

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

36 WEST 38TH STREET LLC,

Debtor.

Chapter 11

Case No. 15-12480 (JLG)

**ORDER PURSUANT TO 11 U.S.C. § 105(a), 363, 506(C) AND 1123(A)(5)(D), AND
RULES 6004 AND 6006 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE
(I) APPROVING THE PURCHASE AGREEMENT AND SALE PROCEDURES IN
CONNECTION WITH THE SALE OF THE PROPERTY LOCATED AT 36 WEST
38TH STREET, NEW YORK, NEW YORK, (II) SCHEDULING AN AUCTION AND
A SALE HEARING, (III) APPROVING THE FORM OF PURCHASE AGREEMENT;
(IV) APPROVING THE FORM OF THE NOTICE OF AUCTION AND (V)
APPROVING THE CREDIT BID RIGHTS AND CONSENSUAL 506(C)
SURCHARGE LIMITS APPLICABLE TO THE DEBTOR'S SECURED LENDER**

Upon the motion (the "Sale Procedures Motion")¹ of 36 West 38th Street LLC (the "Debtor"), for the entry of an order, pursuant to Sections 105(a), 363, 506(c) and 1123(A)(5)(D) of Title 11 of the United States Code (the "Bankruptcy Code"), Rules 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and the amended guidelines adopted by General Order M-383 (a) approving bidding procedures (the "Sale Procedures") in connection with the sale (the "Sale") of the real property located at 36 West 38th Street, New York, NY (the "Property"), as more particularly described in the form sale agreement (the "36 West Sale Agreement"); (b) approving the 36 West Sale Agreement; (c) scheduling an auction (the "Auction"); (d) approving the form of notice of such Sale Procedures, the Auction and the Sale; and (e)

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Sale Procedures Motion or the 36 West Sale Agreement (as defined herein).

approving the credit bid rights and consensual 506(c) surcharge limits applicable to the Debtor's secured lender 36 West 38th Street Hotel Capital LLC (the "UBS Lender"); and the Court having reviewed the Sale Procedures Motion and the attachments thereto; and upon the record of the case, including the hearing held before the Court on November 17, 2016; and the Court having determined that the relief requested in the Sale Procedures Motion is in the best interest of the Debtor's estate, its creditors and other parties-in-interest; and after due deliberation thereon; and good and sufficient cause appearing therefor, it is hereby

FOUND AND DETERMINED THAT:²

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334 and the Standing Order of Referral of Cases to Bankruptcy Court Judges of the District Court for the Southern District of New York, dated July 10, 1984 (Ward, Acting C.J.), as amended by order M-431 dated January 31, 2012 (Preska, C.P.J.).

2. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (N), and (O). Venue of this case and the Sale Procedures Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicates for the relief sought in the Sale Procedures Motion and the bases for the approvals and authorizations herein are Sections 105(a),

² Where appropriate in this Procedures Order (as defined herein), findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact pursuant to Bankruptcy Rule 7052.

363, 506(c) and 1123(A)(5)(D) of the Bankruptcy Code and Bankruptcy Rules 6004 and 6006.

4. Appropriate and sufficient notice of the relief sought in the Sale Procedures Motion was given under the circumstances, and no further notice is required, and such notice complied with all applicable requirements of Sections 102, and 363 of the Bankruptcy Code; Bankruptcy Rules 2002, 6004, 6006, and 9008; and any other applicable provision of the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules and any Administrative Orders. A reasonable opportunity to object or be heard regarding the relief requested in the Sale Procedures Motion (including, without limitation, with respect to the proposed Sale Procedures) has been afforded to all interested persons and entities including, but not limited to: (i) the Office of the United States Trustee – Region 2; (ii) all creditors; (iv) the Internal Revenue Service; and (v) all other parties that have filed a notice of appearance and demand for service of papers in this bankruptcy case under Bankruptcy Rule 2002 (the “Bidding Procedures Notice Parties”).

5. The Debtor’s proposed notice of the Sale Procedures and the Auction, as set forth in the Sale Procedures Motion, is appropriate and reasonably calculated to provide all interested parties with timely and proper notice, and no other or further notice is required.

6. The Sale Procedures, attached to this order (this “Procedures Order”) as **Exhibit A**, are fair, reasonable and appropriate and are designed to maximize the recovery for the Debtor’s estate.

7. The entry of this Procedures Order is in the best interests of the Debtor's estate, its creditors and parties in interest; and it is therefore

ORDERED, ADJUDGED AND DECREED THAT:

1. The 36 West Sale Agreement, substantially in the form attached to this Procedures Order as **Exhibit B**, is approved.

2. The Sale Procedures are approved and shall apply with respect to, and shall govern all proceedings related to, (i) the 36 West Sale Agreement or, if applicable, an amended Purchase Agreement (the "Modified 36 West Sale Agreement"), (ii) the Auction, and (iii) the Sale.

3. The Debtor is authorized to take any and all actions reasonably necessary or appropriate to implement the Sale Procedures.

4. The notice procedures for the Auction as described in the Sale Procedures Motion are approved in all respects, and the form of Notice of Auction, in substantially the form attached to the Sale Procedures Motion as **Exhibit C** is hereby approved.

5. If a Qualified Bid is timely received in accordance with the Sale Procedures, the Auction shall be scheduled for **January 17, 2017, at 10:00 a.m. (ET)** (unless rescheduled to a later date in accordance with the Sale Procedures) and shall be held in Courtroom 601 at the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, NY 10004.

6. No later than three (3) business days after entry of this Procedures Order, the Debtor (or its agents) shall serve a copy of this Procedures Order (including the Sale Procedures and the Notice of Auction substantially in the form attached as to the Sale

Procedures Motion as **Exhibit C**) upon the following by first-class mail: (i) the Office of the United States Trustee – Region 2; (ii) all federal, state and local regulatory or taxing authorities or recording offices that are reasonably known by the Debtor to have an interest in the relief requested by the Motion; (iii) all parties known by the Debtor to have expressed a bona fide interest in acquiring the Property; (iv) the Internal Revenue Service; (v) the United States Attorney’s office; (vi) all known creditors of the Debtor (or their counsel, if represented by counsel); and (vii) all entities who have filed a notice of appearance and request for service of papers in the Debtor’s case (collectively, the “Auction and Sale Notice Parties”).

7. Any sale resulting from the approved procedures must comply with all of the provisions of the confirmed Plan in this case, or must otherwise be approved upon an alternative Motion and Order of the Court.

8. To the extent the Debtor has not already done so, no later than November 30, 2016, the Debtor (or its agents) shall arrange to place advertisements in The New York Times and The Wall Street Journal (the “Advertisements”), advertising the Sale of the Property and advising interested parties of the minimum bid, the Bid Deadline, the date of Auction, and how such parties could receive additional information.

9. The UBS Lender shall have all rights to credit bid as set forth in section 363(k) of the Bankruptcy Code and the consensual surcharge of the UBS Lender’s collateral under Bankruptcy Code section 506(c), including the administrative Carve-Out, is approved to the extent that the proceeds of the Sale are not sufficient to pay all Other Secured Claims and Administrative Claims in full.

10. The Debtor and UBS Lender shall use their best efforts to answer any questions from the Office of the U.S. Trustee or any equity holders of the Debtor as to how the agreed amount of the UBS Lender's claim was calculated.

11. If the Successful Bidder at the Auction is not the UBS Lender, prior to disbursement of any proceeds from the Sale to the UBS Lender, all administrative, secured and priority claims shall be paid in full from the proceeds of Sale, or sufficient funds shall be reserved from the Sale proceeds to facilitate prompt payment of such claims following any reconciliation thereof or resolution of objections thereto.

