Dated: March 03, 2015
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re	PERFORMA ENTERTAINMENT REAL ESTATE, INC.,	Case. No. 10-26100-L Chapter 11
	Debtor.	

ORDER DENYING MOTION OF DEBTOR TO ENFORCE SETTLEMENT AGREEMENT AND GRANTING MOTION OF CITY OF MEMPHIS TO ENFORCE SETTLEMENT AGREEMENT AND FOR ACCOUNTING AND DENYING MOTION OF CITY OF MEMPHIS FOR DISGORGEMENT OF PARKING COMMISSIONS

THIS MATTER came before the court for hearing on February 25, 2015, on cross motions of Performa Entertainment Real Estate, Inc. (the "Debtor") and the City of Memphis (the "City"). The parties dispute the meaning of the term "parking commissions" as used in reference to certain revenue received from the Debtor from the operation of a parking lot near the Beale Street Historic District, Memphis, Tennessee. The Debtor contends that it is entitled to 100% of the net parking

lot revenue, while the City contends that the Debtor is entitled to only 50% of that revenue. In addition, the City asks that the Debtor or whomever received the net parking lot revenue during calendar year 2013 and the early months of calendar year 2014 be instructed to disgorge and return it to the City for distribution pursuant to the Settlement Agreement. The Settlement Agreement in dispute is that by and among the City; the Debtor; John A. Elkington; Joseph Calabretta; Performa Entertainment, LLC; Performa Mississippi, LLC; Performa Louisiana, LLC; Elkington Real Estate Group, LLC; and Beale Street Merchants Association, filed with the Bankruptcy Court on September 15, 2011, and subsequently amended by Notice of Amendment to Settlement Agreement filed January 17, 2013. Tr. Ex. 2.

At the hearing, the Debtor was represented by Toni Campell Parker. The City was represented by Michael P. Coury and J. Michael Fletcher. First Tennessee Bank National Association joined the Debtor's motion, and was represented at the hearing by John C. Speer. The court heard the testimony of John A. Elkington, Paul Morris, Joseph Calabretta, Lewis Winston, Jr., and John L. Ryder. Twenty-three exhibits were admitted. After considering the testimony of the witnesses and carefully reviewing the exhibits and related court documents, the court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

JURISDICTION

Jurisdiction over a contested matter arising in a case under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under

title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The determination of proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship are core proceedings arising under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(B). In addition, the dispute before the court arises out of the Debtor's confirmed Plan of Liquidation, which reserved to the court jurisdiction to construe, implement, and enforce the plan. *See* Amended Plan of Liquidation for Performa Entertainment Real Estate, Inc., Dkt. No. 569 (December 12, 2013) (the "Plan"), pp. 26-27. The bankruptcy court has authority to enter an order resolving the present dispute subject only to appellate review.

FINDINGS OF FACT

The Debtor commenced this case by filing a petition for voluntary relief under Chapter 11 of the Bankruptcy Code on June 7, 2010. The Debtor remained in possession of property of the bankruptcy estate until May 23, 2011.

Although no trustee was appointed for the Debtor's estate, John L. Ryder, appointed receiver pursuant to state law before the bankruptcy case was filed, was ordered to retake possession and control of property of the bankruptcy estate on May 23, 2011. Mr. Ryder signed and submitted the monthly operating reports for the Debtor from that time forward. Tr. Ex. 9.

On September 15, 2011, the Debtor filed a Motion to Approve Compromise and Settlement pursuant to Federal Rule of Bankruptcy Procedure 9019(a). Tr. Ex. 1. The motion related to the Settlement Agreement described above.

Pursuant to the Settlement Agreement, it was contemplated that the Debtor would assign to the City all of its interests in the 1982 Sublease (the "Sublease") between the Debtor and Beale Street Development Corporation ("BSDC") relating to the Beale Street Historic District. Tr. Ex. 3.

