Plan Confirmation Hearing Date & Time: November 30, 2015 at 2:00 p.m. EDT

David B. Shemano, Esq.
ROBINS KAPLAN LLP
601 Lexington Avenue
Suite 3400
New York, NY 10022-4611
Tel: (212) 980-7400
Fax: (212) 980-7499

- and -

Howard J. Weg, Esq., *pro hac vice*
Scott F. Gautier, Esq., *pro hac vice*
ROBINS KAPLAN LLP
2049 Century Park East
Suite 3400
Los Angeles, CA 90067-3208
Tel: (310) 552-0130
Fax: (310) 229-5800

Counsel for Debtors and Debtors in Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
33 Peck Slip Acquisition LLC, *et al*.	Case No. 15-12479 (JLG)
Debtors. [1]	(Jointly Administered)

DEBTORS' REPLY IN SUPPORT OF CONFIRMATION OF JOINT LIQUIDATING PLAN DATED OCTOBER 16, 2015

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: 33 Peck Slip Acquisition LLC (3412), 52 West 13th P, LLC (4970), 36 West 38th Street, LLC (6842), and Gemini 37 West 24th Street MT, LLC (4143).

33 Peck Slip Acquisition LLC ("**33 Peck**"), and its affiliated debtors and debtors in possession 52 West 13th P, LLC ("**52 West**"), Gemini 37 West 24th Street MT, LLC ("**37 West**"), and 36 West 38th Street LLC ("**36 West**") (collectively, the "**Debtors**"), in support of confirmation of the Debtors' Joint Liquidating Plan Dated October 16, 2015 (the "**Plan**")[2] hereby reply to the objections filed to confirmation of the Plan, and state as follows:

I.

INTRODUCTION

After a hearing on October 7, 2015, the Bankruptcy Court entered the Order Setting Plan Confirmation Schedule (the "**Plan Scheduling Order**"). In accordance with the Plan Scheduling Order, on October 19, 2015, the Debtors served on all creditors, members and other parties in interest: (a) the Plan, (b) a notice of the confirmation hearing on the Plan (the "**Confirmation Notice**"), (c) a disclosure document summarizing the Plan (the "**Disclosure Document**"), and (d) a notice regarding treatment of executory contracts under the Plan (the "**Executory Contracts Notice**").

The Debtors have received objections to the confirmation of the Plan from: (1) Local 966, International Brotherhood of Teamsters, (2) Oracle America, Inc., (3) William T. Obeid, (4) the Cornerstone Lenders and UBS Lenders, and (5) the New York City Department of Finance and the New York State Department of Taxation and Finance (collectively, the "**Objections**"). A chart listing each of the objections

[2] Terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Plan.

and the short description of the Debtors' response to each objection is attached hereto as Exhibit A.

The Debtors are prepared to modify the Plan to address many of the Objections. Attached as Exhibit B is a blackline of the Plan showing the proposed modifications.

Attached as Exhibit C is a proposed Confirmation Order that the Debtors intend to lodge with the Court at the conclusion of the Confirmation Hearing. The Debtors welcome all constructive comments to the proposed Confirmation Order.

II.

OBJECTION OF LOCAL 966, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Local 966, International Brotherhood of Teamsters ("**Local 966**"), is a labor organization representing employees of 33 Peck Slip that are parties to a collective bargaining agreement. Local 966 requests that the Plan be modified to provide that the collective bargaining agreement may be rejected only if the Debtors comply with section 1113 of the Bankruptcy Code.

The Debtors expect that the collective bargaining agreement will be assumed by the purchaser of the hotel owned by 33 Peck. However, the Debtors acknowledge the possibility that the collective bargaining agreement could be rejected.

To address Local 966's concern, the Debtors will modify Article 7.1 of the Plan to include the following language:

> Notwithstanding anything to the contrary in the Plan, including this Article 7.1, the Debtors may reject a collective bargaining agreement only in compliance with the requirements of section 1113 of the Bankruptcy Code.

The Debtors are informed that the proposed modification is acceptable to Local 966 and Local 966 will be withdrawing its objection to the Plan.

III.

