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

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
33 PECK SLIP ACQUISITION LLC, *et al*.[1]	Case No. 15-12479
Debtors.	(Jointly Administered)

DEBTORS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CONFIRMATION OF DEBTORS' 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**"); 36 West 38th Street LLC ("**36 West**"); Gemini 37 West 24th Street Mt, LLC ("**37 West**"); and 52 West 13th P, LLC ("**52 West**"), as debtors and debtors in possession (collectively, the "**Debtors**"), submit this Memorandum of Points and Authorities (the "**Memorandum**") in support of their request for confirmation of the Debtors' Joint Liquidating Plan Dated October 16, 2015 (the "**Plan**") pursuant to section 1129(a) of title 11 of the United States Code (the "**Bankruptcy Code**").

At the hearing scheduled for November 30, 2015 (the "**Confirmation Hearing**"), the Debtors will request that the Bankruptcy Court make those findings of fact and reach those conclusions of law set forth in the proposed order confirming the Plan attached as Exhibit B to the Reply (as defined below) (the "**Confirmation Order**") and enter the Confirmation Order, which provides that it will be effective immediately pursuant to Rule 3020(e) of the Federal Rules of Bankruptcy Procedure ("**FRBP**").

In support of confirmation of the Plan, the Debtors submit this Memorandum, the separately filed Debtors' Reply In Support Of Confirmation Of Joint Liquidating Plan Dated October 16, 2015 (the "**Reply**"), and the separately filed declarations of Christopher F. La Mack ("**La Mack Declaration**") and Douglas Hercher ("**Hercher Declaration**") and respectfully state as follows:[2]

I.

INTRODUCTION

1. The Debtors filed their Joint Liquidating Plan on October 15, 2015 [Docket No. 98]. After a hearing on October 7, 2015, (the "**Plan Scheduling Hearing**"), the Bankruptcy Court entered the Order Setting Plan Confirmation Schedule [Docket No.

[2] Capitalized terms used, but not otherwise defined, herein, shall have the meaning ascribed to such term in the Plan. For the convenience of the Court, the Definitions section of the Plan is attached hereto as Exhibit A.

100] (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 [Docket No. 156], (b) a notice of the confirmation hearing on the Plan [Docket No. 153] (the "**Confirmation Notice**"), (c) a disclosure document summarizing the Plan [Docket No. 155] (the "**Disclosure Document**"), and (d) a notice regarding treatment of executory contracts under the Plan [Docket No. 154] (the "**Executory Contracts Notice**").

2. The Debtors have received the following objections to the confirmation of the Plan: (1) Amended Objection Of The New York City Department Of Finance To Debtors' Plan Confirmation Dated October 16,2015 [Docket 165] ("**NYC Objection**"); (2) Joinder By The New York State Department Of Taxation And Finance In Objection Of The New York City Department Of Finance To Plan Confirmation And Proposed Exemption Under 11 U.S.C. Section 1146 [Docket 151] ("**NYS Joinder**"); (3) Limited Objection Of Local 966, IBT To Debtors' Proposed Joint Liquidating Plan [Docket 159] ("**Local 966 Limited Objection**"); (4) Cornerstone Lenders' Protective Objections And Responses To Plan Confirmation [Docket 163] ("**Cornerstone Protective Objections**"); (5) UBS Lenders' Reservation Of Rights And Joinder In Cornerstone Lenders' Protective Objections And Responses To Plan Confirmation [Docket 167] ("**UBS Reservation of Rights**"); (6) William T. Obeid's Objection To Confirmation Of Debtors' Joint Liquidating Plan Dated October 16, 2015 [Docket 162] ("**Obeid Objection**"); and (7) Oracle's Rights Reservation Regarding Debtors' Joint Liquidating Plan Dated October 16, 2015 ("**Oracle Reservation of Rights**") [Docket 161] (collectively, the "**Objections**"), which Objections are withdrawn, addressed and/or resolved as set forth in the Reply.

3. This Memorandum, the Reply and the supporting La Mack and Hercher Declarations demonstrate that each of the applicable requirements of sections 1122, 1123(a) and 1129 of the Bankruptcy Code has been satisfied and evidence solid grounds for confirmation of the Plan. Accordingly, the Debtors respectfully request that the Plan

be confirmed and that the Debtors be permitted to consummate the Plan without any stay of the Confirmation Order under FRBP 3020(e).

II.

STATEMENT OF FACTS

4. The Disclosure Document and La Mack Declaration contain discussions of the Debtors' operations and assets and liabilities, as well as the major developments in the Chapter 11 Cases. The following is a brief summary.

A. The Debtors' Structure And Assets

5. 33 Peck is a Delaware limited liability company that owns and operates a hotel at 33 Peck Slip in the South Street Seaport Historic District on the Lower Manhattan waterfront in New York City, New York (the "**Best Western Seaport Hotel**"). The sole member and manager of 33 Peck is 33 Peck Slip Holding LLC, a Delaware limited liability company, the manager for which is 33 Peck Slip Manager LLC, a Delaware limited liability company, the sole member and manager of which is Gemini Equity Partners, LLC, a Delaware limited liability company ("**GEP**"), whose members are Dante A. Massaro ("**Massaro**"), Christopher La Mack ("**La Mack**") and William T. Obeid ("**Obeid**").

6. 37 West is a Delaware limited liability company that owns and operates a hotel at 37 West 24th Street in the Flatiron district of New York City, NY (the "**Wyndham Flatiron Hotel**"). The sole member and manager of 37 West is Gemini NYC Hotel LLC, a Delaware limited liability company, the manager for which is Gemini Real Estate Advisors, LLC ("**GREA**"), a Delaware limited liability company, whose members are Massaro, La Mack and Obeid.

