

1 determine is owed to each lien claimant, and such additional amounts as may be awarded pursuant to
2 NRS 108.237, but the liability of the surety may not exceed the penal sum of the surety bond.”

3 4. In consideration for the issuance of the Bond and to induce Philadelphia to issue the
4 Bond, defendants Five Star, Westbury Manor Enterprises, Vincent Scott and Michelina Scotto (the
5 “Indemnitors”) entered into an Indemnity Agreement wherein they each agreed, jointly and severally,
6 as follows:

7 **3. INDEMNITY** - Indemnitors agree to indemnify and hold harmless
8 Surety from and against any Loss sustained or incurred: (a) by reason
9 of having executed or being requested to execute any and all Bonds; (by
10 failure of Indemnitors or Principals to perform or comply with any of
11 the covenants or conditions of this Agreement or any other agreement.
12 The Indemnitors’ obligation to indemnify the Surety shall also apply to
any Bond renewals, continuations or substitutes therefore. In the event
of payments by Surety, Indemnitors agree to accept vouchers, a sworn
itemization, or other evidence of such payments as prima facie evidence
of the fact and extent of the liability of Indemnitors to Surety in any
demand, claim or suit by Surety against Indemnitors. . . .

13 5. The Indemnitors further agreed to provide collateral security upon Philadelphia’s
14 demand:

15 **4. POSTING OF COLLATERAL** – Indemnitors agree to deposit
16 immediately upon demand by Surety an amount equal to the greater of:
17 (a) the amount of any reserve established by Surety in its sole direction
18 to cover any actual or potential liability for any Loss or potential Loss
19 for which Indemnitors would be obliged to indemnify Surety hereunder;
20 or (b) the amount of any Loss or potential Loss (including legal,
professional, consulting, and expert fees and expenses) in relation to any
claim or claims or other liabilities asserted against Surety as a result of
issuing any Bond, as determined by the Surety in its sole discretion. . . .

21 6. The Indemnitors also agreed to provide documentation and information to
22 Philadelphia:

23 **11. ACCESS TO BOOKS & RECORDS** – Surety, including its
24 designated agents, shall, at any and all times, have unrestricted access
25 upon reasonable notice to review all books and records of Principal and
26 Indemnitors, including all books and records pertaining to their financial
27 condition, and to the status of each unbonded and Bonded Contract.
28 Principal and Indemnitors agree to provide updated financial statements
upon the Surety’s request. Principal and Indemnitors hereby authorize
those with whom such Bonded Contracts are made to furnish to Surety
all information such contracts and the work thereunder. Principal and
Indemnitors also hereby authorize any bank, financial or lending

1 institution, or depository to provide Surety with access to bank
2 statements or financial records or any other information or documents
3 requested by Surety.

4 7. The Principal and Indemnitors also agreed to obtain written consent from Philadelphia
5 prior to any changes in status/transfer of assets outside the ordinary course of business or that shielded
6 any Indemnitor from liability:

7 **15. EFFECT OF CHANGE IN STATUS/TRANSFER OF**
8 **ASSETS** – Each Principal and Indemnitor agrees not to change or
9 convert its respective individual, corporate or partnership status to the
10 extent such change has the effect of limiting, reducing or shielding the
11 liability of either the entity or its partners and/or officers hereunder,
12 without the prior, express, written consent of Surety. Should any
13 Principal or Indemnitor so change its respective corporate or
14 partnership status without the prior, express, written consent of Surety,
15 Principal or Indemnitor agrees that such change in its status shall not
16 limit, reduce or otherwise shield its obligations, its partners' and/or
17 officers' obligations, to Surety which arise from this Agreement. The
18 Principal and Indemnitors hereby expressly waive as against Surety
19 any and all defenses which may arise from such a conversion to a LLC,
20 LLP or similar status. Principal and Indemnitors acknowledge that the
21 Surety relies upon the assets reflected in their financial statements in
22 the issuance of Bonds, and **agree not to dispose of or transfer said**
23 **assets, except in the ordinary course of business, without the prior,**
24 **express, written consent of Surety.** (emphasis added).

25 8. Commencing September 14, 2016, Philadelphia began receiving claims on the Bond.
26 As of March 24, 2017, those claims are as follow:

27 Claimant	Amount
28 Advantage Electric	\$ 140,670.18
QED (subcontractor to Advantage Electric)	\$ 38,085.15
Cutting Edge Cabinets	\$ 59,549.28
Desert Eagle Flooring	\$ 22,463.50
Diamond Eagle Flooring	\$ 17,945.00
Southern Nevada Welding	\$ 23,607.60
Steel Concepts (subcontractor to Southern Nevada Welding)	\$ 12,780.00
Statewide Fire Protection	\$ 6,836.73
Woodwork's Construction	\$ 9,818.45
Moser Architecture Studio	\$ 14,500.00
TCD	\$ 646,612.60
TOTAL	\$ 992,868.49

1 9. In light of these claims and in exercise of Indemnity Agreement rights, on December
2 21, 2016, Philadelphia demanded that the Indemnitors post collateral security in the amount of
3 \$332,637.23.