Pursuant to Section 4 of the Sublease, the Lessee (Debtor, f/k/a Elkington and Keltner Properties, Inc.) was obligated to pay to the Lessor (BSDC) an amount equal to the Gross Rental Income (as defined in the Sublease), less and except certain charges set forth in the Sublease. Subparagraph 4 of Section 4 excluded from Gross Rental Income "one-third (1/3) of all gross revenues received by the Lessee for parking charges."

While not denominated a "commission" under the Sublease, the Debtor accounted for 1/3 of the gross parking revenues as "Parking Commission" on its profit and loss statements. See Tr. Ex. 8. The Debtor's parking commission was calculated on the net revenue received from operation of certain parking lots in and around the Beale Street Historic District (i.e., gross parking revenue less operating expenses).

On January 10, 2002, BSDC and the Debtor amended the Sublease as it related to the parking commissions to reflect a decrease in parking revenue resulting from the use of certain of the parking lots to construct various buildings in and around Beale Street such as the FedEx Forum and Westin Hotel. Subparagraph 4 was amended to permit the Debtor to retain one-half of the revenue received from parking operations. Tr. Ex. 4.

The Settlement Agreement provided that, on the Effective Date, the Debtor would assign to the City all of its rights under the Sublease, Merchant Subleases, and Ancillary Property. As defined in the Sublease, Ancillary Property includes parking leases.

Section 9 of the Settlement Agreement provided, *inter alia*, that:

> 9. **Payments of Parking Commissions.** After the Effective Date, the City or its designee shall pay to Elkington Real Estate Group or its Commissions Designee on the fifteenth (15th) day of each month fifty percent (50%) of the gross parking commission revenue generated by the parking lot located at [the property] shown on Exhibit "A" to the Lease between the City of Memphis and Beale Street Development Corporation ... until November 29, 2032. Termination or assignment of the Master Lease or the Sublease will not affect or interfere with the City's or its designee's obligation to pay the (50%) parking commissions to Elkington Real Estate Group or its Commissions Designee until November 29, 2032. These parking commissions will be paid to Elkington Real Estate Group or its Commission Designee.

The United States Trustee objected to the Motion to Approve Compromise and Settlement for the reason, among others, that the parking commissions belonged to the bankruptcy estate rather than Elkington Real Estate Group ("EREG") because it was the Debtor, not EREG, that was a party to the Sublease and therefore, it was the Debtor, not EREG, that was entitled to the benefit of the exclusion of 50% of parking revenue from the calculation of Gross Rental Income under the Sublease as amended.

BSDC also filed an objection to the Motion to Approve Compromise and Settlement. After a hearing on that objection, the court entered its Order Conditionally Granting Motion to Assume Unexpired Leases and Executory Contracts with and Conditionally Authorizing Assignment of Unexpired Leases and Executory Contracts to the City of Memphis and Disallowing Claim No. 18 of Beale Street Development Corporation (the "Conditional Order"). Pursuant to the Conditional Order, the court approved the assumption and assignment of the Sublease to the City contingent upon the court's approval of the Settlement Agreement.

In anticipation of resolving the United States Trustee's objection regarding the payment of parking revenue to EREG, the City, Beale Street Merchants Association, and the Debtor entered into

a Notice of Amendment to the Settlement Agreement which was filed with the court on January 17, 2013. Tr. Ex. 7. The Notice provided in pertinent part as follows:

> Further Debtor has agreed with U.S. Trustee that under [the] Settlement Agreement that the "parking commissions" as set forth in paragraph nine (9) of the Settlement Agreement are property of the estate of Performa Entertainment Real Estate, Inc. and the Settlement Agreement is hereby amended that such property will be first paid to the Debtor to [the] extent necessary to fund a Chapter 11 plan from the "parking commissions" and upon payments made under a confirmed Plan the "parking commissions" will be disbursed in accordance with paragraph nine (9) of the Settlement Agreement.

