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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

BH SUTTON MEZZ LLC,
a Delaware Limited Liability Company,
SUTTON 58 OWNER LLC,
a Delaware Limited Liability Company, and
SUTTON 58 OWNER LLC,
a New York Limited Liability Company,

Chapter 11

Case No.: 16-10455 (SHL)
(Jointly Administered)

Debtors.

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CHAPTER 11 DEBTORS' MOTION SEEKING THE ENTRY OF AN ORDER: (I) AUTHORIZING AN AUCTION SALE OF THE DEBTORS' REAL PROPERTY AND RELATED DEVELOPMENTS RIGHTS, FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES, WITH SUCH LIENS, CLAIMS AND ENCUMBRANCES TO ATTACH TO PROCEEDS OF SALE; (II) APPROVING THE TERMS AND CONDITIONS TO GOVERN THE AUCTION SALE; (III) SETTING AN AUCTION SALE DATE; AND (IV) GRANTING RELATED RELIEF

TO THE HONORABLE SEAN H. LANE,
UNITED STATES BANKRUPTCY JUDGE

Chapter 11 debtors and debtors-in-possession BH Sutton Mezz LLC, a Delaware Limited Liability Company ("Sutton Mezz"), Sutton 58 Owner LLC, a Delaware Limited Liability Company ("Sutton Owner DE") and Sutton 58 Owner LLC, a New York Limited Liability Company ("Sutton Owner NY", and together with Sutton Mezz and Sutton Owner DE, the "Debtors"), by their counsel, LaMonica Herbst & Maniscalco, LLP, submit the instant motion (the "Motion") seeking the entry of an Order, pursuant to 11 U.S.C. §§ 105(a), 363 and 365, and Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"): (I) authorizing a public auction sale (the "Auction Sale") of: (A) the Debtors' real

properties located at, and known as, 428, 430 and 432 East 58th Street, New York, New York 10022 (the “Real Property”); and (B) all zoning and development rights owned by or available to the Debtors and/or to which the Debtors have a right, title and interest in, including the rights, licenses, easements and other agreements contained in those certain agreements: (i) with the owners of: (a) 426 East 58th Street, New York, New York (Lot 36), including certain construction licenses and the right to 13,185 square feet of unused development rights; (b) 422 East 58th Street, New York, New York (Lot 37), including the right to 21,750 square feet of unused development rights; (c) 434 and 436 East 58th Street, New York, New York (Lots 31 and 33), including certain construction licenses and the right to 33,442 square feet of unused development rights; (d) 440 East 58th Street, New York, New York (Lot 30), including the right to 13,556 square feet of unused development rights; (e) 442 East 58th Street, New York, New York (Lot 129), including the right to 16,267 square feet of unused development rights; (f) 444-446 East 58th Street, New York, New York (Lot 29), including the right to 22,583 square feet of unused development rights; (g) 461 East 57th Street, New York, New York (Lot 22), including the right to 23,428 square feet of unused development rights; and (h) 455 East 57th Street, New York, New York (Lot 19), including the right to use such property as a pass-through to allow for the acquisition of unused development rights from 461 East 57th Street, New York, New York; and (ii) with Gemini Residential LLC, including the right to 57,715 square feet of inclusionary development rights pursuant to that certain Inclusionary Air Rights Purchase Agreement dated January 20, 2015 (the “Development Rights”, and together with the Real Property, the “Assets”) to the highest or best bidder, free and clear of all liens, claims and encumbrances (the “Liens”), with such Liens to attach to the proceeds of sale in the same order, priority, and extent as they existed on the date the Debtors filed for bankruptcy; (II) approving the terms and conditions to

govern the Auction Sale of the Assets (the “Terms of Sale”); (III) setting a date for the Auction Sale; and (IV) granting such other and further relief as this Court deems just and proper. In support of the Motion, the Debtors respectfully represent as follows:

JURISDICTION AND STATUTORY PREDICATES

1. This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein, include, *inter alia*, 11 U.S.C. §§ 105(a), 363 and 365 (the “Bankruptcy Code”) and Bankruptcy Rules 2002, 6004 and 6006.

BACKGROUND

A. The Commencement Of The Debtors’ Bankruptcy Cases

3. On February 26, 2016, Sutton Mezz filed a voluntary petition for reorganization pursuant to Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) in this Court. Sutton Mezz is a Delaware limited liability company that was formed on December 30, 2014. Sutton Mezz is the 100% owner of both Sutton Owner DE and Sutton Owner NY.

4. On March 23, 2016, the United States Trustee appointed an Official Committee of Unsecured Creditors (the “Committee”) in the Sutton Mezz case. See Dkt. No. 28.

5. On April 6, 2016, Sutton Owner DE filed a voluntary petition for reorganization pursuant to Chapter 11 of the Bankruptcy Code in this Court. Sutton Owner DE is a Delaware limited liability company that was formed on March 10, 2015.