12. If the proceeds of the Sale are insufficient to pay the UBS Lender, the Other Secured Claims, and Administrative Claims, then the amounts necessary to pay the Other Secured Claims and Administrative Claims in full, shall either be (a) deducted from the Purchase Price paid by a Qualified Bidder prior to paying the UBS Lender; or (b) contributed in cash by the UBS Lender in the event the UBS Lender's credit bid is the only bid or the Successful Bid.

13. Any bidder that has previously signed a confidentiality agreement will not be required to execute another confidentiality agreement.

14. In the event that no Qualified Bids are received and the UBS Lender's credit bid is accepted, RobertDouglas and Cushman & Wakefield, as Real Estate Advisors to the Debtor, shall each receive an Advisory Fee of \$25,000 plus the reimbursement of all out-of-pocket expenses, provided that such out-of-pocket expenses shall not exceed \$20,000 for each Real Estate Advisor, subject to final Bankruptcy Court approval to the extent required by the RobertDouglas Retention

Order and the Order approving the employment of Cushman & Wakefield or any other Court order.

15. No later than **December 20, 2016**, the Debtor shall file a Notice or a Motion regarding the proposed treatment of unsecured creditors.

16. The Debtor is hereby authorized and empowered to take such steps, expend such sums of money and do such other things as may be necessary to implement and effect the terms and requirements established by this Procedures Order and the Sale Procedures.

17. This Court shall retain jurisdiction over any matters related to or arising from the implementation of this Procedures Order, including (but not limited to) the right to amend this Procedures Order.

BY ORDER OF THE COURT

Dated: New York, New York
November 23, 2016

/s/James L. Garrity, Jr.

THE HONORABLE JAMES L. GARRITY, JR.
UNITED STATES BANKRUPTCY JUDGE

PURCHASE AND SALE AGREEMENT

This Purchase and Sale Agreement (this "Agreement") is made as of the ___ day of _____, 2016 (the "Effective Date"), whereby 36 West 38th Street, LLC, a Delaware limited liability company ("Seller"), agrees to sell and convey to _____, or an assignee formed for the sole purpose of the transaction contemplated hereby ("Purchaser"), and Purchaser agrees to buy, in connection with the filing by Seller of a petition under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), upon the terms and conditions hereof and in accordance with and pursuant to sections 105, 363 and 365 of the Bankruptcy Code, that certain tract of land, now known as and numbered 34-36 West 38th Street, New York, New York (the "Land"), as more particularly described on the attached Exhibit A, along with all rights, privileges, and appurtenances relating or pertaining hereto (collectively with the Land, the "Property"), including, without limitation, the following:

- a. Any improvements situated on, over and/or under the Land;
- b. All and singular the rights and appurtenances pertaining to the Property and/or such improvements, including, without limitation, all right, title and interest of Seller in and to adjacent streets, roads, alleys, easements and rights-of-way, and all awards made or to be made in connection therewith; and
- c. If and to the extent the same would not comprise and be considered a part of the appurtenances described in subparagraph b above, all water rights, wastewater rights, utility rights, air and development rights, if any, associated with or appurtenant to the Property and/or such improvements.
- d. To the extent assignable, all certificates of occupancy, FAR rights, use permits, zoning letters, building permits, licenses, plans, specifications, plats, assessments, agreements, reports, public reports, studies, surveys or similar documents issued to or owned by Seller relating to the construction of the proposed hotel.
- e. All of the following, to the extent they relate to the Property, are owned by Seller, and are assignable: (i) all rights to credits, refunds, rebates, reimbursements, repayments, bonds, deposits, and rights to payment from any utility company, municipality, school district, or other governmental or quasi-governmental authority; (ii) all rights under any reciprocal easement agreements, declarations, covenants, conditions, restrictions or easements, including without limitation, its rights as "Declarant", "Developer" or similar designation; and (iii) all approvals, variances, waivers, development rights, and entitlements, if any.
- f. To the extent that the following are assignable and have been obtained by the Seller: all preliminary, final, draft and proposed building plans and specifications, design development plans, interior design and construction drawings including, but not limited to, those

prepared by Gene Kaufman Architect (the “Hotel Plans, Specs and Drawings”), and any specifications for the improvements on the Property, all surveys, grading plans, topographical maps, architectural and structural drawings and engineering, soils, seismic, environmental, geologic and architectural reports, studies, and tests, with all test results, relating to the Property will be assigned to the Purchaser. Seller hereby represents, warrants and covenants to Purchaser that Seller has paid, or will have paid by or at Closing (as defined below) all amounts due and payable for all work product conveyed to Purchaser, including, but not limited to, the Hotel Plans, Specs and Drawings. The conveyance by Seller to Purchaser of the work product contained herein does not violate any obligation or agreement to which Seller or the work product is otherwise bound, and does not require the consent of any other party to give effect to the transfers contemplated hereby.

1. Purchase Price. The purchase price for the Property shall be \$_____. [the minimum bid is: \$19,250,000] (the “Purchase Price”).

2. Payment of Escrow Deposit and Balance. Purchaser has deposited the sum of One Million, Nine Hundred Twenty Five Thousand Dollars (\$1,925,000) in immediately available funds (the “Escrow Deposit”) with Kensington Vanguard National Land Services 39 W 37th Street, 3rd Floor New York, NY 10018, Attention: Matthew Schmeelk, Executive Vice President, 212-532-8686, schmeelk@kvnational.com (the “Title Company” and “Escrow Agent”). The balance of the Purchase Price, after taking into account the Escrow Deposit and other adjustments and prorations provided for herein, shall be paid by federal funds wire transfer by Purchaser to the Escrow Agent on or before the Closing. The Escrow Agent shall deposit the Escrow Deposit in one or more interest bearing FDIC-insured accounts with a bank or other financial institution acceptable to Seller, which shall comply with any requirement of the Bankruptcy Court and the UST Guidelines. Interest earned on the Escrow Deposit shall be deemed a portion of the Escrow Deposit. The return of the Escrow Deposit shall be governed by the terms of the Sale Procedures Order (as defined below).

3. Title Report; Survey; Additional Information.

a. Seller shall provide Purchaser with the existing Survey, updated by visual inspection, and a preliminary title report (the “Preliminary Title Report”). This Agreement is not contingent on any approval of the condition of title as shown on the Preliminary or Final Title Report, except as set forth in section 3(c), below.

b. Purchaser acknowledges and agrees that Seller has not verified and shall not verify the accuracy, completeness or any other aspect of the Title Report or the Survey, or any documents or materials which may be furnished by Seller to Purchaser (collectively, the “Due Diligence Materials”). If Seller shall make any Due Diligence Materials available to Purchaser, Seller shall be doing so solely as an accommodation to Purchaser, without representation or warranty as to completeness or accuracy or any other matter.

