

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re:

Chapter 11

D.A.B. GROUP LLC,

Case No. 14-12057 (SCC)

Debtor.  
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**DEBTOR'S DISCLOSURE STATEMENT  
PURSUANT TO 11 U.S.C. §1125**

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THIS IS NOT A SOLICITATION OF ACCEPTANCES OR REJECTIONS OF THE PLAN. ACCEPTANCES OR REJECTIONS MAY NOT BE SOLICITED UNTIL A DISCLOSURE STATEMENT HAS BEEN APPROVED BY THE BANKRUPTCY COURT. THIS DISCLOSURE STATEMENT IS BEING SUBMITTED FOR BANKRUPTCY COURT APPROVAL, BUT HAS NOT YET BEEN ACTUALLY APPROVED.

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D.A.B. Group LLC (the "Debtor") hereby submits this Disclosure Statement (the "Disclosure Statement"), pursuant to §1125 of Title 11, United States Code (the "Bankruptcy Code"), in connection with the accompanying Debtor's plan of reorganization of (the "Plan"). Defined terms in the Plan will have the same meaning for purposes of this Disclosure Statement.

**INTRODUCTION**

Although the Chapter 11 case is still in its early stages, and there is much to do during the upcoming months, the ultimate sale of the Debtor's property at 139-141 Orchard Street, New York, NY [designated as Block 415, Lots 66 and 67] (the "Property" or the "Hotel Property") under Chapter 11 is the best approach for all concerned. Thus, the Plan is being filed in contemplation of a future sale (the "Sale") of the Property to provide a vehicle for accomplishing a transaction in the most efficient and economical manner.

The filing of the Plan also meets the requirements of 11 U.S.C. § 362(d)(3)(A), as the Plan has a reasonable possibility of being confirmed within a reasonable time, based upon the

Debtor's commitment to actively market the Property through Massey Knakal Realty Services (Massey Knakal).

At this juncture, the Property is partially constructed, and remains subject to a second extension granted by the Board of Standards and Appeals (BSA) which grandfathered certain zoning entitlements for the benefit of the Debtor, provided construction of the Property is substantially completed by August 20, 2015. In view of the BSA issues, it remains an open question as to whether maximum value can be generated by a sale of the Property in its current state, or alternatively, whether the Debtor will be required to resume substantial construction during the upcoming months so as to be in a position to field the best possible offers. Accordingly, while Massey Knakal is marketing the Property, the Debtor is also exploring the availability of potential post-petition construction financing under 11 U.S.C. §364(c) or (d). Indeed, with these issues in flux, the Debtor reserves all of its rights to modify and/or supplement the Plan, although the goal still remains the ultimate sale of the Property free and clear of all claims, liens, taxes and encumbrances, pursuant to 11 U.S.C. § 363(b) and (f), as permitted by 11 U.S.C. §§ 1123(a)(5)(D) and 1123(b)(4).

The Plan fundamentally serves as the mechanism for distributing the Sale proceeds to the holders of allowed claims against the Debtor with a transfer tax exemption. Also, in conjunction with the confirmation process, the Debtor intends to pursue a formal adversary proceeding and/or objection to the mortgage claim of Orchard Hotel LLC (Orchard), challenging Orchard's entitlement to interest, default interest, and other costs and legal fees after March 1, 2011, based upon, *inter alia*, the equitable defenses outlined in the Debtor's opposition to Orchard's pre-bankruptcy motion for summary judgment. Prior to bankruptcy, Orchard's motion for summary judgment to foreclose the mortgage was denied on March 21, 2014. Thus, there has been no

final judicial determination that Orchard is entitled to any specific amounts under the mortgage. In turn, because of the denial of summary judgment, there are no collateral estoppel or res judicata principles precluding a comprehensive examination in bankruptcy concerning the proper, just and lawful amount of Orchard's Mortgage Claim. Moreover, all other creditors will be benefited by the Debtor's success in challenging the claim.

### **SUMMARY**

This Disclosure Statement (the "Disclosure Statement") has been found by the Bankruptcy Court to contain adequate information for use in connection with the solicitation of acceptances of the Plan from holders of claims against and interests in the Debtor pursuant to Section 1125 of title 11 of the United States Code (the "Bankruptcy Code").

The Bankruptcy Court's finding that the Disclosure Statement contains adequate information pursuant to Section 1125 of the Bankruptcy Code does not mean, indicate or imply in any manner that the Bankruptcy Court recommends either an acceptance or a rejection of the Plan by a party eligible to vote thereon.

A glossary of terms frequently used in this Disclosure Statement is set forth in Article II of the Plan. Capitalized terms not otherwise defined in the Disclosure Statement are defined in the Plan.

In the Debtor's opinion, the treatment of claims under the Plan provides a better and quicker recovery for creditors than that which is likely to be achieved under a liquidation in Chapter 7 of the Bankruptcy Code. Accordingly, confirmation of the Plan is in everyone's best interests, and the Debtor recommends that all creditors vote to accept the Plan. In making this recommendation, the Debtor wants to emphasize that pursuit of the Plan, even before a stalking horse purchaser is designated, helps lessen the possibility that the BSA deadline could depress

the Property's overall value. Indeed, launching the confirmation process now will provide the bankruptcy estate with the best opportunity to proceed expeditiously once a suitable offer is obtained. The Debtor will, of course, supplement and modify the Plan and this Disclosure Statement as these evolving events materialize.

