT COURIER) By depositing a true and correct copy of the above-referenced document for overnight delivery via Federal Express, at a collection facility maintained for such purpose, addressed to the parties on the attached service list, at their last known delivery address, on the date above written.

☐ (FACSIMILE) That I served a true and correct copy of the above-referenced document via facsimile, to the facsimile numbers indicated, to those persons listed on the attached service list, on the date above written.

  
An employee of Samaro, Driggs, Welch,  
Kearney, Holley & Thompson

1                                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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5 VINCENT W. HESSER, an individual,

6                   Appellant,

7 vs.

8 KENNEDY FUNDING, INC., a New Jersey  
9 corporation,

10                   Respondent.  
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Electronically Filed  
Aug 03 2010 01:07 p.m.  
Supreme Court No. 55654  
Tracie K. Lindeman

**APPEAL FROM EIGHTH JUDICIAL  
DISTRICT COURT**

17                                   **APPENDIX TO**  
18                                   **APPELLANTS' OPENING BRIEF**  
19  
20

21 HAROLD P. GEWERTER, ESQ.  
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28 Attorney for Appellants

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**CERTIFICATE OF SERVICE BY MAIL**

I hereby certify that on the 3<sup>rd</sup> day of August 2010, I personally served a true copy of the foregoing APPENDIX TO APPELLANT’S OPENING BRIEF, by placing a true copy thereof in the United States Mail, postage fully prepaid, addressed as follows:

Richard F. Holley, Esq.  
Ogonna M. Atamoh, Esq.  
Santoro, Driggs, Walch,  
Kearney, Holley & Thompson  
400 South Fourth Street, Third Floor  
Las Vegas, NV 89101  
Fax: (702) 791-1912

/s/ Michele Aceves  
An Agent of HAROLD P. GEWERTER, ESQ., LTD.