6. On May 3, 2016, the United States Trustee filed an amended appointment of the Committee in the Sutton Mezz and Sutton Owner DE cases. See Dkt. No. 73.

7. On July 12, 2016, Sutton Owner NY filed a voluntary petition for reorganization pursuant to Chapter 11 of the Bankruptcy Code in this Court. Sutton Owner NY is a New York limited liability company that was formed on June 13, 2014.

8. Pursuant to an Order of the Court dated July 22, 2016, the Debtors' cases are being jointly administered under the Sutton Mezz case. See Dkt. No. 148.

9. The Debtors have continued in the management of their businesses and the operation of their affairs as debtors and debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No Trustee or Examiner has been appointed in the Debtors' cases.

B. The Brokers' Retention

10. By order dated September 20, 2016, the Debtors retained Jones Lang LaSalle America, Inc. ("JLL") and Meridian Investment Sales ("Meridian") as co-brokers (collectively, the "Brokers") to market and sell the Debtors' Assets. See Dkt. No. 255.

11. Since their retention, the Debtors have worked with the Brokers and Sutton Lender on proper marketing material, confidentiality agreements and an offering memorandum for the marketing of the Assets.

12. The Brokers have been marketing the Assets for sale and communicating with multiple interested parties about the Assets. As of the date of this Motion, the Debtors have received written offers for the Assets. The buyers have requested information about the Terms of Sale and the timing of the process.

C. The Auction Sale

13. The Debtors believe that the sale of the Assets in accordance with the Terms of Sale is in the best interest of the Debtors' estates and their creditors.

14. Based upon the location of the Real Property, communications with the Brokers regarding the current marketing process, and independent investigations conducted by the Debtors, it is anticipated that there will be strong interest by potential buyers to acquire the Assets.

15. The Debtors will market the Assets for sale by public auction sale. The auction sale shall offer the Assets for sale “As Is”, “Where Is” and free and clear of the Liens, with any such Liens to attach to the proceeds of sale in the order, priority and extent as they existed on the date the Debtors filed their bankruptcy petitions.

16. The Brokers intend to conduct the Auction Sale of the Assets on December 8, 2016. However, the Auction Sale may be adjourned for up to one week such that it occurs on or before December 15, 2016 in accordance with the Terms of Sale.

17. As this Court is aware, the nature, extent and validity of the secured claim held by Sutton 58 Associates LLC (“Sutton Lender”) as against the Debtors’ Assets, and Sutton Lender’s right to credit bid at the proposed Auction Sale, are subject to a judicial determination in connection with a trial presently being held before this Court. See, generally, BH Sutton Mezz LLC, et al. v. Sutton 58 Associates LLC, et al., Adv. Pro. No. 16-01187.

D. The Terms And Conditions Of Sale

18. In order to facilitate an orderly sale of the Assets, the Debtors seek approval of the Terms of Sale pursuant to which competing bids for the Assets will be solicited. A copy of the Terms of Sale is annexed hereto as **Exhibit A**. The Terms of Sale were negotiated and agreed to by the Debtors, Sutton Lender and the Committee.

19. Pursuant to the Terms of Sale, any potential individual, partnership or entity that wishes to tender an offer or bid to purchase the Assets must be deemed a qualified bidder

(“Qualified Bidder”). A Qualified Bidder is a potential bidder who no later than December 1, 2016 delivers a written and signed irrevocable and binding offer (the “Qualifying Statement”). The necessary information and components of the Qualifying Statement are set forth in Article I of the Terms of Sale. Pursuant to the Terms of Sale, the Qualifying Statement must be accompanied by evidence that a good faith deposit has been made in the amount of the lesser of five million dollars (\$5,000,000) or five percent (5%) of any bid in immediately available funds (the “Deposit”). Further, the Qualifying Statement must contain a signed acknowledgment that if such bidder is determined to be the Successful Bidder (as that term is defined in the Terms of Sale), subject to the approval of the Court, that it will, within three (3) business days after the Auction Sale, increase the Deposit as necessary to an amount equal to ten percent (10%) of its final bid as to the Successful Bidder’s obligation to increase the Deposit.

20. Further, the Terms of Sale provide for terms and procedures for closing on the sale of the Assets. The Successful Bidder must close on the purchase of the Assets on a date (the “Closing Date”) which is not later than fifty (50) days from the date of entry of an Order of the Court confirming the sale of the Assets to the Successful Bidder (the “Sale Confirmation Order”), subject to certain extensions and conditions as specified in the Terms of Sale.

21. No transaction shall be deemed final until approved by the Court.

22. All interested parties are respectfully referred to the Terms of Sale for its more precise terms.

RELIEF REQUESTED AND BASIS FOR RELIEF

23. By this Motion, the Debtors seek this Court’s authorization to sell the Assets by public auction sale in accordance with the Terms of Sale. The Debtors anticipate that any

ultimate closing on the sale of the Assets will be conducted pursuant to an Order of this Court and confirmation of a plan of liquidation.