c. If Purchaser is the Successful Bidder at the Auction (as hereinafter defined), the Title Company will deliver to Purchaser, within five (5) business days of the Auction, a Commitment for Title Insurance issued by the Title Company, (the “Final Title Report”) together with full and legible copies of all exceptions to title set forth in the Final Title Report. Purchaser

shall have ten (10) days from the Auction Date to object in writing to any title exceptions that were not reflected on the Preliminary Title Report and/or the Survey, but are shown on the Final Title Report, by giving written notice to Seller; provided that matters not objected to in writing by Purchaser within such 10-day period shall be deemed to be acceptable to Purchaser and to be Permitted Exceptions (as defined below). Seller shall use reasonable efforts to cure any such title objections within twenty (20) days after receipt thereof, and in such event the Closing Date (as defined below) shall be automatically extended to the day of expiration of such 20-day cure period if the original Closing Date would have occurred during such cure period; provided, however, that (i) any title objections which will be cured by the “free and clear” nature of the sale pursuant to the Confirmation Order (defined below) shall not be otherwise cured; (ii) Seller shall not be obligated to institute any litigation to cure any such objections; (iii) Seller shall not be obligated to remove any non-liquidated encumbrances (such as easements, restrictions, covenants, and the like) and shall not be obligated to spend more than \$10,000.00 to effect any such cure (exclusive of payment of voluntary monetary liens, which Seller shall be obligated to pay off in full at Closing at Seller’s cost and expense); (iv) Seller shall use the Purchase Price at Closing for the purpose of curing any such objections, and (v) Seller shall have the right to decrease the duration of such cure period such that such cure period shall expire on the originally scheduled Closing Date, so that the Closing Date will not be extended. If Seller fails to cure any such objections after utilizing its best efforts, the Purchaser may either (i) cancel the transaction and receive a full refund of its Escrow Deposit; or (ii) consummate the purchase of the Property subject to the objections (which shall constitute a waiver of such objections), without any deductions or offsets from the Purchase Price. Any exceptions to title that are either accepted or waived by Purchaser hereunder shall be referred to as “Permitted Exceptions.”

d. The Title Company shall issue a standard coverage owners’ policy of title insurance with regional exceptions with coverage equal to the Purchase Price insuring title to the Property vested in Purchaser subject only to the Permitted Exceptions (the “Title Policy”). Purchaser shall have the right to order and obtain an extended coverage policy of title insurance without regional exceptions (“Extended Coverage Policy”). The Title Policy shall be subject only to the following matters (all of which shall be deemed Permitted Exceptions hereunder):

- (i) a lien for real property taxes, bonds, or assessments not then delinquent;
- (ii) exceptions set forth in the Title Report which have not been objected to in writing by Purchaser as set forth in Section 3.c. hereof; and
- (iii) any exceptions created or consented to by Purchaser, including, without limitation, any exceptions arising by reason of Purchaser’s possession of or entry on the Property.

4. Bankruptcy Matters.

a. Seller has filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court and, in connection therewith filed a motion (the "Sales Procedures Motion") in such case (the "Bankruptcy Case") whereby the Bankruptcy Court entered an order approving the procedures for bidding and conducting an auction (the "Auction") for the sale of the Property (the "Sale Procedures Order"). The date of the Auction is January 17, 2017, at 10:00 a.m. in Courtroom 601 of the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, NY 10004 (the "Auction Date"). The Debtor has already confirmed a plan of liquidation (the "Plan") pursuant to an order that provides for sale of the Property (the "Confirmation Order"). The Plan and Confirmation Order authorizes Seller, to the extent of its right, title and interest, to transfer the Property to Purchaser free and clear of all liens, claims, interests or encumbrances ("Free and Clear"), except as otherwise set forth in this Agreement.

b. Accordingly, Purchaser acknowledges and is aware that (i) this Agreement and the transaction contemplated herein (the "Transaction") has been or shall be noticed to creditors and parties in interest in the Bankruptcy Case, (ii) the sale contemplated by the Transaction and Agreement is subject to any higher or better offers at an auction, (iii) the Transaction will be subject to approval by the Bankruptcy Court and (iv) Seller and its agents and representatives are obligated, after the entry of the Sale Procedures Order, to market the Property for sale and to solicit higher or better offers until the Property is sold.

5. Closing; Closing Documents.

a. The closing of the Transaction (the "Closing") shall (a) be held at the offices of counsel to the Seller, Robins Kaplan LLP, 601 Lexington Blvd, New York, New York 10018 at 10:00 a.m. and (b) occur no later than February 28, 2017 (the "Closing Date"), provided, however, that if any of the Conditions (as hereinafter defined) shall not have been satisfied by the Closing Date, Seller shall have the option to extend the Closing Date for up to thirty (30) days until all of the Conditions shall have been satisfied, such extension right to be exercised by written notice to Purchaser. Escrow Holder will cause the Confirmation Order (as entered by the Bankruptcy Court) and a bargain and sale deed described in Section 5(c)(ii) below to be recorded at the Closing and will cause the Title Policy to be issued to Purchaser at the Closing, and will wire transfer the purchase price net proceeds due Seller to the Seller at the Closing.

b. Possession of the Property shall be delivered to Purchaser at the Closing Free and Clear other than the Permitted Exceptions. The Property shall be delivered as vacant land.

c. Seller agrees to deliver at the Closing, the following, in form and substance reasonably acceptable to Purchaser:

- (i) The Confirmation Order, which has already been entered by the Bankruptcy Court and which is deemed to be reasonably acceptable to Purchaser;

- (ii) a bargain and sale deed, without covenants against Seller's acts, conveying the Property to Purchaser, and an appropriate assignment assigning to Purchaser all of Seller's right, title, and interest in all permits, licenses, and intangible assets to the Property;
- (iii) a non-foreign certificate satisfactory for compliance with Internal Revenue Service reporting purposes;
- (iv) a closing statement prepared by the Escrow Agent;
- (v) all required transfer tax forms; and
- (vi) an affidavit in form reasonably and customarily required by the Title Company as to parties in possession and contractor's liens on the Property.

d. Purchaser agrees to deliver at the Closing, the following, in form and substance reasonably acceptable to Seller:

- (i) the Purchase Price; and
- (ii) a closing statement prepared by the Escrow Agent.

e. At the Closing, the Purchase Price shall be paid to Seller by federal funds wire transfer or other funds acceptable to Seller, subject to adjustments under Section 6 hereof.

f. All of Seller's obligations under this Agreement, including without limitation Seller's obligation to consummate the Closing, are conditioned upon Purchaser's fulfillment of each and every material obligation of Purchaser hereunder, and the absence of any material, uncured breach of this Agreement by Purchaser.

g. All of Purchaser's obligations under this Agreement, including without limitation Purchaser's obligation to consummate the Closing, are conditioned upon the following: (i) Seller's fulfillment of each and every material obligation of Seller hereunder, and the absence of any material, uncured breach of this Agreement by Seller; (ii) the issuance to Purchaser of the Owner's Title Policy in the amount of the Purchaser Price; and (iii) the Confirmation Order.

6. Prorations; Closing Costs.

a. Real estate taxes for the year of the Closing shall be prorated, and real estate taxes for subsequent years shall be assumed by Purchaser. To the extent not dealt with under section 1146 of the Bankruptcy Code or otherwise addressed under the Plan and Confirmation Order, Seller shall pay any applicable transfer taxes. If applicable, any mortgage recording taxes and any similar taxes, recording fees, and related fees incurred in connection with this Agreement and the Transaction customarily paid by Purchaser shall be paid at the Closing, in addition to the Purchase

Price. Notwithstanding the foregoing, any real estate taxes and assessments or other municipal charges due and payable as of the Closing shall be paid in full at Closing, and all real estate taxes, assessments, municipal charges, and other items customarily adjusted between buyers and sellers in the vicinity of the Property, shall be prorated as of the Closing. If the tax figures used for the closing adjustments are based on estimated figures, the parties agree to make any necessary adjustments between themselves when the actual figures for the year of the Closing are known. All agreements between Seller and Purchaser set forth in this Agreement relating to the proration and payment of taxes on the Property and any subsequent adjustment of taxes following the Closing shall survive the Closing Date and shall not merge therein.

b. If the Successful Bidder, Purchaser shall pay all costs of the Title Report, the Survey, title insurance premiums for Purchaser's fee ownership title insurance policy and any lender's title insurance policy, any due diligence performed by or at the request of Purchaser, and fifty percent (50%) of the escrow fees charged by the Escrow Agent. Seller shall pay fifty percent (50%) of the escrow fees charged by the Escrow Agent. Except as is otherwise provided herein, each party shall pay its own attorneys' fees, and all other closing costs shall be allocated as is customary in the vicinity of the Property.