The purpose of this amendment was to ensure that the 50% of parking revenue that was excluded from the calculation of Gross Rental Income under the Sublease as amended would be available to the Debtor to fund a plan. It was not the intention of this amendment to change the percentage to be excluded from parking revenue.

On March 11, 2013, the court entered its Order Granting Motion to Approve Compromise and Settlement. Tr. Ex 10. Paragraph 3 of the Order provides in pertinent part:

> [T]he Debtor and all parties agree that the following language is substituted for the first sentence of paragraph 9 of the Settlement Agreement:
>
> > After the Effective Date, the Parking Commissions are property of the estate of the Chapter 11 Debtor PERE and the parking commissions will be first paid to PERE to extent necessary to fund a Chapter 11 Plan from the parking commissions and upon completion of all plan payments under a confirmed Chapter 11 Plan the parking commissions will be disbursed in accordance with Section 9 of the Settlement Agreement. The City or its designee shall pay to Elkington Real Estate Group or its Commissions Designee on the fifteenth (15th) day of each month fifty percent (50%) of the gross parking commission revenue generated by the parking lot ....

> The U.S. Trustee has withdrawn its objections to the Settlement Agreement based upon the amendment of paragraph 9 above.

Order Approving Compromise and Settlement, pp. 3-4.

There is no evidence that the parties intended to change the percentage of parking revenue that might be excluded from the calculation of Gross Rental Income under the Sublease as amended. Rather, this language memorializes the parties' agreement that the parking revenue assigned to EREG under the Settlement Agreement would be retained by the Debtor so long as it was needed to fund the Debtor's plan. Thereafter, the parking revenue would be distributed as originally provided in the Settlement Agreement, i.e., 50% included in Gross Rental Income and 50% paid to EREG (for reasons that were never specified but presumably resulted from the negotiations of the parties).

From the original appointment of Mr. Ryder as receiver on June 8, 2010, and throughout the Chapter 11 case, the profit and loss statements showed all of the parking revenue (net of expenses from the parking lot operator) in the calculation of "Total Revenues," and "Parking Commission" as a deduction from Total Revenues as part of the "Cost of Sales." Tr. Ex. 8. Mr. Ryder testified that while he served as receiver, a parking commission of 50% of net parking revenue was paid monthly to EREG.

Beginning in January 2013 (but excluding February 2013), no further parking revenue is reflected in the profit and loss statements. Mr. Calabretta, controller for the Debtor at that time, testified that this was because no further parking revenue was received by the Debtor.

Lewis Winston, Jr., an employee of the Debtor and later owner of All-Win, LLC, the operator of the parking lot, testified that he was instructed to deposit the daily receipts from

operation of the parking lot to an account maintained by EREG. Tr. Ex. 14. The effect of these instructions was to exclude funds from the bankruptcy estate that properly belonged to it.

On December 30, 2013, the court signed its Order Confirming the Amended Plan of Liquidation for the Debtor (entered January 2, 2014, Dkt. No. 596). The confirmed Plan defines "Parking Commissions" as "the Commissions as described in the Settlement Agreement under Paragraph 9 and the Order entered by the Court on March 23 [sic], 2013 approving the Settlement Agreement with the substitute language." Tr. Ex. 11, p. 4.

Pursuant to the confirmed Plan, as amended by the Order Granting Confirmation, the parking commissions are to be used to pay the holders of claims of Class 7(b) (allowed prepetition claims for attorney fees) not paid from other sources, and the holders of claims of Class 7(c) (allowed claims of $25,000 and above) pro rata on a monthly basis for a five-year period commencing thirty days after the effective date of the Plan, but in the event that the holders of claims in Class 7(c) fail to receive 50% of their allowed claims at the end of that five-year period, the parking commissions will continue to be paid to the holders of Class 7(c) claims until they have been paid not less than 50% of their claims. Plan, Tr. Ex. 11, pp. 10, 12, 15, 17; Order, Tr. Ex. 13, p. 3.