THE OBJECTION OF ORACLE

Oracle is a licensor under a license software agreement with the Debtors. Oracle requests that the Court deny confirmation of the Plan to the extent the Plan seeks to authorize the Debtors to assume and assign any Oracle agreements without compliance with the requirements of section 365 of the Bankruptcy Code.

The treatment of executory contracts under the Plan is set forth in Article 7 of the Plan. Article 7.1 provides that all executory contracts will be rejected as of the Effective Date unless, on or prior to the Effective Date, the Debtors serve notice of intent to assume and assign such executory contract. A notice of intent to assume shall provide for the cure of any default and satisfaction of other preconditions to assumption and assignment consistent with the provisions of section 365(b)(1) of the Bankruptcy Code.

Article 7.1 further provides that if the non-Debtor party to the contract objects to the assumption and assignment, the non-Debtor shall have the right to file an objection and the objection will be resolved by the Bankruptcy Court.

Accordingly, confirmation of the Plan will not result in assumption of any executory contract without compliance with the requirements of section 365 of the

Bankruptcy Code and the opportunity for the non-Debtor party to object. To the extent the Objection is not withdrawn, it should be overruled.

IV.

THE OBJECTIONS FILED BY OBEID

As reported to the Court on November 13, 2015, the Debtors have reached a resolution with Obeid pursuant to which Obeid will withdraw his objection to the sales of the properties and all objections to the Plan. The resolution is currently being documented in a Stipulation that will be presented to the Court for approval at or prior to the Confirmation Hearing (the "**Stipulation**").

As of the deadline for this Reply, the Stipulation has not been finalized. Therefore, the Debtors submit the following responses to Obeid's Objection, each of which the Debtors believe is consistent with the agreement of the parties to be finalized in the Stipulation.

A. Preservation Of Derivative Rights (Objections to Articles 1.44 (new 1.45), 1.69 (new 1.7), 5.1, 5.4, 5.5, 9.4, 10.1)

The primary focus of Obeid's Objection is the preservation of his rights, if any, to pursue his pending derivative state and federal litigation on behalf of the Debtors. The Debtors have agreed that nothing in the Plan will affect those rights, if any. Therefore, the Debtors propose to modify the Plan as follows:

1. Definition of Derivative Claims.

The Debtors propose a new Article 1.41, which defines "Derivative Claims" as follows:

> *Derivative Claims* means the derivative claims asserted by William T. Obeid derivatively on behalf of, inter alia, 33 Peck, 36 West, 52 West and 37 West against Christopher La Mack, Dante Massaro, Bridgeton Holdings, LLC, Bridgeton Acquisitions, LLC, Bridgeton Hotel Management, LLC, Atit Jariwala and Elevation Real Estate Group, LLC in actions now pending in the United States District Court for the Southern District of New York before Judge Laura Taylor Swain styled *William T. Obeid v. Christopher La Mack et al.*, Case No. 14-CV-6498 (LTS) (the "Federal Action") and the Supreme Court of the State of New York, County of New York, Commercial Division before Justice Saliann Scarpulla, styled *William T. Obeid, et al. v. Bridgeton Holdings, LLC, et al.*, Index No. 152596/2015 (N.Y. Sup. Ct. Commercial Division) (the "State Court Action," and together, with the Federal Action, the "Pending Actions."

2. Non-Impairment of Derivative Rights

The Debtors propose a new Article 5.10, which provides that the Derivative Claims are not impaired under the Plan:

> ***Non-Impairment of Derivative Rights***. Nothing in this Plan shall modify, compromise or impair William T. Obeid's rights, standing or authority with respect to the Derivative Claims, including any right, standing or authority that Obeid had, has or may in the future have to prosecute the Derivative Claims.

B. Disposition Fees (Objections to Article 1.8, 3 and 7)

Obeid requests various provisions providing for the payment of certain disposition fees to Obeid. Obeid's claim to disposition fees is against Gemini Real Estate Advisors, LLC ("**GREA**"), not the Debtors, and should not be addressed in the

Plan. The Stipulation will provide for payment of these amounts to Obeid from GREA upon each sale.