7. **AS-IS Transaction.** Purchaser acknowledges and agrees that it has conducted its own due diligence concerning the Property and the management and operation thereof. Purchaser acknowledges and agrees that it shall not have a due diligence contingency or similar termination rights. Purchaser is relying solely on its own due diligence and is not relying on any statements, documents, materials, projections, forecasts, financial statements, business plans, title documents, surveys, plans, Due Diligence Materials or other information of any kind or nature provided orally or in writing by Seller or any party acting on behalf of Seller, other than the representations and warranties expressly set forth herein. Purchaser is purchasing the Property on an AS-IS/WHERE IS basis, without contingency or recourse of any kind or nature.

9. **Representations, Warranties and Covenants of Purchaser.** Purchaser represents and warrants to and covenants with Seller as follows:

a. **Good Standing.** Purchaser is a _____ duly organized, validly existing and in good standing under the laws of the State of _____.

b. **Requisite Power and Authority.** Purchaser has legal capacity to enter into this Agreement, to perform its obligations under this Agreement, and to consummate the Transaction. This Agreement has been duly authorized, executed and delivered by Purchaser and constitutes a legal, valid and binding obligation of Purchaser, enforceable against Purchaser in accordance with its terms; except that such enforcement may be subject to applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws, now or hereinafter in effect, affecting creditors' rights generally.

c. **No Conflicts; Consents.** The execution and delivery of this Agreement by Purchaser does not, and the consummation of the Transaction contemplated hereby, and compliance with the terms hereof will not, conflict with, or result in any violation of or default (with or without notice or lapse of time, or both) under, or result in the creation of any lien upon any of the properties

or assets of Purchaser under any provision of (i) any contract, commitment, agreement or arrangement to which Purchaser is a party or by which any of its properties or assets are bound or (ii) any judgment, order, decree, statute or law. No permit, order, license, approval or authorization of, or registration, declaration or filing with, any person, firm, corporation, partnership, limited liability company, joint venture, association or entity (governmental or private) is required to be obtained or made by or with respect to Purchaser in connection with the execution, delivery and performance of this Agreement or the consummation of the Transaction contemplated hereby.

d. Anti-Terrorism. None of Purchaser's property or interests is subject to being "blocked" under any Anti-Terrorism Laws and neither Purchaser nor any Person holding any direct or indirect interest in Purchaser is in violation of any Anti-Terrorism Laws. Neither Purchaser nor any of its affiliates, nor any of their respective partners, members, shareholders or other equity owners, and none of their respective employees, officers, directors, representatives or agents (collectively, a "Purchaser Party") is, nor will they become: (i) a person or entity, or owned or controlled by a person or entity, with whom U.S. persons or entities are restricted from doing business, or with whom U.S. persons or entities may transact business only subject to the imposition of significant fines and penalties, under regulations of the Office of Foreign Asset Control ("OFAC") of the U.S. Department of Treasury (including those named on OFAC's Specially Designated and Blocked Persons List) or under any statute, executive order or other governmental action; (ii) designated by the President or OFAC pursuant to the Trading with the Enemy Act, 50 U.S.C. App. § 5, the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06, the USA Patriot Act of 2001, Pub. L. No. 107-56, Executive Order 13224 (September 23, 2001), or any executive orders of the President issued pursuant to such statutes; or (iii) controlled by the government of any country or person that is subject to an embargo by the U.S. government, including without limitation OFAC, that prohibits Purchaser from conducting the business activities contemplated by this Agreement with Purchaser. Purchaser, including its Purchaser Parties, (1) is in compliance with, (2) is not under investigation by any governmental authority; (3) has not been charged with, convicted of, or assessed civil or criminal penalties; and (4) has not had any of its funds seized or forfeited in any action, for violation of any applicable anti-money laundering laws, including without limitation, the USA Patriot Act, the Bank Secrecy Act, 31 U.S.C. § 5311 et seq., the Trading with the Enemy Act, 50 U.S.C. App. § 1 et seq., Executive Order 13224 (September 23, 2001), the International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq., and the sanction regulations promulgated pursuant thereto by OFAC, and laws relating to prevention and detection of money laundering in 18 U.S.C. §§ 1956-57

10. Representations, Warranties and Covenants of Seller. Seller represents and warrants to and covenants with Purchaser as follows:

a. Good Standing. Seller is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware.

b. Authorization; Requisite Power and Authority; Enforceability. Pursuant to the Confirmation Order, Seller has legal capacity to enter into this Agreement, to perform its obligations under this Agreement, and to consummate the Transaction. This Agreement has been duly authorized, executed and delivered by Seller and constitutes a legal, valid and binding obligation of

Seller, enforceable against Seller in accordance with its terms; except that such enforcement may be subject to applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws, now or hereinafter in effect, affecting creditors' rights generally.

c. No Conflicts; Consents. The execution and delivery of this Agreement by Seller does not, and the consummation of the Transaction, and compliance with the terms hereof will not, conflict with, or result in any violation of or default (with or without notice or lapse of time, or both) under, or result in the creation of any lien upon any of the properties or assets of Seller under any provision of (i) any contract, commitment, agreement or arrangement to which Seller is a party or by which any of its properties or assets are bound or (ii) any judgment, order, decree, statute or law. No permit, order, license, approval or authorization of, or registration, declaration or filing with, any person, firm, corporation, partnership, limited liability company, joint venture, association or entity (governmental or private) is required to be obtained or made by or with respect to Seller in connection with the execution, delivery and performance of this Agreement or the consummation of the Transaction contemplated hereby.

d. Litigation. To the best of Seller's knowledge, except as set forth on Schedule 10.d. attached hereto, there is no pending or threatened litigation, allegations, lawsuits or claims, whether for personal injury, property damage, property taxes, contractual disputes or otherwise, which do or may affect the Property or the operation, value or development thereof, and there are no actions or proceedings pending or threatened against Seller before any court or administrative agency in any way connected with the Property and neither the entering into of this Agreement nor the consummation of the Transaction will constitute or result in a violation or breach by Seller of any judgment, order, writ, injunction or decree issued against or imposed upon Seller. To the best of Seller's knowledge, except as set forth on Schedule 10.d. attached hereto, there is no action, suit, proceeding or investigation pending or threatened against Seller that would become a cloud on Seller's title to and/or have a material adverse impact upon the Property or any portion thereof or which questions the validity or enforceability of the Transaction or any action taken pursuant hereto in any court or before or by any federal, district, county, or municipal department, commission, board, bureau, agency or other governmental instrumentality.

e. Anti-Terrorism. None of Seller's property or interests is subject to being "blocked" under any Anti-Terrorism Laws and neither Seller nor any Person holding any direct or indirect interest in Seller is in violation of any Anti-Terrorism Laws. Neither Seller nor any of its affiliates, nor any of their respective partners, members, shareholders or other equity owners, and none of their respective employees, officers, directors, representatives or agents (collectively, a "Seller Party") is, nor will they become: (i) a person or entity, or owned or controlled by a person or entity, with whom U.S. persons or entities are restricted from doing business, or with whom U.S. persons or entities may transact business only subject to the imposition of significant fines and penalties, under regulations of the Office of Foreign Asset Control ("OFAC") of the U.S. Department of Treasury (including those named on OFAC's Specially Designated and Blocked Persons List) or under any statute, executive order or other governmental action; (ii) designated by the President or OFAC pursuant to the Trading with the Enemy Act, 50 U.S.C. App. § 5, the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06, the USA Patriot Act of 2001, Pub. L. No. 107-56, Executive Order 13224 (September 23, 2001), or any executive orders of the