7. 36 West is a Delaware limited liability company that owns a development lot that is approved for development as a 114-room boutique hotel at 34-36 West 38th Street in the Bryant Park district of New York City, New York (the "**Bryant Park Development Site**"). The sole member and manager of 36 West is 36 West 38th Street

Holding LLC, a Delaware limited liability company, the manager for which is 36 West 38th Street Manager, LLC, a Delaware limited liability company, the sole member and manager of which is GEP.

8. 52 West is a Delaware limited liability company that owns and operates a hotel at 52 West 13th Street in Greenwich Village in Lower Manhattan in New York City, New York (the "**Jade Greenwich Village Hotel**"). The sole member of 52 West is 52 West 13th Street Holding LLC, a Delaware limited liability company the majority stakeholder of which is member and manager Gemini NY Hospitality Fund LLC, a Delaware limited liability company, the manager of which is GREA.

9. The Debtors' hotels and the Bryant Park Development Site are managed under contract with Gemini Property Management, LLC a Delaware limited liability company which sub-contracted the management of the Wyndham Flatiron Hotel and the Jade Greenwich Village Hotel to Bridgeton Hotel Management, LLC (the "**Hotel Manager**") pursuant to contract(s) dated as of January 26, 2015 (the "**Hotel Management Contract**"). The Hotel Manager is also assisting with the management of the Best Western Seaport Hotel.

B. Events Precipitating The Chapter 11 Filings.

10. In or about April 2003, Massaro, La Mack and Obeid formed GREA to invest in commercial real estate projects.

11. The Debtors were established to facilitate investment in hotel properties through a group of corporate groups that are, in whole or in part, managed by GREA and/or GEP.

12. As has been well-documented in these Chapter 11 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. On July 1, 2014, at a meeting of the members of GREA, La Mack and Massaro voted to remove Obeid as the President of GREA. Thereafter, La Mack and Massaro 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 to GREA and seeking injunctive relief to prevent Obeid's continued interference with GREA's business.

13. After the North Carolina Action was filed, La Mack and Massaro alleged that Obeid continued to interfere with GREA's business operations through, among other things, communications with GREA's employees, lenders and business relationships.

14. On August 14, 2014, Obeid filed a retaliatory lawsuit against La Mack and Massaro in federal court in New York (the "**New York Action**"). Thereafter, Obeid sought a TRO (which was denied) to halt the sale and liquidation of certain of GREA's subsidiary's holdings.

15. In connection with the New York Action, Obeid filed notices of Lis Pendens in the chain of title for all four Debtors (collectively, the "**Lis Pendens**").

16. The disputes among Obeid, La Mack and Massaro have not significantly affected the day-to-day operation of the Debtors' hotels, which are independently operated under contracts with the Hotel Manager. However, 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.

C. Chapter 11 Cases and Plan Formation

17. After careful analysis, taking into consideration the disputes and pending litigation and the existence of the Lis Pendens clouding title to the property owned by the Debtors, the Debtors concluded that a timely sale of the Debtors' assets could only be consummated through a chapter 11 proceeding.

18. 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.

19. Given the similarities between the Debtors – each owned real property as the primary asset - and the overlap between the Debtors' management and to some extent, creditor bodies, the Debtors determined that a joint liquidating plan would be the most beneficial and cost-effective process for the Estates and creditors.

20. On September 3, 2015, each of the Debtors filed a voluntary chapter 11 petition, thereby commencing these Chapter 11 Cases (the "**Petition Date**").

21. Accordingly, the Debtors are liquidating their assets in these Bankruptcy Cases through a joint plan of liquidation to protect the interests of creditors and stakeholders by maximizing the value that can be achieved through a sale of the Real Estate Assets.

22. On the Petition Date, the Debtors filed motions for orders setting plan confirmation schedule [Docket No. 10] attaching the first draft of the Debtors' proposed Plan. On September 30, 2015, the Debtors filed a Notice of Supplement To Debtors' Motion For An Order Setting Plan Confirmation Schedule [Docket No. 69] attaching an amended form of the Plan and attaching a draft of the Disclosure Document to accompany the Plan. On October 15, 2015, the Debtors filed a Second Notice of Supplement To Debtors' Motion For An Order Setting Plan Confirmation Schedule [Docket No. 98] attaching a further amended form of plan, an amended draft Disclosure Document, a proposed notice of confirmation hearing, and a proposed notice of treatment of executory contracts. Concurrently with the filing of this Memorandum, the Debtors have filed the Reply, which attaches proposed modifications to the Plan to address certain objections to the Plan.

D. Solicitation and Votes

23. After entry of the Plan Scheduling Order, the Debtors mailed copies of the Plan and Disclosure Document to creditors and equity interest holders. The Debtor did

not mail any ballots because no creditor or equity interest holder is entitled to vote on the Plan. Under the Plan, all Classes are treated as unimpaired and are deemed to accept the Plan and, therefore, are not entitled to vote.

E. Confirmation Is In The Best Interest of Estates

24. Because of the disputes among Obeid, Massaro and La Mack, the Debtors must utilize chapter 11 of the Bankruptcy Code to sell their properties, satisfy the claims of creditors, and distribute the surplus proceeds to their equity holders. Consummation of the sales pursuant to a confirmed plan is preferable to consummation of the sales outside of a plan because, among other benefits, the sales will be exempt from transfer taxes, which will provide a substantial economic benefit to the Debtors' Estates. Accordingly, immediate confirmation of the Plan is in the best interests of the Estates.

III.

SUMMARY OF THE PLAN

25. Pursuant to the Plan, each of the Debtors will consummate a sale of its Real Estate Assets. When a sale is consummated and upon satisfaction of the conditions precedent, the Effective Date of the Plan for that specific Debtor will occur. Each of the Debtors will continue to exist after the Effective Date as a separate legal entity, with all the powers of such an entity under applicable law pursuant to the Debtor's articles of organization or formation, operating agreement and other organizational documents in effect as of the Effective Date (post-Effective Date, the Debtors shall be referred to as the "**Reorganized Debtors**"). The Plan contemplates the revesting of all property comprising each Debtor's Estate (including Retained Actions) in the applicable Reorganized Debtor.