24. The sale of the Assets now is appropriate and necessary. The Terms of Sale were agreed to by the Debtors, Sutton Lender and the Committee. The proposed Auction Sale will ensure that the value of the Assets is maximized and that the highest or best offer for the Assets is received. The Debtors submit that granting the relief requested herein and a closing on the sale of the Assets pursuant to a plan of liquidation is in the best interest of the creditors of the estate.

A. The Terms Of Sale Should Be Approved

25. As set forth above, the Terms of Sale were negotiated and agreed to by the Debtors, Sutton Lender and the Committee.

26. The Debtors believe that the proposed Terms of Sale provide an appropriate framework for selling the Assets in an orderly and timely fashion. The Terms of Sale will enable the Debtors to review, analyze and compare all of the bids received to determine which bid is in the best interest of the Debtors, their estates, their creditors and interest holders, and which bid represents the highest or best offer made for the Assets.

27. The Debtors believe that the Terms of Sale are fair and reasonable and in the best interests of the Debtors' estates, creditors and other parties in interest.

28. Accordingly, the Debtors respectfully submit that the Terms of Sale should be approved.

B. The Auction Sale Of The Assets Should Be Approved

29. Section 363(b) of the Bankruptcy Code governs the sale of assets outside the ordinary course of business. Section 363(b)(1) provides, in relevant part, that “[t]he [Debtors], after notice and hearing, may use, sell, or lease, other than in the ordinary course of business,

property of the estate” 11 U.S.C. § 363(b)(1). The terms of such sale are generally within the sound discretion of the debtor. See In re Iridium Operating, LLC, 478 F. 3d 452 (2d Cir. 2007) (“In this Circuit, the sale of the asset of the estate under § 363(b) is permissible if the ‘judge determined [the] § 363(b) application expressly find[s] from the evidence presented before [him or her] at the hearing [that there is] a good business reason to grant such an application.’” (citing Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F. 2d 1063, 1071 (2d Cir. 1983)); see also Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co. v. LTV Corp. (In re Chateaugay Corp.), 973 F.2d 141, 145 (2d Cir. 1993); In re Dial-A-Mattress Operating Corp., 2009 Bankr. LEXIS 1801, at *12 (Bankr. E.D.N.Y. June 24, 2009) (“The business judgment test is the standard for Section 363 sales in this Circuit.” (citations omitted)); In re Hirsch, 360 B.R. 43, 45–46, 48, 50 (Bankr. E.D.N.Y. 2007) (requiring “existence of ‘a good business reason to grant such an application’” (quoting In re Lionel Corp., 722 F.2d at 1071)); In re Thomson McKinnon Sec., Inc., 120 B.R. 301, 307–08 (Bankr. S.D.N.Y. 1990).

30. In addition, section 105(a) of the Bankruptcy Code grants the Court the authority to “issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a). This provision is “the basis for a broad exercise of power [by the Court] in the administration of a bankruptcy case. 2 COLLIER ON BANKRUPTCY ¶ 105.01 (Alan N. Resnick and Henry J. Sommer. eds., 16th ed.).

31. In accordance with Bankruptcy Rule 6004(f)(1), sales of property outside of the ordinary course of business may be by private sale or by public sale. In practice, the preferred method is to conduct a public sale because a public sale will most often result in a greater number of potential bidders in the shortest amount of time. That is, in order to determine that a

private sale has yielded the highest or best offer, property generally must remain on the market for a significantly longer period of time than when offered at a public sale.

32. Here, sound business reasons exist for the proposed Auction Sale, which will effectively result in the sale of substantially all of the Debtors' assets. See In re Dial-A-Mattress Operating Corp., 2009 Bankr. LEXIS 1801 (a debtor's decision to sell substantially all of its assets to the highest bid at an auction was an appropriate business judgment decision because the highest bid presented the greatest benefits to the Chapter 11 estate).

33. The Debtors have substantial business justification for the proposed sale of the Assets. The Debtors, Sutton Lender and the Committee all agree that a sale of the Debtors' Assets is in the best interests of the Debtors, their estates and their creditors. The Terms of Sale were agreed to by the Debtors, Sutton Lender and the Committee. The Debtors believe that an Auction Sale will enable the estate to realize value from the Assets for the benefit of the Debtors' creditors.

34. As set forth above, the Brokers intend to conduct the Auction Sale of the Assets on December 8, 2016.¹ The Debtors submit that the Brokers have, and will continue to, provide for adequate marketing of the Assets prior to the Auction Sale.

35. The Debtors, in the exercise of their reasonable business judgment, therefore recommend that the Court approve the sale of the Assets and schedule the Auction Sale for December 8, 2016.