President issued pursuant to such statutes; or (iii) controlled by the government of any country or person that is subject to an embargo by the U.S. government, including without limitation OFAC, that prohibits Purchaser from conducting the business activities contemplated by this Agreement with Seller. Seller, including its Seller Parties, (1) is in compliance with, (2) is not under investigation by any governmental authority; (3) has not been charged with, convicted of, or assessed civil or criminal penalties; and (4) has not had any of its funds seized or forfeited in any action, for violation of any applicable anti-money laundering laws, including without limitation, the USA Patriot Act, the Bank Secrecy Act, 31 U.S.C. § 5311 et seq., the Trading with the Enemy Act, 50 U.S.C. App. § 1 et seq., Executive Order 13224 (September 23, 2001), the International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq., and the sanction regulations promulgated pursuant thereto by OFAC, and laws relating to prevention and detection of money laundering in 18 U.S.C. §§ 1956-57.

As used herein, the phrase “Seller’s knowledge” shall mean only the actual knowledge of Christopher La Mack.

11. Limitation of Survival. The covenants, representations and warranties of Purchaser and Seller set forth above and contained elsewhere in this Agreement shall survive and be enforceable after the Closing Date for a limited period of ninety (90) days following the Closing.

EXCEPT FOR THE EXPRESS REPRESENTATIONS AND WARRANTIES MADE BY SELLER IN SECTION 10 HERETO, SELLER MAKES NO REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, CONCERNING THE PROPERTY INCLUDING WITHOUT LIMITATION WITH RESPECT TO ANY HAZARDOUS SUBSTANCE OR ENVIRONMENTAL MATTERS, IT BEING SPECIFICALLY UNDERSTOOD BY PURCHASER THAT, EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH IN SECTION 10 HERETO, THE PROPERTY IS BEING SOLD AND TRANSFERRED “AS IS” IN ALL RESPECTS. SELLER SPECIFICALLY DISCLAIMS ANY WARRANTY OF MERCHANTABILITY OR SUITABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF PURCHASER’S, WHETHER OR NOT SELLER HAS BEEN MADE AWARE OF ANY SUCH PURPOSE.

12. Limitation of Liability. Seller shall not be liable for any amounts with respect to the breach of a representation, covenant, or warranty unless and until such amounts shall exceed in the aggregate one hundred fifty thousand dollars (\$150,000) (the “Limitation Amount”) (in which case Seller shall only be liable with respect to the excess over the Limitation Amount). There shall be no Seller liability with respect to any such matter for individual amounts of less than ten thousand dollars (\$10,000) and such amounts shall not be taken into account in determining whether the Limitation Amount has been exceeded. In no event shall Seller’s liability exceed \$2,000,000 in the aggregate. Neither Seller nor Purchaser shall be responsible for any indirect, incidental, punitive, special or consequential damages whatsoever, including loss of profits or goodwill.

13. Brokers. Seller and Purchaser each represent and warrant to the other that they have dealt with no broker in the Transaction other than Robert Douglas and Cushman & Wakefield, and each agrees to hold and indemnify the other harmless from and against any losses, damages, costs or expenses (including reasonable attorneys’ fees) that either party may suffer as a result of

claims made or suits brought by any other broker in connection with the Transaction, the obligated party hereunder to be the party whose conduct gives rise to such claim. Subject to Bankruptcy Court approval, Seller shall pay all commissions owed to Robert Douglas and Cushman & Wakefield pursuant to a separate written agreement. This Section 13 shall survive the Closing and any termination of this Agreement.

14. Default.

a. If the Successful Bidder, should Purchaser fail to carry out the terms of this Agreement for any reason except the failure of any condition to Purchaser's obligations hereunder or the default of Seller under this Agreement, Seller shall have the right to terminate this Agreement upon written notice to Escrow Agent and to receive all Escrow Deposits consistent with the terms of the Sale Procedures Order. If Purchaser is the Successful Bidder, the amounts paid by Purchaser under this Agreement are liquidated damages and not a penalty; provided however, that the remedy of liquidated damages set forth in this Section shall not limit, and shall not be deemed to limit, in any way the remedies available to Seller under this Section 14 of this Agreement, and/or Seller's right to recover actual damages for Purchaser's breach of any of the warranties and representations of Purchaser contained in this Agreement. The parties acknowledge that the Escrow Deposit has been agreed upon, after negotiation, as the parties' reasonable estimate of Seller's damages in the event of termination or default under this Agreement on the part of Purchaser. SELLER AND PURCHASER ACKNOWLEDGE THAT THEY HAVE READ AND UNDERSTAND THE PROVISIONS OF THIS SECTION.

b. Should Seller fail to comply with any of the requirements of this Agreement for any reason other than the default of Purchaser under this Agreement, Purchaser may, as its sole and exclusive remedy, either (1) terminate this Agreement upon written notice to Seller, whereupon Purchaser shall be entitled to receive an immediate return of all Escrow Deposits theretofore paid under this Agreement, and neither party shall have any remaining recourse against the other, or (2) seek the remedy of specific performance.

c. IF PURCHASER IS THE SUCCESSFUL BIDDER, AND THE TRANSACTION DOES NOT CLOSE BECAUSE OF DEFAULT BY PURCHASER, AND SELLER IS NOT OTHERWISE IN DEFAULT, THIS AGREEMENT SHALL BE TERMINATED AND THIS ESCROW CANCELLED. DUE TO THE FLUCTUATION IN LAND VALUES, THE CURRENT UNPREDICTABLE STATE OF THE ECONOMY, THE FLUCTUATING MONEY MARKET FOR REAL ESTATE LOANS OF ALL TYPES, AND OTHER FACTORS WHICH DIRECTLY AFFECT THE VALUE AND MARKETABILITY OF THE PROPERTY, PURCHASER AND SELLER ACKNOWLEDGE THAT IT WOULD BE EXTREMELY DIFFICULT AND IMPRACTICAL, IF NOT IMPOSSIBLE, TO ASCERTAIN WITH ANY DEGREE OF CERTAINTY BEFORE SIGNING THIS AGREEMENT THE AMOUNT OF DAMAGES WHICH WOULD BE SUFFERED BY SELLER IF PURCHASER FAILS TO PERFORM ITS OBLIGATION UNDER THIS AGREEMENT TO PURCHASE THE PROPERTY. HAVING MADE DILIGENT BUT UNSUCCESSFUL ATTEMPTS TO ASCERTAIN THE ACTUAL DAMAGES SELLER WOULD SUFFER IF PURCHASER DEFAULTS UNDER THIS AGREEMENT, PURCHASER AND SELLER AGREE THAT A REASONABLE ESTIMATE OF

SELLER'S DAMAGES IN SUCH EVENT IS THAT PURCHASER SHALL BE RESPONSIBLE FOR ALL ESCROW CANCELLATION COSTS AND THE ESCROW DEPOSITS (THE "LIQUIDATED DAMAGES AMOUNT"). THE PAYMENT OF THE LIQUIDATED DAMAGES AMOUNT IS NOT INTENDED AS A FORFEITURE OR PENALTY, BUT IS INTENDED TO CONSTITUTE LIQUIDATED DAMAGES TO SELLER. THEREFORE, UPON THE TERMINATION AND CANCELLATION OF THIS AGREEMENT BY REASON OF PURCHASER'S DEFAULT HEREUNDER WHEN SELLER IS NOT OTHERWISE IN DEFAULT, ESCROW AGENT SHALL IMMEDIATELY CANCEL THE ESCROW, AND PAY TO SELLER THE LIQUIDATED DAMAGES AMOUNT ON ACCOUNT OF PURCHASER'S FAILURE TO PURCHASE THE PROPERTY. FOR THE AVOIDANCE OF DOUBT THIS SECTION IS OF NO FORCE AND EFFECT IF PURCHASER IS NOT THE SUCCESSFUL BIDDER.

d. In the event either party hereto defaults (or is alleged to have defaulted) in the performance of any of the terms, covenants, agreements or conditions contained in this Agreement, and the other party hereto places the enforcement of this Agreement, or any part hereof, in the hands of attorneys, or files suit upon the same, the non-prevailing party agrees to pay the reasonable attorneys' fees and all court costs of the prevailing party.