26. After the consummation of the sale of the Real Estate Assets, each of the Reorganized Debtors will no longer operate as a going-concern business and instead will exist solely to liquidate any remaining assets, satisfy the claims of creditors, and

distribute the surplus proceeds to the equity holders. In general terms, the distributions to creditors are as follows:

Secured Claims

27. Secured Claims are Claims secured by liens on property of the Estates. Secured Claims are classified in Classes 1.2, 1.3, 1.4, 2.2, 2.3, 2.4, 3.2, 3.3, 3.4, 4.2, 4.3, 4.4 under the Plan. All Secured Claims will be paid in full on the Effective Date from the proceeds of the sale of Real Estate Assets.

Administrative Claims

28. Administrative Claims are Claims held by creditors that provided goods and services to the Debtors during these Chapter 11 Cases (such as trade vendors, landlords, and professionals). Many such Administrative Claims have been or will be paid in the ordinary course of business. Under the Plan, on or as soon as reasonably practicable after the Effective Date, or on the date on which an Administrative Claim becomes Allowed or otherwise payable under any agreement related to such Administrative Claim, each holder of an Allowed Administrative Claim shall receive Cash equal to the unpaid portion of such Allowed Administrative Claim.

Priority Tax Claims

29. Priority Tax Claims are Claims held by a governmental unit of the kind specified in sections 502(i), 507(a)(8), or 1129(a)(9)(D) of the Bankruptcy Code. Such Claims are entitled to priority treatment as described in the Bankruptcy Code. The Debtors are aware of Priority Tax Claims alleged by (1) the City of New York and its agencies, including the New York City Department of Finance; and (2) New York State Department of Taxation and Finance. As set forth in the Plan, Priority Tax Claims will be paid in full on the later of the Effective Date or the date on which a Priority Tax Claim becomes an Allowed Priority Tax Claim or such other treatment as to which the parties have agreed.

Non-Tax Priority Claims

30. Non-Tax Priority Claims are Claims, other than Administrative Claims or Priority Tax Claims, which are entitled to priority in payment pursuant to section 507(a) of the Bankruptcy Code. Unless otherwise mutually agreed, on or soon as reasonably practicable after the Effective Date, or on the date on which a Non-Tax Priority Claim becomes Allowed or otherwise payable, each holder of an Allowed Non-Tax Priority Claim shall receive Cash equal to the unpaid portion of such Allowed Non-Tax Priority Claim.

General Unsecured Claims

31. Most creditors, such as trade vendors, will have Claims that are neither secured nor entitled to priority. The Debtor expects that General Unsecured Claims will be paid in full from the proceeds of the Real Estate Assets. Unless otherwise mutually agreed, on or soon as reasonably practicable after the Effective Date, or on the date that the General Unsecured Claim becomes Allowed, each holder of a General Unsecured Claim shall receive Cash equal to the unpaid portion of the Allowed Amount.

Insured Claims

32. Insured Claims are claims against a Debtor that are covered by insurance or an indemnity policy, agreement, bond or right maintained by or for the benefit of such Debtor, but only to the extent of coverage or liability under the insurance or indemnity policy, agreement, bond or right. On the Effective Date, all Insured Claims will be Reinstated.

Equity Interest Holders

33. On the Effective Date, the rights of all Interest holders, those that hold ownership rights in the Debtors, will be reinstated by leaving unaltered the legal, equitable, and contractual rights to which the Interest entitles the Holder of the Interest.

IV.

REQUIREMENTS FOR PLAN CONFIRMATION ARE SATISFIED

34. Section 1129 of the Bankruptcy Code provides that a plan of reorganization shall be confirmed if the applicable confirmation requirements set forth in section 1129 are satisfied. The following discussion details how the Plan satisfies each and every confirmation requirement set forth in section 1129.

A. The Plan Complies with the Applicable Provisions of Title 11 (Section 1129(a)(1))

35. Section 1129(a)(1) requires that a plan comply with "the applicable provisions of" chapter 11 of the Bankruptcy Code. It is generally accepted that, under 1129(a)(1), the two "applicable provisions" of the Bankruptcy Code are sections 1122 and 1123, which govern the classification of claims and interests and the other contents of a plan. 7 COLLIER ON BANKRUPTCY ¶ 1129.02[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). As discussed below, the Plan satisfies the requirements of both sections 1122 and 1123.

1. The Plan Properly Classifies Claims (Section 1122)

36. The Debtors have broad discretion to classify claims in a plan of reorganization. *In re One Times Square Associates Ltd. Partnership*, 159 B.R. 695, 703 (Bankr. S.D.N.Y. 1993). The only restriction on the creation of classes imposed by the Bankruptcy Code is section 1122(a), which provides that a plan may place a claim or an interest in a particular class only if the claim or interest is "substantially similar" to other claims or interests in that class. Claims that are secured by different collateral, or secured under different agreements, are entitled to separate classification. *In re Chateaugay Corp.*, 89 F.3d 942 (2d Cir. 1996) (holding that separate classification of surety-reimbursement claims from unpaid workers' compensation claims that both arose from the Debtors' worker's compensation obligations was valid).