C. The Assets Should Be Sold Free And Clear Of All Liens

36. Bankruptcy Code section 363 permits the sale of assets to be free and clear of liens, claims and interests of an entity in such property if: (a) applicable state law will permit the

¹ Pursuant to the Terms of Sale, however, the Auction Sale may be adjourned for up to one week such that it occurs on or before December 15, 2016. See Exhibit A at § IV (The Sale).

sale; (b) such entity consents; (c) the price at which the assets is being sold exceeds the liens, claims and interests; (d) the security interest in the property is disputed; or (e) the entity with an interest in the asset being sold could be compelled in a legal or equitable proceeding to accept a money satisfaction of its interest in and to the property. See 11 U.S.C. § 363(f).

37. Since Bankruptcy Code section 363(f) is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to approve the sale of the Assets “free and clear” of liens, claims, encumbrances and interests. See 11 U.S.C. § 363(f); Mich. Employment Sec. Comm’n v. Wolverine Radio Co. (In re Wolverine Radio Co.), 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (recognizing that section 363(f) of the Bankruptcy Code is written in disjunctive, and holding that court may approve sale “free and clear” provided that at least one subsection of section 363(f) is met), cert. dismissed, 503 U.S. 978 (1992); Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot), 94 B.R. 343, 345 (E.D. Pa. 1988) (same).

38. Here, as reflected in the agreed upon Terms of Sale, the sale of the Assets is being conducted pursuant to, inter alia, Bankruptcy Code section 363(f).

D. The Successful Bidder Should Be Afforded Protection Under Bankruptcy Code Section 363(m)

39. Bankruptcy Code section 363(m) affords protection to a good faith purchaser in any interest in property purchased from an estate, whether the sale conducted is later reversed or modified on appeal. Specifically, Bankruptcy Code section 363(m) provides as follows:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). See Allstate Ins. Co. v. Hughes, 174 B.R. 884, 888 (Bankr. S.D.N.Y. 1994)

(“Section 363(m) . . . provides that good faith transfers of property will not be affected by the

reversal or modification on appeal of an unstayed order, whether or not the transferee knew of the pendency of the appeal.”); In re Stein & Day, Inc., 113 B.R. 157, 162 (Bankr. S.D.N.Y. 1990) (“good faith purchasers are protected from the reversal of a sale on appeal unless there is a stay pending appeal”).

40. The Second Circuit Court of Appeals has held that a party would have to show fraud or collusion between a buyer and the debtor-in-possession or trustee in order to demonstrate a lack of good faith. See Kabro Assocs. of West Islip, LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.), 111 F. 3d 269, 276 (2d Cir. 1997) (citations omitted) (“[t]ypically the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.”). See also In re Bakalis, 220 B.R. 525, 537 (Bankr. E.D.N.Y. 1998).

41. Subject to Court approval, the Assets here will be sold at a public auction sale in accordance with the Terms of Sale. The sale process will be conducted at arm’s length through an independent process.

42. As such, the Debtors submit that the Successful Bidder should be afforded good faith purchaser status under Bankruptcy Code section 363(m).

E. The Debtors Should Be Granted Related Relief

43. Pursuant to Bankruptcy Rule 6004(h), all orders authorizing the sale of property pursuant to Bankruptcy Code section 363 are automatically stayed for fourteen (14) days after entry of the order, unless otherwise ordered by the Court. FED. R. BANKR. P. 6004(h). The stay period is intended to provide sufficient time for an objecting party to appeal before the order is implemented. See Advisory Committee Notes to FED. R. BANKR. P. 6004(h).

44. Although little guidance is provided by either Bankruptcy Rule 6004(h) or the Advisory Committee Notes as to when a court should “order otherwise”, it has been suggested that the 14-day stay period should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to the procedure.” See 10 COLLIER ON BANKRUPTCY § 6004.09 (Lawrence P. King, et al. eds, 15th ed. rev. rel. 2003). Colliers also proposes that if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to seek a stay pending such appeal. Id.

45. Here, the Debtors respectfully request that the Court waive the 14-day stay period required under Bankruptcy Rule 6004(h). This relief is both necessary and appropriate under the circumstances of this case given the imminent proposed Auction Sale date.

46. Pursuant to the General Order M-383 dated November 18, 2009 adopting the Amended Guidelines for the Conduct of Asset Sales, the Debtors are required to highlight any “extraordinary provisions” in a separate section of a motion seeking to sell estate assets. The Debtors submits that there are no “extraordinary provisions” with respect to the proposed Auction Sale that have not otherwise been highlighted herein.

NOTICE/NO PREVIOUS APPLICATION

47. By separate application, the Debtors will seek the entry of an Order scheduling a hearing on shortened and limited notice of this Motion.

48. No previous request for the relief sought herein has been made to this or any other Court.

CONCLUSION

49. Based upon the foregoing, the Debtors respectfully request entry of an Order pursuant to sections 105(a), 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004 and 6006: (a) authorizing the Auction Sale of the Assets; (b) approving the Terms of Sale; (c) setting the Auction Date as December 8, 2016, subject to the extensions referenced herein; and (d) granting such other and further relief as this Court deems necessary.