15. Assignment of Agreement. Purchaser may assign all or any portion of this Agreement with written notice to Seller; provided, that any such assignment shall not relieve Purchaser of its obligations under this Agreement; provided that notification to Seller shall not be required for the designation of a nominee to take title to the Property. Seller may assign all or any portion of this Agreement without Purchaser's approval by giving written notice to Purchaser; any such assignment shall not relieve Seller of any of its obligations under this Agreement.

16. Miscellaneous.

a. Time is of the essence of this Agreement.

b. This Agreement constitutes the entire agreement of the parties hereto, supersedes any prior agreement with respect to the subject matter hereof, and may not be modified, amended or supplemented except by a written agreement signed by Seller and Purchaser and dated subsequent to the date hereof. If any provision of this Agreement shall be held invalid or unenforceable, the remainder of the Agreement shall not be affected thereby. This Agreement may not be recorded.

c. This Agreement shall be construed and interpreted under the law of the State of New York.

d. Any notice hereunder must be in writing, and shall be effective when deposited in the United States Mail, Certified Return Receipt Requested, or with a recognized overnight courier service, addressed to the parties as set forth below (or as may be designated from time to time as provided in this Section):

To Seller: Gemini Real Estate Advisors, LLC
16740 Birkdale Commons Parkway
Suite 306
Huntersville, NC 28078
Attention: Dante Massaro

with a copy to: Robins Kaplan LLP
800 Boylston Street
Boston, MA 02199
Attention: Mark S. LaConte, Esq.

To Purchaser:

with a copy to:

e. This Agreement may be executed in multiple originals or in counterparts, each of which will be an original and all of which taken together shall constitute one contract.

f. If any date set forth in the Agreement for the performance of any obligation by Purchaser or Seller for the delivery of any instrument or notice should be on a Saturday, Sunday or legal holiday, the compliance with such obligation or delivery shall be deemed acceptable on the next business day following such Saturday, Sunday, or legal holiday. For purposes of this paragraph "legal holiday" shall mean any state or federal holiday for which financial institutions or post offices are generally closed in the vicinity of the Property, for the observance thereof.

g. This Agreement and the terms and provisions hereof shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, legal representatives, successors and permitted assigns wherever the context so requires or permits.

h. The acceptance of a deed by the Purchaser or its nominee as the case may be, shall be deemed to merge and be a full performance and discharge of every agreement and obligation of the Seller herein contained or expressed, except such as are, by the express terms hereof, to be performed after the delivery of said deed.

i. If the Seller or Purchaser executes this Agreement in a representative or fiduciary capacity, only the principal or the estate represented shall be bound, and neither the Seller nor Purchaser so executing, nor any shareholder, member or officer of same, or trustee or beneficiary of same, shall be personally liable for any obligation, express or implied, hereunder.

j. Purchaser shall keep the terms of this Agreement confidential and shall not disclose any of the same except as approved in writing by Seller.

[Signature Page Immediately Follows]

DULY EXECUTED under seal as of the date indicated above.

SELLER:

36 WEST 38TH STREET, LLC

By: 36 WEST 38TH STREET HOLDING, LLC,
Its Sole Member

By: 36 West 38th Street Manager LLC,
Its Sole Manager

By: _____
Name:
Title:

PURCHASER:

[]

By: _____
Name:
Title:

JOINDER OF EXECUTION

The undersigned hereby acknowledges receipt of a fully executed copy of this Agreement and the “Escrow Deposit” required thereunder, and agrees to perform the duties of the Title Company, including disbursement of the Escrow Deposit, strictly in accordance with the terms of the Agreement.

TITLE COMPANY:

_____ TITLE INSURANCE COMPANY

By: _____

Name: _____

Title: _____

Date: _____

EXHIBIT A

LEGAL DESCRIPTION OF LAND

Schedule 10.d.
Pending or Threatened Litigation

1. William T. Obeid, directly and derivatively on behalf of Gemini Real Estate Advisors LLC, Gemini Equity Partners, LLC, et al., Plaintiffs v. Bridgeton Holdings, LLC, Atit Jariwala, The Congress Group, and John Doe Defendants 1 – 10, Defendants, and, Gemini Real Estate Advisors, LLC, Gemini Equity Partners, LLC, et al., Nominal Defendants, Case No. 152596/2015 in the Supreme Court of the State of New York, New York County.
2. William T. Obeid, directly and derivatively on behalf of Gemini Real Estate Advisors, LLC, et al., Plaintiff v. Christopher La Mack, Dante Massaro, Bridgeton Holdings, LLC, Bridgeton Acquisitions, LLC, Bridgeton Hotel Management, LLC, Atit Jariwala and Elevation Real Estate Group, LLC, Defendants, and, Gemini Real Estate Advisors, LLC, et al., Nominal Defendants, Case No. 14-CV-06498-LTS in the U.S. District Court for the Southern District of New York.
3. Christopher La Mack, Dante A. Massaro, and Gemini Real Estate Advisors, LLC v. William T. Obeid, Case No. 14-CV-12010 in the General Court of Justice Superior Court Division, Mecklenburg County, North Carolina.

SALE PROCEDURES

The following bidding and sale procedures (the "Sale Procedures"), which were approved by the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") by order (the "Sale Procedures Order") (Docket No. []), dated [], 2016, shall govern the sale/auction process for the real property located at 34-36 West 38th Street, New York, New York (the "Property").

On September 3, 2015, 36 West 38th Street LLC (the "Debtor"), along with three affiliated entities (the "Related Debtors"), filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. On December 8, 2015, the Bankruptcy Court entered an order confirming the Debtor's and Related Debtors' First Amended Joint Liquidating Plan Dated December 2, 2015 (the "Plan") that contemplates and approves the sale of the Property free and clear of all claims, liens, charges, encumbrances, rights, and interests pursuant to Bankruptcy Code section 1123(a)(5)(D).

The secured lender, 36 West 38th Street Hotel Capital LLC (the "UBS Lender"), has made a minimum credit bid of \$19 million for the 36 West Asset and retains all rights to increase its credit bid up to the amount of its claim, which the UBS Lender asserts and the Debtor has agreed will be approximately \$23,146,668.70 as of the date of the Auction (as defined below), but which amount may increase based on, among other things, accrual of additional attorney fees and expenses and/or the time of the closing of the Sale. Interested parties may submit bids to purchase the Property pursuant to the Sale Procedures set forth below.

1. Assets to be Sold. The Seller is selling the Property, along with all appurtenances; improvements; and to the extent obtained by the Debtor and assignable, all licenses and other agreements related to the Property in effect at the time of the Sale closing. The Property shall be sold free and clear of any claims, liens, charges, encumbrances, rights, and interests with such claims, liens, charges, encumbrances, rights and interests attaching to the proceeds of the Sale.