37. In accordance with section 1122, the Plan classifies the claims against the Debtors as follows:

Claims Against 33 Peck

- Class 1.1 consists of all Allowed Non-Tax Priority Claims that are subject to classification under the Bankruptcy Code. These Claims are substantially similar because they are all otherwise unsecured claims that are entitled to priority under the Bankruptcy Code and must receive value on the Effective Date or on the date on which such Claim is allowed or becomes due, whichever is later.
- Class 1.2 consists of the City of New York Secured Claim. This Claim arises from specific statutory rights of the City of New York and is classified separately from other Secured Claims that arise under agreements or other circumstances and are secured by different collateral.
- Class 1.3 consists of the UBS 33 Peck Allowed Secured Claim. This Claim arises from prepetition agreements between UBS and the Debtor and is classified separately from other Secured Claims that arise under different agreements and are secured by different collateral.
- Class 1.4 consists of all Secured Claims not otherwise classified. Claims in this Class receive individual treatment as secured creditors in accordance with the Bankruptcy Code.
- Class 1.5 consists of all General Unsecured Claims other than Insured Claims. Such Claims are all unsecured and have equal priority under the Bankruptcy Code.
- Class 1.6 consists of all Insured Claims, which are Claims against the Debtor covered by insurance or an indemnity policy, agreement, bond, or right maintained by or for the benefit of the Debtor.
- Class 1.7 consists of all Interests in 33 Peck.

Claims Against 36 West

- Class 2.1 consists of all Allowed Non-Tax Priority Claims that are subject to classification under the Bankruptcy Code. These Claims are substantially similar because they are all otherwise unsecured claims that are entitled to priority under the Bankruptcy Code and must receive value on the Effective Date or on the date on which such Claim is allowed or becomes due, whichever is later.
- Class 2.2 consists of the City of New York Secured Claim. This Claim arises from specific statutory rights of the City of New York and is classified separately from other Secured Claims that arise under agreements or other circumstances and are secured by different collateral.
- Class 2.3 consists of the UBS 36 West Allowed Secured Claim. This Claim arises from prepetition agreements between UBS and the Debtor and is classified separately from other Secured Claims that arise under different agreements and are secured by different collateral.
- Class 2.4 consists of all Secured Claims not otherwise classified. Claims in this Class receive individual treatment as secured creditors in accordance with the Bankruptcy Code.
- Class 2.5 consists of all General Unsecured Claims other than Insured Claims. Such Claims are all unsecured and have equal priority under the Bankruptcy Code.
- Class 2.6 consists of all Insured Claims, which are Claims against the Debtor covered by insurance or an indemnity policy, agreement, bond, or right maintained by or for the benefit of the Debtor.
- Class 2.7 consists of all Interests in 36 West.

Claims Against 37 West

- Class 3.1 consists of all Allowed Non-Tax Priority Claims that are subject to classification under the Bankruptcy Code. These Claims are substantially

similar because they are all otherwise unsecured claims that are entitled to priority under the Bankruptcy Code and must receive value on the Effective Date or on the date on which such Claim is allowed or becomes due, whichever is later.

- Class 3.2 consists of the City of New York Secured Claim. This Claim arises from specific statutory rights of the City of New York and is classified separately from other Secured Claims that arise under agreements or other circumstances and are secured by different collateral.

- Class 3.3 consists of the Cornerstone 37 West Allowed Secured Claim. This Claim arises from prepetition agreements between Cornerstone and the Debtor and is classified separately from other Secured Claims that arise under different agreements and are secured by different collateral.

- Class 3.4 consists of all Secured Claims not otherwise classified. Claims in this Class receive individual treatment as secured creditors in accordance with the Bankruptcy Code.

- Class 3.5 consists of all General Unsecured Claims other than Insured Claims. Such Claims are all unsecured and have equal priority under the Bankruptcy Code.

- Class 3.6 consists of all Insured Claims, which are Claims against the Debtor covered by insurance or an indemnity policy, agreement, bond, or right maintained by or for the benefit of the Debtor.

- Class 3.7 consists of all Interests in 37 West.

Claims Against 52 West

- Class 4.1 consists of all Allowed Non-Tax Priority Claims that are subject to classification under the Bankruptcy Code. These Claims are substantially similar because they are all otherwise unsecured claims that are entitled to priority under the Bankruptcy Code and must receive value on the Effective Date or on the date on which such Claim is allowed or becomes due, whichever is later.

- Class 4.2 consists of the City of New York Secured Claim. This Claim arises from specific statutory rights of the City of New York and is classified separately from other Secured Claims that arise under agreements or other circumstances and are secured by different collateral.
- Class 4.3 consists of the Cornerstone 52 West Allowed Secured Claim. This Claim arises from prepetition agreements between Cornerstone and the Debtor and is classified separately from other Secured Claims that arise under different agreements and are secured by different collateral.
- Class 4.4 consists of all Secured Claims not otherwise classified. Claims in this Class receive individual treatment as secured creditors in accordance with the Bankruptcy Code.
- Class 4.5 consists of all General Unsecured Claims other than Insured Claims. Such Claims are all unsecured and have equal priority under the Bankruptcy Code.
- Class 4.6 consists of all Insured Claims, which are Claims against the Debtor covered by insurance or an indemnity policy, agreement, bond, or right maintained by or for the benefit of the Debtor.
- Class 4.7 consists of all Interests in 52 West.

38. The Plan's classification of Claims is proper. The separate classification of the Secured and Unsecured Claims, as well as equity Interests, is appropriate because the Debtors' obligations to each Class is substantially unique, secured under different agreements, or secured by separate collateral.

2. The Plan Contains All Mandatory Provisions and Certain Permissive Provisions Set Forth in Section 1123

39. Section 1123 sets forth the mandatory and permissive contents of a plan. As discussed below, the Plan contains each of the mandatory provisions required by section 1123(a) and a number of the provisions expressly permitted by section 1123(b).

a. Compliance With Section 1123(a) (Mandatory Plan Provisions)

(1) Section 1123(a)(1) (Designation of Classes of Claims and Interests)

40. Section 1123(a)(1) requires that a plan designate classes of interests and claims, other than claims of a kind specified in section 507(a)(2) (administrative expense claims), section 507(a)(3) (claims arising during the period between the filing of the petition and the earlier of the appointment of a trustee or order for relief in an involuntary case), and section 507(a)(8) (certain tax claims). The Plan does not classify claims of the type described in sections 507(a)(2), 507(a)(3), or 507(a)(8). Administrative Claims under section 507(a)(2) are designated as unclassified claims and are discussed in Article 2 of the Plan (Article 2 § 2.2). There are no claims under section 507(a)(3), as these Chapter 11 Cases were commenced as voluntary chapter 11 cases. Priority Tax Claims under section 507(a)(8) are designated as unclassified claims and are discussed in Article 2 of the Plan (Article 2 § 2.4). All other Claims and Interests are classified in the Plan. As such, the Plan satisfies the requirements of section 1123(a)(1).