C. Article 1.81 - Exhibits To Plan

Article 1.81 incorporates by reference all of the Exhibits to the Plan. While the Debtors have not currently proposed any such Exhibits, the Debtors reserve the right to include Exhibits to the Plan prior to the Confirmation Hearing and will circulate any Exhibits to parties in interest prior to the Confirmation Hearing.

D. Article 5.9 – Management of the Debtors

In conformance with section 1129(a)(3) and 1129(a)(5) of the Bankruptcy Code, Article 5.9 identifies the entities that will manage the Reorganized Debtors, including the proposed Officers and Directors. Obeid objects that the Debtors "fail to acknowledge Obeid's ongoing objection to the manner in which Debtors have been and will be managed going forward." Any claims based upon mismanagement are unimpaired as set forth above.

E. Article 6.7 – Set Off Rights

Article 6.7 provides that the Reorganized Debtors may, pursuant to applicable law, but shall not be required to, exercise their right to set off against payments due to the Holders of Claims. Whatever rights the Reorganized Debtors have, the Reorganized Debtors may exercise. The provision does not grant or deny the Reorganized Debtors any rights in contravention of the Bankruptcy Code or any applicable law and is appropriate.

F. Article 7.1 of the Plan –Termination of Contracts Based on Financial Condition of the Debtors

Article 7.1 of the Plan addresses the assumption and assignment of executory contracts and states, in part, that "[N]o provision of any agreement or other document that permits a person to terminate or modify an agreement or to otherwise modify the rights of the Debtors based on the filing of the Chapter 11 Cases or the financial condition of the Debtors shall be enforceable." Obeid objects that the phrase "financial condition of the Debtors" is vague. The language in section 7.1 is taken directly from section 365(e)(1)(A) of the Bankruptcy Code and is appropriate.

G. Articles 8.2 and 8.3 – Conditions To Effective Date

Articles 8.2 and 8.3 of the Plan provide for certain conditions precedent to the occurrence of the Effective Date, including entry of the Confirmation Order and the requirement that all other documents, and agreements necessary to implement the Plan shall have been effected or executed. Article 8.3 also provides that the Debtors may waive the conditions to the Effective Date. Such provisions are standard and do not prejudice Obeid or any other party. The Debtors are in the best position to determine what is needed to declare that the Effective Date has occurred.

H. Article 9.4(b) – Exculpation

Obeid argues that the exculpation provisions are inconsistent and should carve-out Obeid's claim in the pending state and federal court actions. The Debtors propose to delete the exculpation provision contained in Article 9.4(b) from the Plan.

I. Article 11.3 – Commencement Date

The words "Commencement Date" in Article 11.3 will be revised to "Petition Date" to reflect the defined terms.

J. Article 11.6 - Modification of the Plan

Article 11.6 of the Plan provides that the Debtors may, subject to section 1127 of the Bankruptcy Code and, to the extent applicable, sections 1122, 1123, and 1125 of the Bankruptcy Code, alter, amend, or modify the Plan. Obeid argues that the Debtors should not be given "carte blanche" permission to modify the Plan. Article 11.6 simply incorporates the Debtors' statutory authority under section 1127(b) to amend a plan after confirmation if circumstances warrant a modification and the Bankruptcy Court, after notice and a hearing, confirms such plan as modified. Accordingly, the provision is appropriate.

K. Article 11.10 – Notice Parties

Article 11.10 requires that, in order to be effective, all notices to or upon the Reorganized Debtors shall be provided to the Reorganized Debtors and their counsel, Robins Kaplan LLP. Obeid is neither a managing member nor officer of the Reorganized Debtors and, therefore, should not be a notice party.

V.

THE OBJECTION OF THE CORNERSTONE AND UBS LENDERS

The Cornerstone Lenders are lenders secured by the assets of 37 West and 52 West. The UBS Lenders are lenders secured by the assets of 33 Peck and 36 West. While it does not appear that the Cornerstone Lenders object to confirmation of the Plan, they request various modifications and clarifications to the Plan that allegedly

affect their claims. The UBS Lenders filed a joinder in the objection filed by the Cornerstone Lenders.