2. Sale As Is, Where Is. The Property shall be sold "**AS IS, WHERE IS**", without any representation or warranty of any type whatsoever, other than as may be contained in the 36 West Sale Agreement.

3. Bidding Requirements. For any potential bidder who wishes to participate and submit a bid ("Acceptable Bid") with respect to the Property, it must satisfy the following criteria (the "Bidding Requirements") to be an "Acceptable Bidder". An Acceptable Bidder is a bidder who delivers to the Debtor a written and binding offer on or before the Bid Deadline (as defined below) that includes each of the following

- a. a bid for the Property in its entirety for a cash price equal to or greater than \$19,250,000;
- b. a clean and duly executed sale agreement (the "Modified 36 West Sale Agreement") marked to reflect any variations from the form 36 West Sale Agreement and any exhibits or attachments thereto;
- c. the Modified 36 West Sale Agreement shall not contain any due diligence contingencies of any kind;
- d. representations that the Acceptable Bidder's offer shall remain open and is irrevocable until the closing of the purchase of the Property if such Acceptable Bidder is ultimately the Successful Bidder (as defined below);
- e. full disclosure and the identity of each entity that will be bidding for the Property or otherwise participating in connection with the bid made by the Acceptable Bidder. To the extent the potential bidder is an entity formed for the purpose of acquiring the Property, the Acceptable Bidder shall disclose the party that will bear liability for a breach;
- f. a cash deposit or cashier's check in the amount of \$1,925,000 (the "Good Faith Deposit"), which Escrow Agent – Kensington Vanguard National Land Services 39 W 37th Street, 3rd Floor New York, NY 10018, Attention: Matthew Schmeelk, Executive Vice President, 212-532-8686, schmeelk@kvnational.com, will hold in a segregated account containing only deposits received from Acceptable Bidders and will be subject to the terms set forth in paragraph 10 of these Sale Procedures. For the avoidance of doubt, the UBS Lender shall not be required to post a deposit to be a bidder;
- g. evidence that the Acceptable Bidder has received debt and/or equity funding commitments or has financial resources readily available sufficient in the aggregate to finance the purchase of the Property, which evidence is satisfactory to the Debtor and William T. Obeid, in its or his reasonable discretion;
- h. evidence of authorization and approval from the Acceptable Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery, and closing of the Modified 36 West Sale Agreement (where applicable);
- i. admissible evidence in the form of affidavits or declarations establishing the Acceptable Bidder's good faith, within the meaning of Bankruptcy Code §§ 363(m) & (n); and
- j. other information reasonably requested by the Debtor in its effort to determine if the Acceptable Bidder is a Qualified Bidder (as defined below).

4. An Acceptable Bid submitted by the Bid Deadline by an Acceptable Bidder that meets each of the above requirements shall be considered by the Debtor, in consultation with the Real Estate Advisors, to determine that such Acceptable Bids are deemed a "Qualified Bid" submitted by a "Qualified Bidder".

5. Bid Deadline. All Acceptable Bids must be submitted by no later than **January 10, 2017, at 4:00 p.m. (ET)** (the "Bid Deadline") to be eligible to be considered a Qualified Bid. Prior to the Bid Deadline, Acceptable Bidders shall deliver written copies of their bids to counsel to the Debtor, Robins Kaplan LLP, 2049 Century Park East, Suite 3400, Los Angeles, CA 90067, Attn. Scott Gautier. The Debtor, with the assistance of counsel and the Real Estate Advisors, shall review any Acceptable Bid and shall make a determination regarding whether such Acceptable Bid is a Qualified Bid and shall notify Acceptable Bidders whether their Acceptable Bids have been determined to be Qualified Bids by no later than **January 13, 2017 at 4:00 p.m. (ET)**.

6. Auction. In the event that the Debtor receives by the Bid Deadline one or more Qualified Bids, the Debtor shall conduct an auction with respect to the Property (the "Auction"). The Auction shall take place on **January 17, 2017 at 10:00 a.m. (ET)** (the "Auction Time") in Courtroom 601 of the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, NY 10004. To the extent the location of the Auction is changed, the Debtor shall notify all Qualified Bidders and other invitees via email or telephone (only to the extent the Debtor does not have an email address for a party) not later than one (1) business day before the Auction Time (or re-scheduled Auction Time, as applicable). If, however, no Qualified Bid other than the credit bid of the UBS Lender is received by the Bid Deadline, then the Auction will not be held, and Debtor shall so notify the UBS Lender no later than one (1) business day after the Bid Deadline. The Auction shall be governed by the following procedures:

- a. Only representatives of the Debtor, William T. Obeid, the UBS Lender and the Qualified Bidders are eligible to participate at the Auction;
- b. All bids shall be made and received in one room, on an open outcry basis, and the UBS Lender and all Qualified Bidders will be entitled to be present for all bidding, and all material terms of each bid shall be fully disclosed to the UBS Lender and all Qualified Bidders;
- c. The Auction will be conducted so that the UBS Lender and each Qualified Bidder will be informed of the previous bid;
- d. Only the UBS Lender and Qualified Bidders shall be entitled to make any subsequent bids at the Auction;

- e. The UBS Lender and Qualified Bidders may submit an initial overbid in the amount of \$250,000 and successive overbids in increments of at least \$100,000, unless otherwise modified at the Auction;
- f. The UBS Lender and each Qualified Bidder will be permitted a fair amount of time to respond to the previous bid at the Auction;
- g. Bidding shall commence at the amount of the highest or best Qualified Bid submitted by the Qualified Bidders by the Bid Deadline;
- h. The UBS Lender and each Qualified Bidder shall participate in person at the Auction (or through a method reasonably designated by Debtor), through a duly authorized representative with authority to bind the bidding entity;
- i. The UBS Lender and each Qualified Bidder shall be required to confirm that it has not engaged in any collusion with respect to the bidding or the sale;
- j. The Auction shall continue in one or more rounds until there is only one Qualified Bid or credit or other bid from the UBS Lender the Debtor determines, after review of such bid on the bases of its financial and contractual terms, to be the highest or best offer (the "Successful Bid") submitted at the Auction from among the Qualified Bidders and the UBS Lender. The UBS Lender or the Qualified Bidder submitting such Successful Bid shall become the "Successful Bidder," and the Qualified Bidder shall have such rights and responsibilities set forth in the 36 West Sale Agreement or the Modified 36 West Sale Agreement, as applicable;
- k. At the end of the Auction, the Debtor shall also announce the next highest or otherwise best offer after the Successful Bid(s) (the "Next Highest Bid," and whether the UBS Lender or the Qualified Bidder(s) submitted such bid, the "Next Highest Bidder") and the Next Highest Bid shall remain open until the first business day following the closing of the Sale of the Property to the Successful Bidder.
- l. The close of the Auction will be formally announced by the Debtor, and no bids made after such announcement will be eligible to be considered a Successful Bid. At the conclusion of the Auction, the Debtor shall immediately request that the Bankruptcy Court approve the credit bid of the UBS Lender or the 36 West Sale Agreement as modified at the Auction;
- m. The UBS Lender and all Qualified Bidders at the Auction shall be deemed to have consented to the core jurisdiction of the Bankruptcy Court and waived any right to a jury trial in connection with any disputes relating to the Auction, these Sale Procedures, and the construction and enforcement of the Qualified Bidders' Modified 36 West Sale Agreement(s), as applicable; and

- n. The Debtor will arrange for the actual bidding at the Auction to be transcribed by a court reporter.
- o. For the avoidance of doubt, a Qualified Bidder may include as a principal William T. Obeid, Dante Massaro or Christopher La Mack or any entity controlled by such persons.