(2) Section 1123(a)(2) (Specification Of Unimpaired Classes)

41. Section 1123(a)(2) requires that a plan "specify any class of claims or interests that is not impaired under the plan." Under section 1124 of the Bankruptcy Code, a class of claims is impaired unless each claim in that class is treated in one of the following ways: (a) the plan leaves unaltered the legal, equitable and contractual rights to which such claim is entitled; or (b) the plan cures any default, reinstates the maturity, compensates the holder for damages and does not otherwise alter the legal, equitable or contractual rights to which such claim entitles the holder.

42. The Plan states that Classes 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, and 4.7 are not impaired and provides for the treatment required under section 1124 (Article 3 §§ 3.2, 3.3, 3.4, 3.5). Accordingly, the Plan complies with section 1123(a)(2).

(3) Section 1123(a)(3) (Specification of Treatment of Impaired Classes)

43. Section 1123(a)(3) requires that a plan "specify the treatment of any class of claims or interests that is impaired under the plan." The Plan states that there are no Classes under the Plan that are Impaired and entitled to vote to accept or reject the Plan (Article 4, § 4.1). Accordingly, the Plan complies with section 1123(a)(3).

(4) Section 1123(a)(4) (Same Treatment For Each Member Of A Class)

44. Section 1123(a)(4) requires that a plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." The Plan provides the same treatment for each Claim contained in each of the Classes under the Plan, in compliance with section 1123(a)(4).

(5) Section 1123(a)(5) (Adequate Means For Implementation of Plan)

45. Section 1123(a)(5) requires that a plan "provide adequate means for the plan's implementation," and sets forth several examples of such adequate means. In accordance with section 1123(a)(5), the means for implementing the Plan are set forth in Article 5 of the Plan.

46. Section 5.1 of the Plan provides that all property comprising the Estates (including Retained Actions) shall revest in the applicable Reorganized Debtor on the Effective Date, as expressly permitted by section 1123(a)(5)(B). Pursuant to the Plan, the Reorganized Debtors, using the proceeds of sales of the Real Estate Assets, will provide the funds necessary to satisfy all of the obligations expressly provided for in the Plan. These funds include distributions to creditors; section 6.2 of the Plan provides that, on the Effective Date, or as soon thereafter as practicable, distributions will be made to Holders of Allowed Claims.

47. Section 5.3 of the Plan provides that, to the extent a sale of a Real Estate Asset has not occurred by the Confirmation Date, then the sale shall be consummated

free and clear of all liens on or before the Effective Date pursuant to section 1123(a)(5)(D) of the Bankruptcy Code.

48. In addition to providing for the funding and distribution of creditor recoveries, Article 5 of the Plan contains provisions for the continuation of the Debtors' as corporate entities. Specifically, Article 5 of the Plan provides that, on the Effective Date, each of the Debtors will continue to exist after the Effective Date as a separate legal entity, with all the powers of such an entity under applicable law pursuant to such Debtor's articles of organization or formation, operating agreement and other organizational documents in effect as of the Effective Date (Article 5, §§ 5.1). In addition, Article 5 of the Plan provides authority for the Debtors to execute all documents necessary or appropriate to effectuate the Plan, and for the Reorganized Debtors to represent the Estates in post-confirmation matters through the closing of these Chapter 11 Cases (Article 11). Accordingly, the Plan provides sufficient means for its implementation and complies with section 1123(a)(5).

(6) Section 1123(a)(6) (Prohibition On Non-Voting Securities)

49. Section 1123(a)(6) of the Bankruptcy Code requires that, with respect to a corporate debtor, the debtor's charter prohibit the issuance of nonvoting equity securities and provide for an appropriate distribution of voting power amongst different equity classes. In accordance with section 1123(a)(6), the Plan provides that the Debtors' organizational documents shall be amended to prohibit the Reorganized Debtors from issuing non-voting equity securities, to the extent necessary to comply with section 1123(a)(6) (Article 5, § 5.1).

(7) Section 1123(a)(7) (Selection Of Officers And Directors)

50. Section 1123(a)(7) requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." Pursuant to the Plan, on

the Effective Date, each of the Debtors will continue to be managed by its sole member in accordance with its applicable operating agreement and that Massoro and La Mack will continue in their officer roles (Article 5, § 5.9). Each of the members has experience with the Debtors and their business and will continue to own the equity interests in the Reorganized Debtors. Accordingly, the Plan is consistent with creditors' interests and public policy and is in compliance with section 1123(a)(7).

b. Compliance With Section 1123(b) (Permissive Plan Provisions)

51. Section 1123(b) of the Bankruptcy Code describes certain permissive plan provisions. The Plan contains a number of these provisions, as follows:

Section 1123(b)(1) (Impairment/Non-impairment).

52. Section 1123(b)(1) provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests." As discussed above, the Plan does not impair any Classes. All Classes are unimpaired (Article 3, §§ 3.2, 3.3, 3.4, and 3.5).

(2) Section 1123(b)(2) (Assumption/Rejection of Executory Contracts And Unexpired Leases)

53. Subject to section 365 of the Bankruptcy Code, section 1123(b)(2) permits a plan to provide for the assumption or rejection of any executory contract and unexpired lease not previously rejected. FRBP 6006(a) provides that the assumption or rejection of an executory contract or unexpired lease as a part of a plan is not governed by FRBP 9014. Thus, no separate motion, notice, or hearing is required.