L. Impairment

The Plan provides that the claims of the Cornerstone Lenders are unimpaired and, on the Effective Date, the claims "shall be paid in Cash, in full, including any amounts owed under section 506 of the Bankruptcy Code." In an apparent effort to create ambiguity where none exists, the Cornerstone Lenders demand that the treatment of their claims be modified to make explicit that they are entitled to postpetition interest and fees, the establishment of a reserve fund, indemnification, and other purported rights and claims.

The Court should reject any effort by the Cornerstone Lenders to turn the confirmation hearing into a claim objection hearing. The Plan cannot be any clearer – the allowed claims of the Cornerstone Lenders, whatever those claims might be, will be paid in full on the Effective Date of the Plan. The Debtors have modified the definitions of the Cornerstone and USB Lenders' claims to make clear that the allowed amounts of the claims have been determined by final cash collateral orders. If there is a dispute regarding the payoff amount on the Effective Date, or whether the Debtors are liable for an asserted claim, such dispute shall be resolved by the Court at a separate hearing. There is no need for the Court to adjudicate any claim amount disputes as a precondition to confirmation of the Plan.

3. Postpetition Interest and Fees

The Cornerstone Lenders argue that Article 6.4 of the Plan, which presumptively provides that postpetition interest and fees will not be paid on claims, improperly impairs the rights of the Cornerstone Lenders. However, Article 6.4 explicitly carves-out from the general presumption postpetition interest and fees provided for in the Plan, required by applicable law or necessary to render a claim unimpaired, so Article 6.4 has no applicability to the treatment of the claims of the Cornerstone Lenders, who are entitled to postpetition interest and fees pursuant to Articles 1.19, 3.3 and 4.3.

While the Cornerstone Lenders are not affected by Article 6.4, all Classes under the Plan are unimpaired so Article 6.4 is likely superfluous. Therefore, the Debtors will delete Article 6.4 from the Plan to avoid any confusion.

4. Reserve for Future Claims

The Cornerstone Lenders argue that the Debtors are required to establish a reserve fund to pay the Cornerstone Lenders' post-closing contingent claims. The Cornerstone Lenders do not cite any provision of their loan agreements requiring the establishment of such a reserve. The Cornerstone Lenders are not entitled to more under the Plan than they would be entitled to outside of bankruptcy. If the Cornerstone Lenders have post-closing contingent unsecured claims, such as ongoing indemnity rights, nothing in the Plan impairs such contingent unsecured claims and the unsecured claims can be asserted against the Reorganized Debtors if and when such claims become non-contingent.

5. Assignment of Loan and Mortgage at Closing

Consistent with New York practice, the Plan requires the Cornerstone Lenders to assign their loan documents to the buyers of the Debtors' property at the closing in connection with the satisfaction of the Cornerstone Lenders' claims. The Debtors acknowledge that the assignment documentation must be reasonable and cannot waive any post-closing contingent claims, if any, that the Cornerstone Lenders may have.

Belatedly, the Cornerstone Lenders have proposed form assignment documentation that they request be referenced in a Plan supplement. The form of the assignment documentation will be of primary concern to the purchasers of the Real Estate Assets, who will not be identified until after confirmation of the Plan, so it would not be appropriate to bind such purchasers to form documentation at this time. The Debtors expect that all parties, including the Cornerstone Lenders, will work together to timely consummate the transactions. If there is any unresolvable dispute concerning form documentation, the Debtors will seek appropriate relief so that the transactions are timely closed.

M. Feasibility

The Cornerstone Lenders object to the Plan to the extent that the Debtors contemplate a single confirmation order. The Cornerstone Lenders are concerned that a single order will complicate the ability of an individual Debtor to close a sale because of delays with respect to the sale by a different Debtor.

The concern of the Cornerstone Lenders, shared by the Debtors, is addressed by Article 8.2 of the Plan. While the Debtors contemplate a single confirmation order,

Article 8.2 provides for a separate Effective Date for each Debtor. The Debtors have added language to Article 8.2 that provides that "[t]he failure of an Effective Date to occur for one Debtor shall not void, preclude or otherwise affect the occurrence of an Effective Date for another Debtor." Therefore, any delay in the closing for one Debtor will not affect the closing and occurrence of the Effective Date for the other Debtors.

