

UNITED STATES OF AMERICA  
Before the  
CONSUMER FINANCIAL PROTECTION BUREAU

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ADMINISTRATIVE PROCEEDING  
File No. 2013-CFPB-0002

In the Matter of:

3D RESORTS-BLUEGRASS, L.L.C.

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**SUPPLEMENTAL STATEMENT OF AUTHORITIES  
SUPPORTING RESPONDENT'S AFFIRMATIVE DEFENSES**

Pursuant to the permission granted by Judge Murray during the scheduling conference on July 2, 2013, Respondent, 3D Resorts-Bluegrass, L.L.C., by and through Thomas M. Duddy, the Chapter 11 Trustee of its bankruptcy estate (the "Trustee"), submits the following additional authorities in support of certain affirmative defenses set forth in Respondent's Answer to Notice of Charges Seeking Rescission, Restitution, Civil Money Penalties, and Other Legal and Equitable Relief.

**First Affirmative Defense**

Under 28 U.S.C. § 1334(e), the CFPB lacks subject matter jurisdiction with respect to contracts or monies which constitute property of Respondent's bankruptcy estate. State of Mo. v. U.S. Bankruptcy Court, E.D. of Arkansas, 647 F.2d 768 (8<sup>th</sup> Cir. 1981) (bankruptcy court's power to control res or property of bankruptcy estate is superior to agency's conflicting police or regulatory power); In re Best Products Co., Inc., 1994 WL 141970 (S.D.N.Y.) (distinguishing

Mcorp case where administrative proceeding would impair court's exclusive jurisdiction over property of bankruptcy estate).

### **Second Affirmative Defense**

The Notice was issued in violation of 11 U.S.C. § 362 and is therefore void. Chao v. Hospital Staffing Services, Inc., 270 F.3d 374 (6<sup>th</sup> Cir. 2001) (actions pursuing government's pecuniary interest and adjudicating private rights are not exempt from automatic stay as exercise of police or regulatory power ); State of Mo. v. U.S. Bankruptcy Court, E.D. of Arkansas, 647 F.2d 768 (8<sup>th</sup> Cir. 1981) (police or regulatory power exception to automatic stay does not apply to action which conflicts with bankruptcy court's power to control the res or property of bankruptcy estate); In re Colonial Realty Company, 980 F.2d 125 (2<sup>nd</sup> Cir. 1992) (statutory ban on court order restraining administrative action does not inhibit operation of automatic stay).

### **Third Affirmative Defense**

The claims asserted in the Notice are barred by the limitation period set forth in 15 U.S.C. § 1711. See Dole v. Hopple Plastics, Inc., 902 F.2d 33 (6<sup>th</sup> Cir. 1990) (where the government files suit on behalf of individuals to vindicate their private rights under a federal statute which does not specify a limitation period, the claim is subject to the limitation period provided in an analogous federal statute); see also U.S. v. Beebe, 8 S.Ct. 1083 (1888) (applying laches of persons whose interest the government was asserting).

**Fourth Affirmative Defense**

The CFPB has waived its right to assert the claims set forth in the Notice in this administrative proceeding by virtue of its participation in Respondent's bankruptcy case, including the filing of a proof of claim and engaging in court-ordered mediation. Langenkamp v. Culp, 498 U.S. 42, 44 (1990) (filing a proof of claim in a bankruptcy proceeding triggers the process of allowance and disallowance of claims thereby subjecting the creditor to the bankruptcy court's equitable power); *accord* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59, n.14 (1989); Katchen v. Landy, 382 U.S. 323, 329-330 (1966); In re: Best Products Co., Inc., 1994 W.L. 141970 (S.D.N.Y.) (filing proof of claim gave bankruptcy court jurisdiction despite jurisdictional limitations under FIRREA; MCorp. Financial is not applicable where a proof of claim has been filed and enforcement of jurisdictional limitation would dramatically impair bankruptcy court's ability to administer debtor's estate); In re Young Oil Corp., 419 B.R. 336 (Bankr.W.D.Ky. 2009) (filing proof of claim subjected regulatory agency to jurisdiction of court and barred further state court proceedings).

Respectfully submitted this 5<sup>th</sup> day of July, 2013.

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by Thomas M. Duddy, Chapter 11 Trustee*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 5<sup>th</sup> day of July, 2013, I caused a copy of the foregoing Supplemental Statement of Authorities Supporting Respondent's Affirmative Defenses to be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties who have consented to electronic service:

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/s/ Michael A. Fiorella  
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