54. Section 7.1 of the Plan provides that each Executory Contract and Unexpired Lease shall be deemed automatically 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 or Unexpired Lease (Article 7, § 7.1). A list of all known Executory Contracts and Unexpired Leases affected by the Plan was attached as Exhibit A to the Executory Contracts Notice.

55. In connection with the sale of the Debtors' Real Estate Assets, the buyers will have the right to designate the contracts it wishes to assume. When a decision is made by the Debtors or the buyers, as applicable, to assume a contract, the Debtors shall serve a Notice of Assumption and Assignment on the non-Debtor party to the contract, including any cure amount. Article 7.1 of the Plan 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. These provisions of the Plan are appropriate under section 1123(b)(2).

(3) Section 1123(b)(3) (Claims or Interests Belonging to the Estate)

56. Section 1123(b)(3) provides for, *inter alia*, "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest." Section 5.5 of the Plan preserves all claims, causes of action, rights of action, suits and proceedings of the Debtors or the Estates (the "**Retained Actions**"), and provides that the Reorganized Debtors shall receive and retain, and may enforce, all Retained Actions. These provisions of the Plan are appropriate under section 1123(b)(4).

(4) Section 1123(b)(4) (Sale of Assets)

57. Section 1123(b)(4) states that a plan may provide for "the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." Section 5.2 and 5.3 of the Plan provides for the sale of the Debtors' Real Estate Assets and provides that all Cash necessary for the Reorganized Debtors to make payments required by the Plan shall be obtained from, among other things, the sale of the Real Estate Assets. These provisions of the Plan are appropriate under section 1123(b)(3).

(5) Section 1123(b)(6) (Other Appropriate Provisions)

58. Section 1123(b)(6) provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." Examples of additional permissive provisions include, but are not limited to, provisions for the retention of jurisdiction by the Bankruptcy court, release of claims and enjoining the prosecution of future claims. *See* 7 COLLIER ON BANKRUPTCY ¶ 1123.02[6] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). In the present case, the Plan provides for, among other things (i) the retention of jurisdiction by the Bankruptcy Court over issues and matters arising from the Chapter 11 Cases (Article 10, § 10.1), (ii) enjoining entities with satisfied Claims under the Plan from taking any future action against the Debtors and third parties on account of any such satisfied claims (Article 9, § 9.3).

59. In sum, the Plan complies both with the classification provisions of section 1122 and with the mandatory and permissive provisions of section 1123. Accordingly, the Plan satisfies the requirements of section 1129(a)(1).

B. The Debtors, As The Plan Proponents, Have Complied With The Provisions Of Title 11 (Section 1129(a)(2))

60. Section 1129(a)(2) focuses on the entity proposing a plan and requires that the proponent comply with the "applicable provisions" of title 11. In this context, the "applicable provision" of title 11 is section 1125, dealing with the disclosure and solicitation of acceptances of a plan. *See, In re PWS Holding Corp*, 228 F.3d 224, 228 (3d Cir. 2000). The principal purpose of section 1129(a)(2) is to ensure that plan proponents have complied with the solicitation and disclosure requirements of section 1125 of the Bankruptcy Code. 7 COLLIER ON BANKRUPTCY ¶ 1129.02[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

1. Section 1125(a) (Disclosure and Solicitation Of Acceptances Of A Plan)

61. Section 1125(a) provides the standard by which the Bankruptcy Court shall judge whether a proposed disclosure statement contains adequate disclosure regarding the plan to the holders of claims and interests. The purpose of the disclosure statement

is to provide creditors with "adequate information" about the Debtors affairs to allow creditors to make an informed decision when voting on a plan. Given that the Plan does not impair any class of creditors, and, therefore, no class of creditors was entitled to vote on the Plan, the Debtors were not required to provide or seek approval of a Disclosure Statement. *In re Feldman*, 53 B.R. 355, 357-58 (Bankr. S.D.N.Y. 1985); *In re Victory Constr. Co.*, 42 B.R. 145, 154 (Bankr. C.D. Cal. 1984); *In re Union County Wholesale Tobacco & Candy Co.*, 8 B.R. 442 (Bankr. D.N.J. 1981).

62. Notwithstanding the Bankruptcy Court does not require service of a disclosure statement, in order to assist creditors in understanding the Plan and deciding whether to file an objection to the Plan, the Debtors prepared and served the Disclosure Document on all creditors, members and other parties in interest.

2. Section 1125(b) (Disclosure and Solicitation Of Acceptances Of A Plan)

63. As set forth above, all of the Classes under the Plan are unimpaired. Therefore, pursuant to section 1126 of the Bankruptcy Code, all creditors and interest holders are deemed to have accepted the Plan and no creditor or interest holder is entitled to vote on the Plan. Accordingly, the Debtors were not required to solicit acceptances of the Plan. Copies of the Plan, Disclosure Document, Executory Contracts Notice and Confirmation Notice were served on all creditors, members and other parties in interest. Therefore, to the extent section 1125 is applicable, the Debtors have complied with the solicitation requirements of section 1125.

C. The Plan Has Been Proposed in Good Faith (Section 1129(a)(3))

64. Section 1129(a)(3) requires that a plan has been "proposed in good faith and not by any means forbidden by law." Although the term "good faith" is not defined by the Bankruptcy Code, a plan is considered proposed in good faith if there is a "reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the Code." *In re Madison Hotel Assocs.*, 749 F.2d 410, 425 (7th Cir. 1984). Good faith requires "a legitimate and honest purpose to reorganize the debtor"

and is to be determined by the bankruptcy court in light of the totality of the circumstances. *In re Chemtura Corp.*, 439 B.R. 561, 608 (Bankr. S.D.N.Y. 2010).