Pursuant to the confirmed Plan, upon completion of payments to Classes 2, 6, and 7, which in the case of Class 7(c), means upon completion of payment of not less than 50% of the allowed claims in that class, the parking commissions are to be paid to EREG as provided in the Settlement Agreement. Plan, Tr. Ex. 11, p. 25; Order, Tr. Ex. 13, p. 3.

The confirmed Plan further provides that:

> The Confirmation Order shall be deemed to supersede the order of the bankruptcy court reinstating the state court receiver, and notwithstanding anything contained in the Receiver Order to the contrary, the funds in possession of the Receiver shall be turned over

> to the Debtor upon Confirmation Order, provided, further, that nothing in this Plan or the Confirmation Order shall be deemed to modify the terms of the Settlement Agreement without the express written consent of the City of Memphis.

Plan, Tr. Ex. 11, p. 16.

The confirmed Plan provided that the "effective date of the plan" was to fall upon the "concurrence of both the entry of the confirmation order and the effective date of the settlement." The "Effective Date of the Settlement" was specified to fall "on or before 11:59 p.m. on December 31, 2013, or such later date as may be agreed upon by the parties ...." On December 31, 2013, the City, the Debtor, and the other parties to the Settlement Agreement filed notice of the Effective Date of Settlement which made the settlement effective on December 31, 2013.

The Amended Disclosure Statement, filed by the Debtor on December 5, 2013, included at Exhibit G a "Monthly Revenue and Expense Budget" for parking revenue that shows projected net income from operation of the parking lot in calendar year 2014 to be $79,561, and increasing amounts in years 2015-2018. The total amount of net parking revenue forecast in Exhibit G is $420,282. The Amended Disclosure Statement, Exhibit E "Supplement" shows "Parking Income Paid Over Five Year Plan" of $420,482. The Debtor argues that these exhibits support its position that the City agreed that 100% of net parking revenue might be used by the Debtor to fund its plan.

There is no evidence, other than the exhibits to the Amended Disclosure Statement which was not prepared or adopted by the City, that the City ever agreed to the use of 100% of net parking revenue by the Debtor to fund its plan. The court finds that there was no such agreement.

According to Mr. Paul Morris, president of the Downtown Memphis Commission (the "DMC"), which assumed responsibility for managing the Beale Street Historic District on January 1,

2014, All-Win was employed to manage the parking lot on behalf of the DMC in March 2014. The DMC received no revenue from operation of the parking lot until April 2014.

Under its agreement with the DMC, All-Win maintains its own bank account into which daily parking receipts are deposited. In the month following receipt of parking receipts, All-Win pays over parking revenue net of expenses and a reserve for operations to the DMC.

In the month following receipt of parking revenue from All-Win, the DMC remits one-half of that revenue to the Debtor. Thus, the distribution made by the DMC in June, for example, is based upon parking receipts received by All-Win in April.

The net parking revenue that the City received from All-Win in April 2014 represents receipts by All-Win in March 2014.

Upon the instruction of John A. Elkington, the parking revenue generated in the period January 2013 through February 2014 was deposited to an account maintained by EREG. This revenue has not been accounted for as provided in the Sublease. Testimony of Joseph Calabretta, former controller for the Debtor; and Lewis Winston, Jr., owner of All-Win.

CONCLUSIONS OF LAW

The Debtor urges the court to compel the City to pay over to it net parking revenue retained by the City from and after April 2014, and to pay over 100% of net parking revenue received in the future until the Debtor's obligation to pay the holders of Class 7(c) claims for sixty months or one-half of their allowed claims, whichever is greater, is complete. The City urges the court to find that it has distributed net parking revenue in a manner consistent with the Settlement Agreement and that it may continue to do so in the future. The City also urges the court to order the Debtor to account

for parking revenue in the period January 2013 to February 2014, and to disgorge any amounts retained in derogation of the Sublease and Settlement Agreement.