WHEREFORE, the Debtors respectfully request the entry of an Order granting the relief requested in the Motion and for such other relief as this Court deems just and proper.

Dated: November 4, 2016
Wantagh, New York

LaMONICA HERBST & MANISCALCO, LLP
General Counsel to the Debtors

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

Chapter 11

BH SUTTON MEZZ LLC, et al.,

Case No.: 16-10455 (SHL)
(Jointly Administered)

Debtors.
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TERMS AND CONDITIONS OF SALE

The following terms of sale (the “**Terms of Sale**”) shall govern the sale (the “**Sale**”) of the following assets: (i) the real properties located at, and known as, 428, 430 and 432 East 58th Street, New York, New York 10022 (the “**Real Property**”); and (ii) all zoning and development rights owned by or available to the Debtors (as hereinafter defined) and/or to which the Debtors have a right, title and an interest in, including the rights, licenses, easements and other agreements contained in those certain agreements (a) with the owners of (1) 426 East 58th Street, New York, New York (Lot 36), including certain construction licenses and the right to 13,185 square feet of unused development rights; (2) 422 East 58th Street, New York, New York (Lot 37), including the right to 21,750 square feet of unused development rights; (3) 434 and 436 East 58th Street, New York, New York (Lots 31 and 33), including certain construction licenses and the right to 33,442 square feet of unused development rights; (4) 440 East 58th Street, New York, New York (Lot 30), including the right to 13,556 square feet of unused development rights; (5) 442 East 58th Street, New York, New York (Lot 129), including the right to 16,267 square feet of unused development rights; (6) 444-446 East 58th Street, New York, New York (Lot 29), including the right to 22,583 square feet of unused development rights; (7) 461 East 57th Street, New York, New York (Lot 22), including the right to 23,428 square feet of unused development rights; and (8) 455 East 57th Street, New York, New York (Lot 19), including the right to use such property as a pass-through to allow for the acquisition of unused development rights from 461 East 57th Street, New York, New York; and (b) with Gemini Residential LLC, including the right to 57,715 square feet of inclusionary development rights pursuant to that certain Inclusionary Air Rights Purchase Agreement dated January 20, 2015 (the “**Development Rights**”, and together with the Real Property, the “**Assets**”).

The Sale is being made pursuant to a chapter 11 plan of liquidation (the “**Plan**”) filed in connection with the Chapter 11 bankruptcy cases of BH Sutton Mezz LLC, a Delaware Limited Liability Company (“**Sutton Mezz**”), Sutton 58 Owner, LLC, a New York Limited Liability Company (“**Sutton Owner NY**”), and Sutton 58 Owner, LLC, a Delaware Limited Liability Company (“**Sutton Owner DE**”, and together with Sutton Mezz and Sutton Owner NY, the “**Debtors**”). The Debtors’ Chapter 11 bankruptcy cases are being jointly administered before the United States Bankruptcy Court for the Southern District of New York (the “**Bankruptcy Court**”) under case number 16-10455-SHL. The Sale of the Assets is being conducted pursuant to Bankruptcy Code Sections 363(b), (d), (f), (k) and (m) and is subject to confirmation of the Plan. The seller shall be the authorized representative of the Debtors’ Chapter 11 bankruptcy estates. References to “Debtors” below shall mean such authorized representative under the Plan or other order of the Bankruptcy Court.

I. Qualified Bidder Status

Any potential individual, partnership or entity that wishes to tender an offer or bid to purchase the Assets must be deemed a “**Qualified Bidder**”. A Qualified Bidder is a potential bidder who no later than **December 1, 2016** delivers so as to be actually received by (a) the Debtors’ retained real estate brokers, Jones Lang LaSalle Americas, Inc., 330 Madison Avenue, New York, New York 10017, Attn: Scott Latham, and Meridian Sales Group, 800 Third Avenue, 38th Floor, New York, New York 10022, Attn: David Schechtman (collectively the “**Broker**”), (b) counsel to the Debtors, LaMonica Herbst & Maniscalco, LLP (“**LH&M**”), 3305 Jerusalem Avenue, Suite 201, Wantagh, New York 11793, Attn: Joseph S. Maniscalco, Esq., (c) counsel to the unsecured creditors committee (the “**Committee**”), Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, 1201 RXR Plaza, Uniondale, New York 11556, Attn: Thomas A. Draghi, Esq., and (d) counsel to Sutton 58 Associates LLC (“**Lender**”), Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, New York 10036, Attn: Adam C. Rogoff, Esq. (the “**Bid Deadline**”), the following:

1. A written and signed irrevocable and binding offer (the “**Qualifying Statement**”) that:
 - a. fully discloses the identity of the person or entity that is bidding for the Assets (the “**Bidder**”). The Bidder must fully disclose all persons or entities that may be participating with the Bidder including the identity of any partner, member, equity holder or financial backer of the Bidder;
 - b. includes the Bidder’s address, e-mail address and telephone number where the Bidder may be contacted along with its counsel’s information;
 - c. states that the Bidder is financially able and interested in acquiring the Assets for the cash price of its offer without any contingencies as to financing and/or additional due diligence of any kind whatsoever, except as provided herein;
 - d. contains a signed acknowledgment that any bid by the Bidder shall not be contingent upon such Bidder obtaining financing;
 - e. contains a signed acknowledgment that the Bidder will be bound by its bid and the representation and statements made in the Qualifying Statement until seven days after the Closing Date (defined herein) or until such bid is rejected in writing by the Debtors in consultation with the Committee and Lender;
 - f. is accompanied by a signed confidentially agreement with respect to all aspects of the Sale in a form to be provided by the Debtors or the Broker, which agreement shall be reasonably acceptable to the Committee and Lender;

- g. is accompanied by financial information which fairly and reasonably demonstrates the source of the Bidder's ability to close on the purchase of the Assets in the amount of its bid in the event that the Bidder is accepted by the Debtors as the Successful Bidder (as defined herein), subject to approval of the Bankruptcy Court;
 - h. is accompanied by evidence that a good faith deposit in the amount of the lesser of \$5 Million Dollars or five percent (5%) of its bid in immediately available funds (the "**Deposit**"), which Deposit shall be made by wire transfer to an attorney escrow account designated by the Debtors pursuant to wire instructions to be provided; and
 - i. contains a signed acknowledgment that if the Bidder is determined by the Debtors to be the Successful Bidder (defined herein), subject to the approval of the Bankruptcy Court, that it will, within three (3) business days after the Auction, increase the Deposit as necessary to an amount equal to ten percent (10%) of its final bid with **Time Being Of The Essence** as to the Successful Bidder's obligation to increase the Deposit.
2. An executed original of these Terms of Sale in which the Bidder agrees and acknowledges that it will be irrevocably bound by each of the terms herein including the following:
 - a. The Bidder expressly acknowledges that it has relied solely on its own independent due diligence, investigation, analysis and valuations of the Assets and that it did not rely upon any oral or written statements, representations, warranties, promises or guarantees whatsoever, whether expressed or implied with respect to the Assets from the Debtors, the Committee, the Lender, their professionals, Brokers, agents and/or representatives.
 - b. The Debtors, the Committee, the Lender, their professionals, Brokers, agents and representatives, have not made, and do not make, any representations as to the Assets physical condition, rents, leases, expenses, zoning, development, operations, value of the land or buildings thereon, if any, or any other matter or thing affecting or related to the Assets, which might be pertinent to the purchase of the Assets, including, without limitation, (i) the current or future real estate tax liability, assessment or valuation of the Assets; (ii) the potential qualification of the Assets for any and all benefits conferred by or available under federal, state, city or municipal laws, whether for subsidies, special real estate tax treatment, insurance, mortgages, or any other benefits, whether similar or dissimilar to those enumerated; (iii) the compliance or non-compliance of the Assets, in its current or any future state, with applicable present or future zoning ordinances or other land use law or regulation, or the ability to obtain a change in the zoning or use, or a variance in respect to the Assets; (iv) the availability of any financing for the purchase, alteration, rehabilitation, development or operation of the Real Property from any source, including,

but not limited to, any state, city or federal government or institutional lender; (v) the current or future use of the Real Property or Assets; (vi) the present and future condition and operating state of any and all machinery or equipment on the Assets, if any, and the present or future structural and physical condition of any building thereon or its suitability for rehabilitation or renovation; (vii) the ownership or state of title of any personal property on the Assets; (viii) the presence or absence of any laws, ordinances, rules or regulations issued by any governmental authority, agency or board and any violations thereof; (ix) any present or future issues concerning subdivision or non-subdivision of the Assets; or (x) the compliance or non-compliance with environmental laws and the presence or absence of underground fuel storage tanks, any asbestos or other hazardous materials anywhere on the Assets.