65. The evidence before the Bankruptcy Court supports the finding that the Plan was proposed in good faith and not by any means forbidden by law, thereby satisfying section 1129(a)(3). As set forth in Section II above and in the La Mack Declaration, the Chapter 11 Cases were filed and the Plan was proposed with the legitimate and honest purpose of selling the Real Estate Assets to maximize the value paid to creditors. While the Debtors are solvent, the disputes and litigation among Massaro and La Mack, on the one hand, and Obeid on the other, and the existence of the lis pendens rendered it impossible to meet the closing conditions and deliver free and clear title to any of the proposed purchasers for the properties, thereby creating the very real risk that the properties could deteriorate in value while the endless litigation continued. A bankruptcy case filing and plan intended to maximize the value of assets for the benefit of creditors is the epitome of good faith. *Crown Vill. Farm, LLC v. ARL, L.L.C. (In re Crown Vill. Farm, LLC),* 415 B.R. 86 (Bankr. D. Del. 2009); *In re Morris Plan Co.*, 62 B.R. 348 (Bankr. N.D. Iowa 1986).

66. Accordingly, the Bankruptcy Court may determine that the Plan has been proposed in good faith and not by any means forbidden by law.

D. The Plan Provides For Court Approval of Fees and Costs Paid By the Estate (Section 1129(a)(4))

67. Section 1129(a)(4) requires that:

> "[a]ny payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable."

68. Article 2 of the Plan discusses the Debtors' administrative expense claims and provides for payment, in accordance with section 1129(a)(4), upon Bankruptcy

Court review and approval of all applications for compensation of professionals for fees and expenses incurred on or before the Effective Date of the Plan (Article 2, §§ 2.2, 2.3, 2.5). As the Plan provides that payments of the type specified in section 1129(a)(4) will be made only after they have been approved by the Bankruptcy Court, this requirement for confirmation is satisfied.

E. The Plan Identifies the Reorganized Debtors' Proposed Officers and Directors (Section 1129(a)(5)).

69. Section 1129(a)(5) provides that the proponent of the plan must disclose the identity and affiliations of anyone proposed to serve as a director or officer of the reorganized debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan. Section 5.9 of the Plan provides that, on the Effective Date, each of the Reorganized Debtors will continue to be managed by its sole member in accordance with its applicable operating agreement and that Massoro and La Mack will continue in their officer roles. Therefore, the Plan satisfies section 1129(a)(5).

F. The Plan Does Not Alter Regulated Rates (Section 1129(a)(6))

70. Section 1129(a)(6) requires that, before a plan may be confirmed, any change in a regulated rate must be pre-approved by the regulating agency, or the rate change must be expressly conditioned on such approval. The Plan does not involve a change in regulated rates and therefore, section 1129(a)(6) is inapplicable because there is no rate change to approve.

G. The Plan Satisfies the Best Interests Test (Section 1129(a)(7))

71. The "best interests of creditors" test embodied in section 1129(a)(7) requires that the plan proponent demonstrate that, with respect to each impaired class of claims or interests, the holder of each claim or interest in such class either has accepted the plan or will receive or retain under the plan property of a value, as of the effective date of the plan, that is not less than the amount that such holder would receive or retain if the debtor were to be liquidated under chapter 7 of the Bankruptcy Code. *See, Bank of*

Am. Nat'l Trust and Savings Ass'n v. 203 N. LaSalle St. Partnership, 526 U.S. 434, 442 (1999).

72. As set forth above, all of the Classes under the Plan are unimpaired. Therefore, the "best interests of creditors" test does not apply. Nevertheless, as all creditors will be receiving payment in full plus postpetition interest at not less than the federal judgment rate, creditors will be receiving value not less than would be received in a chapter 7 case. *See, In re Cardelucci*, 285 F.3d 1231 (9th Cir. 2002).

H. Acceptance or Unimpairment (Section 1129(a)(8))

73. Section 1129(a)(8) requires that each class of claims and interests either has accepted the plan or is not impaired under the plan. A class of claims accepts the plan if holders of at least two-thirds in dollar amount and a majority in number of claims of that class vote to accept the plan, counting only those claims whose holders actually vote to accept or reject the plan..

74. As set forth above, all of the Classes under the Plan are unimpaired. While no creditor has objected that its claim is impaired under the Plan, it is evident that all Classes are unimpaired under the Plan. Without exception, each member of a Class receives one of the following two treatments: (a) the legal, equitable, and contractual rights of the member of the Class are left unaltered, or (b) the Claim as of the Petition Date is paid in full plus interest from the Petition Date though the date that the Allowed Claim is satisfied pursuant to the Plan at the greatest of (i) the legally enforceable rate of interest set forth in a contract between the Holder of the Allowed Claim and the applicable Debtor, (ii) the legally enforceable statutory rate of interest set forth in non-bankruptcy law applicable to such Allowed Claim, and (iii) the rate set forth in 28 U.S.C. § 1961 as of the Petition Date. *See generally, In re Energy Future Holdings Corp.*, 2015 Bankr. LEXIS 3702 (Bankr. D. Del. Oct. 30, 2015) (determining if and how much postpetition interest is required to leave claim unimpaired).

75. Therefore, pursuant to section 1126 of the Bankruptcy Code, all creditors and interest holders are deemed to have accepted the Plan and no creditor or interest holder is entitled to vote on the Plan.

1. Administrative and Priority Claims (Section 1129(a)(9))

76. Section 1129(a)(9) contains provisions generally requiring payment in cash of administrative and priority claims and permitting the deferred payment of priority tax claims over a period not exceeding five years. Section 1129(a)(9)(A) requires the holder of an administrative claim to receive payment of the amount of the allowed claim on the effective date of the plan. Section 2.2 of the Plan provides for the payment in full in cash of each Allowed Administrative Claim on the Effective Date (except to the extent that such payment is pending final approval of professional fees by the Bankruptcy Court) (Article 2, § 2.2).