At best, the Debtor points to the Exhibits to the Amended Disclosure Statement as evidence that the City agreed that it might keep 100% of net parking revenue in order to fund its plan. There is no evidence of any written or oral agreement to that effect. The Settlement Agreement, as amended, provides that "parking commissions" shall be deemed property of the estate. In the usage of the parties, "parking commissions" historically referred to the portion of net parking revenue that was excluded from calculation of Gross Rental Income under the Sublease. At first, this exclusion was equal to one-third of net parking revenue. The exclusion was increased in 2002 to one-half of net parking revenue. This usage is consistent with the profit and loss statements prepared by the Debtor both before and after the filing of the bankruptcy petition. In each of those profit and loss statements, net parking revenue is included in the calculation of "Total Revenues," and "Parking Commission" is included in the calculation of the "Cost of Sales."

Whenever there is a conflict between a plan and a disclosure statement, the language of the plan controls. *In re AOV Indus., Inc.*, 792 F.2d 1140, 1153 (D.C. Cir. 1986); *In re Futter Lumber Corp.*, 2011 WL 5417094, slip op. at *5 (Bankr. E.D.N.Y 2011); *In re Bridgepoint Nurseries, Inc.*, 190 B.R. 215, 223 (Bankr. D. N.J. 1996); *In re Hiller*, 143 B.R. 263, 267 (Bankr. D. Colo. 1992). It is the confirmed plan that binds the debtor and its creditors, not the disclosure statement. *See* 11 U.S.C. § 1141(a) ("[T]he provisions of a confirmed plan bind the debtor ... and any creditor, equity security holder, or general partner in the debtor, whether or not ... such creditor, equity security holder, or general partner of the debtor has accepted the plan.").

The provisions of the confirmed Plan in this case override any conclusion that might be drawn from the exhibits to the Amended Disclosure Statement. Moreover, the confirmed Plan in this case explicitly provides that it is to be interpreted to conform with the Settlement Agreement. The Settlement Agreement had the initial effect of shifting the parking commissions to EREG. As amended, however, it reserved so much of those commissions as is necessary to fund the Debtor's plan to the Debtor. The later amendment set forth in the Order Confirming the Plan merely adjusts the division of parking commissions between the Debtor and EREG by providing that the Debtor might retain the parking commissions for more than five years if necessary to pay the holders of Class 7(c) claims 50% of their allowed claims. In each case, "parking commissions" has the meaning it has always had in the dealings among these parties: 50% of net parking revenue.

There is no doubt that EREG improperly captured parking revenue during the period January 2013 through February 2014. Had the net parking revenue been paid to the Receiver, it would have been accounted for as it had been prior to January 2013. It would have been used to pay the 50% parking commission to EREG, with the balance being used to pay the expenses of the Debtor and/or possibly to make distributions by the Receiver. EREG, however, is not properly before the court and cannot be compelled to disgorge the revenue that it improperly retained until it is. At the hearing, Mr. Elkington indicated that he would cause EREG to voluntarily account for and disgorge the parking revenue withheld from the Debtor. The court would be very pleased if this were to happen.

CONCLUSION

For the foregoing reasons, the motion of the Debtor is **DENIED**. The motion of the City, insofar as it asks for enforcement of the Settlement Agreement consistent with prior practice is

GRANTED. The Debtor is entitled to a parking commission in an amount equal to 50% of net parking revenue for use in funding its Plan until it has made payment to the holders of Class 7(c) claims for sixty months or in an amount equal to one-half of their allowed claims, whichever is greater. The City is entitled to retain the remaining 50% of net parking revenue. Insofar as the City's motion asks for disgorgement of parking commissions paid prior to the effective date of the Settlement Agreement, the motion is **DENIED**, but only for the reason that the recipient of the parking revenue, Elkington Real Estate Group, is not before the court.