- c. The Bidder expressly acknowledges that any and all of its incurred expenses concerning any due diligence, such as obtaining title reports or environmental inspections, shall be the sole responsibility of the Bidder, and under no circumstances shall the Debtors, their estates, the Committee, the Lender, the Brokers, or professionals be responsible to pay such expenses.
- d. The Bidder expressly acknowledges that the Bidder will be responsible for completion of any required transfer taxes and any ACRIS forms or applicable recording documents, any required New York State and New York City real property transfer tax forms, if required, and fees associated in connection therewith and the transactions hereunder.
- e. The Bidder expressly acknowledges that **Time Is Of The Essence** with respect to the Bidder's obligation to pay the Deposit (defined herein) and the balance of the purchase price on the Closing Date (defined herein), and that any failure by the Bidder to pay the balance of the purchase price on the Closing Date will result in the Debtors retaining the Deposit as liquidated damages as an asset of the Debtors' estates, and the termination of the Bidder's right to acquire the Assets.
- f. The Bidder expressly acknowledges that **Time Is Of The Essence** as to the Bidder to perform all of the obligations required on its part in accordance with the Terms of Sale.
- g. The Bidder expressly acknowledges that no offer or bid for the Assets shall be deemed accepted by, or binding upon, the Debtors' estates unless and until such offer or bid is accepted in writing by the Debtors and approved by Order of the Bankruptcy Court.
- h. In the event that the Bidder is selected as the highest and best bid at the Auction (the "**Successful Bidder**"), the Bidder expressly acknowledges that it must close on the purchase of the Assets on a date (the "**Closing Date**") which is not later than fifty (50) days from the date of the Auction. The Sale

shall be subject to entry of an Order of the Court confirming the sale of the Assets to the Bidder (the “**Sale Confirmation Order**”). The Debtors, with the prior written consent of the Committee and Lender which consent may not be unreasonably withheld, may extend the Closing Date. The closing shall take place at the office of the Debtors’ professional or such other location as reasonably requested by the Successful Bidder prior to the Closing by the Debtors. Notwithstanding the foregoing, Debtors may grant the Successful Bidder a single twenty (20) day extension (the “**Extension**”), at the request of the Successful Bidder, provided the Successful Bidder provides a written request at least five (5) days prior to the closing date and posts an additional, non-refundable deposit equal to \$5.0 Million (the “**Additional Deposit**”). The Additional Deposit shall be made by wire transfer to the same account as the Deposit. If the Successful Bidder elects for the Extension and wires the Additional Deposit in accordance with the terms herein, the closing on the sale of the Assets shall take place on or before the seventieth (70th) day following the Auction. **Notwithstanding the foregoing, the closing of the Sale of the Assets must occur on or before February 23, 2017. Time Is Of The Essence.**

- i. The Successful Bidder shall be obligated to close on the purchase of the Assets and there is no contingency of any kind or nature that will permit the Successful Bidder to avoid its obligations under these Terms of Sale. Anything to the contrary contained in these Terms of Sale notwithstanding, the Debtors with the prior written consent of the Committee and the Lender, which consent shall not be unreasonably withheld, shall have the right to adjourn the Closing Date in order to remedy any defect to title.
- j. The Bidder expressly acknowledges and agrees that in the event that another person or entity is selected as the Successful Bidder but fails to timely tender the Deposit or Additional Deposit or otherwise perform its obligations under these Terms of Sale, the Debtors, with either (i) the prior written consent of the Committee and Lender or (ii) prior order of the Bankruptcy Court, may contact the second highest bidder (the “**Second Bidder**”) to sell the Assets to the Second Bidder without any further notice (other than to the Committee and Lender) or further approval of the Bankruptcy Court, without giving credit for the Deposit or Additional Deposit and it shall be forfeited by the Successful Bidder, and upon such other terms and conditions as the Debtors deem appropriate in their reasonable business judgment and with either (i) the prior written consent of the Committee and Lender or (ii) prior order of the Bankruptcy Court. Thereafter, the Second Bidder shall be deemed for all benefits and obligations to be the Successful Bidder and shall comply with the terms, conditions, and obligations set forth herein and the related documents and order of the Bankruptcy Court.
- k. The Bidder expressly acknowledges that the Assets are being sold in accordance with the Plan and pursuant to 11 U.S.C. § 363(b), (d), (f), (k) and (m), **“AS IS”, “WHERE IS” IN ITS CURRENT CONDITION,**

WITHOUT ANY REPRESENTATIONS, COVENANTS, GUARANTEES OR WARRANTIES OF ANY KIND OR NATURE WHATSOEVER, and free and clear of any liens, claims or encumbrances of whatever kind or nature, with such liens, if any, to attach to the proceeds of sale, and is subject to among other things (a) any state of facts that an accurate survey may show; (b) any covenants, restrictions and easements of record; (c) any state of facts a physical inspection may show; and (d) any building or zoning ordinances or any other applicable municipal regulations and violations thereof; (e) all leases, if any, as may exist or encumber the Assets or any portion thereof; and (f) environmental conditions.

- l. The Bidder acknowledges that its Bid shall include the payment of any and all cure costs as required under section 365 of the Bankruptcy Code in connection with the assumption of any executory contracts or unexpired leases that constitute part of the Assets subject to the Bid.
- m. The Bidder expressly acknowledges and agrees to otherwise be bound by all the terms of the Terms of Sale.