77. Section 1129(a)(9)(B) requires the holder of certain priority claims to receive payments equal to the allowed amount of such claims. Article 3 of the Plan (addressing the treatment of Classes 1.1, 2.1, 3.1 and 4.1) provides for all such Priority Claims to receive payment in the full amount of such Claims either on the Effective Date or as such Claims become due and payable (Article 3, §§ 3.2,3.3, 3.4 and 3.5).

78. Section 1129(a)(9)(C) provides that with respect to priority tax claims, "the holder of such claim will receive on account of such claim regular installment payments in cash (1) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim; (ii) over a period ending not later than 5 years after the date of the order for relief…; and (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan." Section 2.4 of the Plan provides for the payment in full of each Allowed Priority Tax Claim in accordance with the requirement of section 1129(a)(9)(C).

79. Section 1129(a)(9)(D) provides that any holder of a secured claim that would otherwise be an unsecured claim of a governmental unit under section 507(a)(8)

of the Bankruptcy Code but for the secured status of the claim shall receive on account of such claim cash payments in the same manner and over the same time as prescribed in section 1129(a)(9)(C). Article 3 of the Plan provides that all secured claims will be paid in full on the Effective Date.

80. Based upon the foregoing, the Plan complies with section 1129(a)(9) of the Bankruptcy Code.

I. Acceptance By One Impaired Class (Section 1129(a)(10))

81. Section 1129(a)(10) requires that, if a class of claims is impaired under the plan, at least one class of impaired claims has accepted the plan, determined without including any acceptance of the plan by an insider holding a claim in such class. As set forth above, all of the Classes under the Plan are unimpaired. Therefore, section 1129(a)(10) is inapplicable.

J. The Plan is Feasible (Section 1129(a)(11))

82. Section 1129(a)(11) requires that confirmation of the plan "is not likely to be followed by the liquidation, or need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." This requirement is often referred to as the "feasibility" requirement. 7 COLLIER ON BANKRUPTCY ¶ 1129.02[11] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). The key element of feasibility is whether there exists a reasonable probability that the provisions of the plan can be performed. *See, Kane v. Johns–Manville Corp.*, 843 F.2d 636, 650 (2d Cir. 1988) (a chapter 11 plan may be "feasible" even though its success is not guaranteed; standard is whether plan offers reasonable assurance of success).

83. As set forth above, the Debtors will be consummating the sale of their Real Estate Assets pursuant to the Plan, the proceeds of the sales will be used to satisfy the claims of creditors, and the Debtors will not have any future payment obligations to creditors. The La Mack and Hercher Declarations evidence that all of the proposed

sales will be timely consummated. The La Mack Declaration evidences that the purchase price of each of the properties will exceed the amounts owed to creditors in these Chapter 11 Cases. Accordingly, the Plan has a reasonably likelihood of viability and satisfies the feasibility requirement of section 1129(a)(11).

K. Section 1930 Fees (Section 1129(a)(12))

84. Section 1129(a)(12) requires that a plan provide that all fees payable under 28 U.S.C. § 1930, consisting primarily of the quarterly fees to the United States Trustee, be paid on the effective date of the plan. Sections 2.1 and 11.4 of the Plan provide for such payment and, therefore, the Plan complies with section 1129(a)(12).

L. Retirees Benefits (Section 1129(a)(13))

85. Section 1129(a)(13) requires that a plan provide for the continued payment of certain retiree benefits "for the duration of the period that the debtor has obligated itself to provide such benefits." The Debtors do not provide "retiree benefits" as such term is defined in section 1144 of the Bankruptcy Code. Therefore, section 1129(a)(13) of the Bankruptcy Code is inapplicable.

M. Principle Purpose of the Plan (Section 1129(d))

86. Section 1129(d) provides that on request of a governmental unit, the court may not confirm a plan if "the principle purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933." A plan may be proposed which takes advantage of tax incidents of the estate so long as that purpose is not "*the* principle purpose." 7 COLLIER ON BANKRUPTCY ¶ 1129.07 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.)("The use of the definite article "the" reflects not only a departure from prior law, but is also an indication of the narrow scope of this section"). Section 1129(d) further provides that the governmental unit has the burden of proof on the issue of avoidance.

87. Here, no governmental unit has requested that the Bankruptcy Court deny confirmation on these grounds. Moreover, as set forth in Section II above and the La

Mack Declaration, the principle purpose of the plan is to consummate a sale of the Real Estate Assets and not to avoid taxes. Therefore, the Plan may be confirmed in accordance with Section 1129(d).

V.

WAIVER OF STAY PURSUANT TO RULE 3020(e) OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

88. The proposed Confirmation Order, attached as Exhibit A to the Reply, provides that it is effective immediately, with no stay pending any appeal of the Confirmation Order. FRBP 3020(e) provides that "an order confirming a plan is stayed until the expiration of fourteen (14) days after the entry of the order, *unless the court orders otherwise*." (emphasis added). In this case, the Debtors submit that a waiver of the stay is necessary and will be beneficial to the Debtors and their Estates.

89. The Confirmation Hearing is scheduled for November 30, 2015, with auctions of the Real Estate Assets owned by 33 Peck and 52 West scheduled to take place on December 1, 2015 and the auction of the Real Estate Assets owned by 37 West scheduled for December 15, 2015. Each of the purchasers desire to close the sales as quickly as possible. Imposition of the stay could unnecessarily delay the closing of the sales and frustrate the sale process. Further, if there is no stay of the Confirmation Order, the creditors will be able to receive distributions earlier. Accordingly, the Debtors respectfully request that the Bankruptcy Court orders a waiver of the stay pursuant to FRBP 3020(e).

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