N. Requested Modifications

The Cornerstone Lenders requested specific modifications to certain Plan provisions. Most of the modifications are acceptable and will be incorporated into the modified Plan.

1. **Sections 1.11 and 1.15.** Acceptable and incorporated in the proposed modifications.

2. **Sections 1.35 and 1.38 (now 1.37).** Acceptable and incorporated in the proposed modifications.

3. **Sections 1.42 (now Section 1.43) and 8.2.** The Cornerstone Lenders request that the Effective Date for a Debtor must occur by January 15, 2016. While an outside date is not unreasonable, it is possible that not all of the contemplated sale closings will be effectuated by January 15, 2016. The Debtors have modified Article 8.2 to provide that the Effective Date must occur by February 29, 2015, without prejudice to the right of the Debtors to request an extension of such deadline.

4. **Section 1.52 (now 1.53).** Acceptable and incorporated in the proposed modifications.

5. **Section 2.3.** Acceptable and incorporated in the proposed modifications.

6. **Section 2.5.** The Cornerstone Lenders are concerned that their attorneys will be required to file fee applications to be reimbursed for fees owed under the lending agreements in accordance with Article 2.5. Article 2.5 is explicitly limited to "Professionals," which are defined as professionals employed pursuant to sections 327, 328 or 1103 of the Bankruptcy Code or any entity seeking compensation pursuant to section 503(b)(4) of the Bankruptcy Code, which definitions do not apply to the attorneys for the Cornerstone Lenders. Therefore, the Debtors confirm that the legal fees and expenses of the Cornerstone Lenders are not subject to Article 2.5.

7. **Section 5.7.** The Plan adequately provides that all transfers under the Plan are exempt from various taxes to the extent authorized by section 1146(a) of the Bankruptcy Code. The Cornerstone Lenders also request a specific provision that, if an exemption is challenged, the tax and fee amounts claimed will be placed in a reserve so as not to delay the closing of the sale. Such a provision is unnecessary. The Plan provides that the sales of the properties will be free and clear, so any objection cannot delay the closing of a sale. The Plan further provides that all claims will be paid in full on the Effective Date. If there is a dispute as to the amount of tax owed, if any, the disputed will be resolved in the normal claim reconciliation process governed by Article 6.8, which requires the establishment of a reserve for disputed claims..

8. **Section 6.4.** As set forth above, Section 6.4 is being deleted.

9. **Section 8.1(b).** The Cornerstone Lenders correctly point out that the buyers of the properties will not be known until after the Confirmation Hearing, so the provision giving buyers a consent right to the form of the Confirmation Order will be deleted. Attached as Exhibit B is a proposed Confirmation Order. All interested parties will have the opportunity to comment on the proposed order at the Confirmation Hearing.

10. **Sections 9.3 and 9.4.** The Cornerstone Lenders argue that the injunction, exculpation and limitation of liability provisions are improper third-party releases. The Debtors disagree. However, in light of (a) the Obeid settlement that will materially limit the exculpation provision, and (b) the fact that all creditors will be paid in full under the Plan, the Debtors will delete the exculpation provision included in Article 9.4. Article 9.3, which simply enjoins parties from taking action to collect a satisfied claim, is consistent with section 1141 of the Bankruptcy Code and appropriate.

VI.

THE OBJECTIONS OF THE NEW YORK CITY DEPARTMENT OF FINANCE AND THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE

The New York City Department of Finance (the "**City of New York**"), joined by the New York State Department of Taxation and Finance (collectively, the "**Taxing Authorities**"), object to Article 5.7 of the Plan, which provides that certain transfers under the Plan will be exempt from certain taxes pursuant to section 1146(a) of the Bankruptcy Code.

A. Section 1146(a) Applies Because The Sales Will Take Place After And Pursuant To Confirmation Of The Plan

When the City of New York filed its original objection on September 30, 2015, the City of New York argued that section 1146(a) did not apply because the proposed sales were to occur prior to the confirmation of a plan. *See generally, Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008). As it is now clear that the proposed sales will take place after and pursuant to confirmation of the Plan, there should be no dispute that 1146(a) applies to all applicable transfers under the Plan.