7. Acceptance of the Successful Bid. The Debtor shall have accepted the credit bid of the UBS Lender or a Qualified Bid as a Successful Bid only when: (a) such bid is declared the Successful Bid at the Auction, (b) definitive documentation has been executed in respect thereof, and (c) the Bankruptcy Court has approved the Successful Bid. For the avoidance of doubt, should no Acceptable Bids be received by the Debtor by the Bid Deadline, then the UBS Lender will be determined to be the Successful Bidder for a Purchase Price of \$19,000,000.

8. Sale Approval. Approval of the Sale shall be pursuant to the Plan which has already been confirmed by the Bankruptcy Court. Accordingly, upon approval of the Successful Bid following the Auction, the Sale shall be deemed approved pursuant to the Plan.

9. Closing. The closing to the Successful Bidder shall take place at the offices of counsel to the Debtor Robins Kaplan LLP, 601 Lexington Blvd, New York, New York 10018 by no later than February 28, 2017.

10. Return of Good Faith Deposit. Good Faith Deposits submitted by Qualified Bidders (other than the Successful Bidder and the Next Highest Bidder, if applicable) that have not been forfeited shall be returned within two (2) business days of the Auction or such other time agreed upon by the Qualified Bidder and the Debtor. The Good Faith Deposit of the Successful Bidder shall be held until the closing of the Sale and applied in accordance with the 36 West Sale Agreement or the Modified 36 West Sale Agreement, as applicable. Within two (2) business days of the closing of the Sale under the 36 West Sale Agreement or the Modified 36 West Sale Agreement, the Good Faith Deposit of the Next Highest Bidder shall be returned to such Next Highest Bidder.

11. Failure to Close. If the Successful Bidder fails to consummate the Sale because of a breach or failure to perform on the part of the Successful Bidder, the defaulting Successful Bidder's Good Faith Deposit shall be forfeited to the Debtor. The Debtor shall also have the right to seek any and all other remedies and damages from the defaulting Successful Bidder. Additionally, if the Successful Bidder fails to close the Sale, the Debtor may, without further Bankruptcy Court approval, designate the Next Highest Bid of the Next Highest Bidder to close the Sale of the Property within fourteen (14) calendar days after such designation by the Debtor.

12. Waiver of Claims. All Qualified Bidders, by becoming Qualified Bidders, expressly waive any claims they may have against the Debtor, Secured Creditors and the Real Estate Advisors. All bidders are required to perform their own due diligence and may not rely on any information provided and waive any and all claims against the above referenced parties:

- a. Any and all data provided to prospective bidders:
 - i. has been prepared for informational purposes only;
 - ii. has been prepared from materials supplied to the Real Estate Advisors by third parties; and
 - iii. is being furnished solely for use by bidders in considering their interest in acquiring the Property;
- b. By accepting data from the Debtor and/or Real Estate Advisors, the recipient acknowledges and agrees that the data has been prepared to assist the recipient in making its own evaluation of the Property and the data does not purport to be all-inclusive or to contain all of the information that a bidder may desire. In all cases, bidders should conduct their own investigation and analysis of the Property, conduct site inspections, and scrutinize all of the data. The Real Estate Advisors have assumed no responsibility for independent verification of any of the data and has not in fact in any way audited such information. The Debtor and the Real Estate Advisors are not making nor will they make and expressly disclaim making any written or oral statements, representations, warranties, promises or guarantees, whether express, implied or by operation of law or otherwise, with respect to the Property and with respect to the accuracy, reliability or completeness of any data, except as expressly stated in a contract executed by the Debtor. The Debtor and the Real Estate Advisors and their respective partners, officers, directors and employees, affiliates and representatives, expressly disclaim any and all liability based on or relating or pertaining to any written or oral statements, financial information, projections, representations, warranties, promises or guarantees, whether express, implied or by operation of law or otherwise.

David B. Shemano, Esq.
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- and -

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Los Angeles, CA 90067-3208
Tel: (310) 552-0130
Fax: (310) 229-5800

Counsel for Debtor and Debtor in Possession

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

36 WEST 38TH STREET LLC,

Debtor.

Chapter 11

Case No. 15-12480 (JLG)

**NOTICE OF AUCTION OF REAL PROPERTY
LOCATED AT 36 WEST 38TH STREET, NEW YORK, NEW YORK**

PLEASE TAKE NOTICE that 36 West 38th Street LLC (the "Debtor"), pursuant to the motion (the "Sale Procedures Motion"),¹ dated November 17, 2016 [Docket No. 49],

¹ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

filed with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), that sought various relief, including, *inter alia*, the entry of an order (the "Procedures Order"), pursuant to Sections 105(a), 363, 365, 506(c), and 1123(a)(5)(D) of Title 11 of the United States Code (the "Bankruptcy Code"), Rules 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and the amended guidelines adopted by General Order M-38, scheduling of an auction (the "Auction") (if a Qualified Bid is timely received by the Debtor) and sale procedures (the "Sale Procedures") for the sale of the improvements and related rights, privileges and appurtenances owned by the Debtor located at 34-36 West 38th Street, New York, NY (the "36 West Asset") free and clear of all claims, liens, charges, encumbrances, rights and interests (the "Sale"), provides notice of the potential Auction as set forth herein. 36 West 38th Street Hotel Capital LLC (the "UBS Lender"), has made a minimum credit bid of \$19 million for the 36 West Asset and retains all rights to increase its credit bid up to the amount of its claim, which the UBS Lender asserts and the Debtor has agreed will be approximately \$23,146,668.70 as of the date of the Auction, but which amount may increase based on, among other things, accrual of additional attorney fees and expenses and/or the time of the closing of the Sale.

PLEASE TAKE FURTHER NOTICE that the Bankruptcy Court approved the Sale Procedures by entry of the Procedures Order dated [] [Docket No. ____].

PLEASE TAKE FURTHER NOTICE that in accordance with the Sale Procedures and the Procedures Order, the Debtor will conduct the Auction with respect to the Sale of the 36 West Asset if an Acceptable Bid is received by January 10, 2017 at 4:00 p.m. ET

and is determined by the Debtor, in consultation with its counsel and the Real Estate Advisors, to be a Qualified Bid under the Sale Procedures by January 13, 2017 at 4:00 p.m. ET.

PLEASE TAKE FURTHER NOTICE that the Auction will take place on January 17, 2017 at 10:00 a.m., before the Honorable James L. Garrity, United States Bankruptcy Judge, in Courtroom 601 of the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004. All interested parties must prequalify for the Auction and to present competing offers to purchase the 36 West Asset in compliance with terms, conditions and procedures described in the Procedures Order.

PLEASE TAKE FURTHER NOTICE that in the event that bidding at the auction will commence at \$19,250,000 and continue in increments of not less than \$100,000, until all Qualified Bidders have made their final offers.

This Notice is qualified in its entirety by the Sale Procedures and the Procedures Order. All persons and entities are urged to read the provisions of the Sale Procedures and the Procedures Order carefully. To the extent that this Notice is inconsistent with the Procedures Order, the terms of the Procedures Order shall govern.

Copies of the Procedures Order, the Sale Procedures, the form purchase agreement and the Sale Procedures Motion are available from the undersigned counsel for the Debtor upon written request or may be obtained from the Bankruptcy Court at www.nysb.uscourts.gov (a PACER password is required in order to access such documents from the bankruptcy courts website).

BY ORDER OF THE COURT

Dated: New York, New York
November 21, 2016

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