4 10. On December 29, 2016, counsel for Five Star, Becky Pinter, advised “The collateral
5 demand is not possible at this time due to the issues with the litigation, the lease and the landlord.”

6 11. On February 22, 2017, Ms. Pinter advised Philadelphia that “Five Star is in the process
7 of selling restaurants, with the sale to close by the end of March.”

8 12. Philadelphia requested documents and information regarding the sale, including the
9 closing date and who was handling the sale, but the Indemnitors have failed to provide the information
10 requested.

11 13. On or about March 9, 2017, Philadelphia retained counsel who sent demand to the
12 Indemnitors to either pay the claimants or provide detailed and specific information with supporting
13 documentation as to Five Star’s specific defenses to each claim by March 15, 2017.

14 14. Philadelphia received no response from Five Star’s counsel to the March 9 demand.

15 15. On March 16, 2017, attorney Kurt Faux, counsel for Philadelphia, called Ms. Pinter to
16 inquire regarding the demanded collateral and information. Faux was informed that collateral would
17 not be posted and that the closing for the sale of Five Star was continued to April 15, 2017. Faux was
18 also informed that there was no guaranty that Five Star would use sale proceeds to resolve the claims
19 against the Bond.

20 16. Five Star has been notified of these demands, concerns, and potential legal action by
21 the contacts described above.

22 17. On March 24, 2017, counsel for Philadelphia sent a demand letter to Westbury Manor
23 Enterprises, Vincent Scott, and Michelina Scotto demanding the posting of collateral security in the
24 amount of \$1,027,868.49. A copy of that demand was sent to Five Star’s counsel.

25 18. To date, the Indemnitors have failed to provide the collateral security demanded by
26 Philadelphia, have failed to provide the requested information regarding the sale, and have failed to
27 pay the claimants.

1 19. The Indemnitors were served with a copy of Philadelphia’s complaint, motion, and
2 my order on March 27, 2017. ECF No. 8.

3 20. At the March 30, 2017 hearing on Philadelphia’s motion, a representative of Five Star
4 confirmed that Five Star is under contract to sell one of its restaurants (Pizzeria de Enzo), is
5 attempting to sell another of its restaurants (Zeffirino’s), and has closed its third restaurant
6 (Tintoretto).

7 21. Absent the Indemnitors being enjoined as described in this order, Philadelphia will be
8 irreparably harmed as it likely will lose its bargained-for rights (i) to be collateralized, (ii) to written
9 consent prior to the Indemnitors’ transfer or disposal of assets, (iii) to meaningful review of
10 Indemnitors’ books and records, and (iv) to equitable entitlements under the doctrine of *quia timet*.

11 22. Philadelphia has a likelihood of success on the merits of its claims. The balance of
12 hardships tips in favor of Philadelphia. And the public interest is served by entering an injunction
13 enforcing and protecting Philadelphia’s contract rights.

14 23. Based upon the foregoing and the reasons stated on the record during the March 30,
15 2017 injunction hearing, good cause exists to enter the following injunctive relief:

16 **IT IS HEREBY ORDERED** that the Indemnitors specifically perform their contractual
17 obligations by posting cash collateral security with Philadelphia in the following amounts: (1)
18 \$165,000.00 by 5:00 p.m. PDT on April 10, 2017, and (2) an additional \$862,869.00 (for a total
19 collateral security amount of \$1,027,869.00) by 5:00 p.m. on May 1, 2017. The parties shall confer
20 to determine whether the collateral security amount can be reduced based upon double-counting or
21 “nesting” of lien amounts among the subcontractors and TCD.

22 **IT IS FURTHER ORDERED** that the Indemnitors are to provide Philadelphia immediate
23 access to their books and records, including all financial information, particularly any and all
24 information related to the sale of Five Star’s assets.

25 **IT IS FURTHER ORDERED** that the Indemnitors are to obtain written consent from
26 Philadelphia prior to transferring or disposing of any assets.

27 **IT IS FURTHER ORDERED** that the Indemnitors and all persons in active concert or
28 participation with the Indemnitors, except as set forth herein, are prohibited, enjoined, restrained and
precluded from selling, transferring, pledging, disposing of, or liening their assets, personal property,
and real property until the full amount of the ordered cash collateral is posted by the Indemnitors

1 with Philadelphia or otherwise ordered by this Court. This Order does not preclude the sale of Five
2 Star or its assets, but the proceeds of any such sale are subject to this Order and are to be deposited
3 with Philadelphia (up to the full amount of the cash collateral security ordered above) until further
4 order of this Court.

5 **IT IS FURTHER ORDERED** that, pursuant to Federal Rule of Civil Procedure (65)(c),
6 Philadelphia shall post security in the amount of \$1,500.00 to pay the costs and damages sustained
7 by any party found to have been wrongfully enjoined or restrained.

8 DATED: March 31, 2017, *nunc pro tunc* to March 30, 2017 at 10:35 a.m.

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12 Andrew P. Gordon
13 UNITED STATES DISTRICT COURT JUDGE
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