B. The Debtors Are Entitled To The Benefits Of Section 1146(a)

As it is now clear that the transfers will be taking place pursuant to the Plan and not prior to confirmation, the Taxing Authorities now argue that these cases "were not filed in good faith so as to be entitled to a stamp exemption under section 1146(a)."

As evidenced by the objection filed, the Taxing Authorities have been aware of the underlying facts and circumstances triggering the bankruptcy filings since the commencement of the cases. Notwithstanding such awareness, the Taxing Authorities elected not to timely file a motion for dismissal of these cases as bad faith filings pursuant to section 1112(b) of the Bankruptcy Code. Instead, the Taxing Authorities elected to sit back and watch as the Debtors, Obeid and other interested parties have expended extraordinary time and resources litigating and negotiating a multitude of issues, which extraordinary efforts successfully resulted in a partial settlement that will facilitate the sales of the properties for the benefit of all constituencies.

If the Taxing Authorities had timely filed a motion to dismiss these cases, and the Court found merit to the motion, the Debtors and other interested parties could have avoided the expenditure of the very significant resources that have been expended. By electing not to timely file a dismissal motion and instead waiting to object to confirmation based upon alleged bad faith, the Taxing Authorities should be deemed estopped from now seeking a dismissal of these cases as bad faith filings. *See, e.g., In re Source Enterprises, Inc.*, 392 B.R. 541, 555 (S.D.N.Y. 2008) (objection to authority to file case raised for the first time in objection to confirmation was "disingenuous").

Regardless of the improper timing of the motion to dismiss these cases, there can be no reasonable dispute that these cases were filed in good faith and for a legitimate purpose. As set forth in the accompanying Confirmation Memorandum and evidenced by the concurrently filed Declaration of Christopher La Mack, while the Debtors are solvent, the disputes and litigation among Dante Massaro ("**Massaro**"), Christopher La Mack ("**La Mack**") and Obeid rendered it impossible to sell the hotel properties to maximize the value of assets for the benefit of creditors and equity holders.

As has been well-documented in these cases, in 2014, disputes arose between Massaro and La Mack on the one hand, and Obeid on the other related to Obeid's management of the business affairs of GREA. La Mack and Massaro voted to remove Obeid as the President of GREA and filed litigation against Obeid in the North Carolina State Court, Mecklenburg County (Case No. 14-CVS-12010) (the "**North Carolina Action**"), seeking damages for breach of fiduciary duties and seeking injunctive relief to prevent Obeid's continued interference in the business.

After filing a retaliatory lawsuit against La Mack and Massaro in federal court in New York in a further attempt to disrupt GREA's business (the "**New York Action**") and seeking a TRO (which has been denied) to halt the sale and liquidation of certain of GREA's subsidiary's holdings, Obeid filed notices of Lis Pendens in the chain of title for all four Debtors (collectively, the "**Lis Pendens**").

The Lis Pendens and the ongoing lawsuits made it impossible to meet the closing conditions and deliver free and clear title to any of the proposed purchasers for the properties. The Debtors were concerned that the value of the properties owned by the Debtors could continue to deteriorate if the sale transactions were put on hold until the litigation was concluded. The Bryant Park Development Site is especially susceptible to continued delay in liquidation because it has no operating revenues.

After careful analysis, taking into consideration the disputes and pending litigation and the existence of the Lis Pendens clouding title to the properties, the Debtors concluded that the sale of the Debtors' assets should be consummated through a chapter 11 proceeding.

The Taxing Authorities submit no evidence that rebuts the necessity of a bankruptcy filing to effectuate a sale of the properties for the benefit of all constituencies.