II. Stalking Horse Option

The Debtors, with either (i) the prior written consent of the Committee and Lender or (ii) separate order of the Bankruptcy Court, reserve the right to enter into an agreement (the “**Stalking Horse Agreement**”) with a Qualified Bidder granting such party “stalking horse” rights to be the initial bidder at a Sale. Should the Debtors, prior to the Sale and subject to the foregoing consent or court approvals requirements, agree to provide a bidder “stalking horse” rights, such rights and procedures will include the following: (i) the “stalking horse” bidder shall pay to the Debtors an amount equal to the lesser of \$5 Million Dollars or five percent (5%) of the “stalking horse” bid prior to the Sale (the “**Stalking Horse Bid**”); and (ii) the “stalking horse” bidder must execute and agree to be bound by these Terms of Sale and Submit a Qualified Statement.

III. Opening Bid

Unless the Debtors enter into a Stalking Horse Agreement as provided for above, the Qualified Bidder that, in the Debtors’ reasonable business judgment in consultation with the Committee and the Lender, has bid the highest and best amount for the purchase of the Assets shall be deemed to have submitted the opening bid for the Assets at the Sale (the “**Opening Bid**”). The Debtors, in the exercise of their reasonable business judgment, shall determine, in consultation with its Brokers, the Committee and the Lender, the opening bid and the bid increments at the Sale.

IV. The Sale

The Brokers shall conduct a public sale of the Assets on December 8, 2016 (“**Auction**”) to be held at Meridian Sales Group, 800 Third Avenue, 38th Floor, New York, New York 10022. The Auction may be adjourned for up to one week such that it occurs on or before December 15, 2016 with the prior consent of the Committee and the Lender, which consent shall not be unreasonably

withheld, or order of the Bankruptcy Court. The Sale shall be governed by the following procedures:

- a. Each Qualified Bidder shall be required to confirm under oath that it has not engaged in any collusion with respect to the bidding or the Sale.
- b. The Debtors, in the exercise of their reasonable business judgment, in consultation with the Broker, the Committee and the Lender, shall determine the successive bid increments at the Sale.
- c. Deposits submitted by the Qualified Bidders who do not become the successful bidder shall be returned by the Debtors within four (4) business days after the Sale.
- d. The Successful Bidder shall within three (3) business days after the Sale increase the Deposit as necessary to an amount equal to ten percent (10%) of its final bid at the Sale with **Time Being Of The Essence** as to the Successful Bidder's obligation to increase the Deposit.
- e. The Sale shall be transcribed by a court reporter and all Qualified Bidders will be required to sign in and identify their attendance with the court reporter.

V. **Miscellaneous**

The Debtors, in consultation with the Committee and Lender, reserve the right to reject any offeror or bidder, who in the reasonable business judgment of the Debtors, is believed not financially capable of consummating the purchase of the Assets. The Debtors with either (i) the prior consent of the Committee and Lender or (ii) order of the Bankruptcy Court, reserve the right to withdraw the Assets from sale as they deem necessary or appropriate in their reasonable business judgment. By participating in this process, the Bidder submits itself to the exclusive jurisdiction of the Bankruptcy Court and any disputes concerning the sale of the Assets shall be determined by the Bankruptcy Court.

Neither the Debtors, Debtors' counsel nor the Debtors' estates, shall be liable or responsible for the payment of fees of any broker that has not previously been approved by Order of the Bankruptcy Court. The Successful Bidder understands and acknowledges it is responsible to pay the Brokers any commission between the parties in accordance with the Broker Retention Order and that it has read and fully understands the Broker Retention Order. The sale of the Assets by the Successful Bidder is a buyer's premium.

Nothing contained in these Terms of Sale is intended to supersede or alter any provisions of Title 11 of the United States Code (the "**Bankruptcy Code**") or otherwise interfere with the jurisdiction of the Bankruptcy Court. All of the terms and conditions set forth in these Terms of Sale are subject to modification as may be directed by the Debtors, with the prior consent of the Committee and Lender, or by the Bankruptcy Court. The Debtors, with the prior consent of the Committee and Lender, and upon notification to the Office of the United States Trustee, reserve

the right to modify the Terms of Sale to maintain consistency with the provisions of the Bankruptcy Code and/or prior orders of the Bankruptcy Court.

With respect to any of the foregoing provisions where the Debtors are permitted to act in consultation with the Committee and the Lender, in the event that the Committee and/or Lender do not agree with the Debtors' determination, the dispute shall be submitted to the Bankruptcy Court for determination.

The foregoing provisions shall not apply to the Lender, who shall be deemed a Qualified Bidder subject to the determination by the Bankruptcy Court that the Lender has an allowed secured claim with respect to some or all of the Assets.

These Terms and Conditions may be modified so as to be consistent with the terms of the Plan and Qualified Bidders will be notified of such modifications on or prior to the commencement of the Auction.

I have read these Terms of Sale and agree to be bound by them. **(Please print clearly)**

Date: _____

Bidder: _____

Signature: _____

Title: _____

Address _____

E-Mail: _____

Phone Number: _____

Attorney Info: _____