If the Court concludes that these cases should not be dismissed as bad faith filings, then the Debtors are entitled to the benefits of section 1146(a). There is no "good faith" exception to section 1146(a). If a bankruptcy case is filed for a legitimate reorganization purpose, the debtor's estate is entitled to all of the benefits of the Bankruptcy Code,

even if the debtor is solvent. *See, e.g., Solow v. PPI Enters.(U.S.) (In re PPI Enters.(U.S.))*, 324 F.3d 197 (3d Cir. Del. 2003) (not bad faith for solvent debtor to file bankruptcy to take advantage of section 502(b)(6)); *Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.)*, 314 F.3d 1070 (9th Cir. 2002) (not bad faith for solvent debtor to file bankruptcy to cure default and avoid default interest); *In re James Wilson Assocs*., 965 F.2d 160, 170 (7th Cir.1992) ("It is not bad faith to seek to gain an advantage from declaring bankruptcy-- why else would one declare it?"); *In re Zenith Electronics Corp*., 241 B.R. 92 (Bankr. D. Del. 1999) (not bad faith to take advantage of cramdown provisions); *In re Bofill*, 25 B.R. 550, 552 (Bankr. S.D.N.Y. 1982) (permitting rejection of contract even though rejection was sole purpose of bankruptcy filing).

The cases were filed in good faith, the Plan has been proposed in good faith, and the Court should overrule the objection if it is not withdrawn.

C. Article 5.7 Has Been Modified To The Satisfaction Of The Taxing Authorities

The Taxing Authorities argue that Article 5.7 of the Plan is improper because it authorizes an exemption from taxes that are not stamp taxes or similar taxes within the meaning of section 1146 of the Bankruptcy Code. The Debtors have no intent to obtain any exemption that is not authorized under section 1146. Therefore, after discussions with the Taxing Authorities, the Debtors propose to modify Article 5.7 as follows:

> ***5.7 Exemption From Certain Transfer Taxes and Recording Fees.*** All transfers from a Debtor to a Reorganized Debtor or to any other Person or entity pursuant to this Plan will not be subject to any stamp tax or similar tax, including any tax imposed pursuant to NY CLS Tax § 1402 or NYC Administrative Code 11-2102, in accordance with section 1146(a) of the Bankruptcy Code. Nothing herein shall be construed to exempt from tax any transfer that is not exempt from tax pursuant to section 1146(a) of the Bankruptcy Code, including any transfer by a non-Debtor or any tax which is not a stamp tax or similar tax. The Confirmation Order will direct the appropriate state or local governmental officials or agents to forego the collection of any such tax and to accept for filing and recordation any of the foregoing instruments or other documents without the payment of any such tax.

As recognized by the Taxing Authorities, taxes imposed pursuant to NY CLS Tax § 1402 or NYC Administrative Code 11-2102 are "stamp taxes" within the meaning of section 1146. *In re 995 Fifth Ave. Assoc., L.P.*, 963 F.2d 503 (2d Cir. 1992); *In re Jacoby-Bender, Inc.*, 758 F.2d 840 (2d Cir. 1985). The Debtors are informed that the modification is acceptable to the Taxing Authorities if the Court rejects the argument of the Taxing Authorities that these cases should be dismissed as filed in bad faith.

D. The Debtors Will Reserve Any Disputed Amount In Accordance With The Plan

The Taxing Authorities request that the Court order the Debtors to escrow the full amount of the estimated real property tax, which could exceed $5 million, until the claim is adjudicated. There is no need for such an order. The resolution of disputed claims, including any claim by the Taxing Authorities for a tax based upon a transfer that is tax exempt under the Plan, is governed by Article 6.8 of the Plan. Article 6.8(b) requires the Debtors to establish and reserve for disputed claims. Therefore, the Taxing

Authorities disputed claim is adequately protected under the Plan pending adjudication of the dispute.

Dated: New York, New York
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ROBINS KAPLAN LLP
By:/s/ David B. Shemano
David B. Shemano, Esq.
601 Lexington Avenue
Suite 3400
New York, NY 10022-4611
Tel: (212) 980-7400
Fax: (212) 980-7499

-and-

Howard J. Weg, Esq., *pro hac vice*
Scott F. Gautier, Esq., *pro hac vice*
2049 Century Park East
Suite 3400
Los Angeles, CA 90067-3208
Tel: (310) 552-0130
Fax: (310) 229-5800

Counsel for Debtors and Debtors in Possession