### **THE DEBTOR**

The Debtor is a limited liability company which owns the Property as its primary asset. The Property is improved by a partially constructed 16-story 92 room boutique hotel, which currently consists of a steel superstructure, but no façade or exterior walls.

The Property is contiguous to commercial property known as Block 415, Lots 61 and 62 (the "Rivington Property") owned by the Debtor's affiliate, 77-79 Rivington Street Realty LLC ("Rivington"). Rivington is pursuing a Chapter 11 case before this Court under Case No. 13-76717-SCC. While the two cases are not being jointly administered, Massey Knakal is simultaneously marketing the Rivington Property, which has the potential to increase the value of the Debtor's Property by making the adjacent Rivington Property available to an investor or developer under appropriate circumstances. The Debtor has listed the stabilized value of the Property in the Bankruptcy Schedules at \$37,500,000.

### **CONFIRMATION OF THE PLAN**

Pursuant to Section 1128 of the Bankruptcy Code, the Bankruptcy Court has scheduled a hearing to consider Confirmation of the Plan, on \_\_\_\_\_, 2014 at 10:00 a.m., Eastern Standard Time, before the Honorable Shelley C. Chapman in the United States Bankruptcy Court, One Bowling Green, Room 623, New York, NY 10004. The Bankruptcy Court has directed that objections, if any, to Confirmation of the Plan be filed and served on or before \_\_\_\_\_, 2014.

At the Confirmation Hearing, the Bankruptcy Court will determine whether the requirements of Section 1129(a) of the Bankruptcy Code have been satisfied, in which event the Bankruptcy Court will enter an order confirming the Plan. **The Debtor believes that the Plan satisfies all applicable requirements of Section 1129(a) of the Bankruptcy Code.** Confirmation makes the Plan binding upon the Debtor and all creditors and equity holders, whether or not they have actually voted on the Plan.

### **VOTING**

**General.** Although the Plan designates all claims of creditors as likely being unimpaired because it is anticipated that the Sale will generate sufficient proceeds to pay all allowed claims in full, the Debtor is nevertheless seeking ballots from creditors to the extent they may be required. Accordingly, creditors should read the ballot carefully and follow the voting instructions.

The Plan can be confirmed by the Bankruptcy Court and thereby made binding on creditors if it is accepted by (a) the holders of two-thirds in amount and more than one-half in number of claims in each impaired class who actually vote on the Plan, and (b) the holders of two-thirds in amount of equity security interests in each impaired class of interests who actually vote on the Plan. Alternatively, the Plan can be confirmed without formal voting if all creditors are unimpaired and thereby presumed to have accepted the Plan, as is anticipated in this case.

**Deadline for Returning Ballots.** The Bankruptcy Court has directed that, to be counted for voting purposes, ballots for the acceptance or rejection of the Plan must be actually received by counsel for the Debtor, no later than 5:00 p.m., Eastern Standard Time, on \_\_\_\_\_, 2014 at the following address:

Goldberg, Weprin, Finkel, Goldstein, LLP  
1501 Broadway, 22<sup>nd</sup> Floor  
New York, New York 10036  
Attn: Kevin J. Nash, Esq.  
E-mail: [KNash@gwfglaw.com](mailto:KNash@gwfglaw.com)  
Facsimile: 212-221-6532

**Voting Questions.** If you have any questions regarding the provisions or requirements for voting to accept the Plan or require assistance in completing your ballot, you may contact Debtor's counsel, Kevin J. Nash, Esq. at (212) 221-5700.

### **NOTICE TO HOLDERS OF CLAIMS**

The historical information concerning the Debtor has been prepared using certain filings made with the State and Bankruptcy Courts. The estimates of claims set forth herein may vary from the final amounts of claims allowed by the Bankruptcy Court.

This Disclosure Statement contains a summary of certain provisions of the Plan and the transactions contemplated thereunder, and may contain descriptions of certain other related documents. While the Debtor believes that these summaries are fair and accurate, such summaries are qualified to the extent that they do not set forth the entire text of such documents. In the event of any inconsistency between the terms of the Plan and this Disclosure Statement, the terms of the Plan shall be controlling.

No statements or information concerning the Debtor or the Property are authorized by the Debtor, other than as set forth in the Plan, this Disclosure Statement and any supplements hereto.

This Disclosure Statement is intended for the sole use of creditors to make an informed decision about the Plan. Each holder of a claim should review the Plan, this Disclosure Statement and any supplements hereto before casting a ballot.

No solicitation of votes to accept or reject the Plan may be made except pursuant to this Disclosure Statement and Section 1125 of the Bankruptcy Code. No person has been authorized

to use or promulgate any information concerning the Debtor or its Property, other than the information contained in this Disclosure Statement and any supplements hereto. You should not rely on any information relating to the Debtor or its businesses or the Plan other than that contained in this Disclosure Statement and any supplements hereto.

### **EVENTS LEADING TO CHAPTER 11**

The Debtor's need for Chapter 11 relief has its genesis in the premature termination of bank financing, which caused the project to come to a screeching halt in midstream. The development began in 2008, based upon certain acquisition and construction mortgages provided by Brooklyn Federal Savings Bank (BFSB) and other participants, totaling approximately \$13.4 million of principal debt. The disputes center upon whether BFSB agreed to an extension of the loans beyond the original maturity date when it consented in writing to the Debtor's new construction contract with Flintlock Construction Services, LLC to complete construction by November, 2011, well after the original maturity date of March 1, 2011.

In the years that followed, extensive litigation ensued with Orchard, which acquired the mortgage from BFSB in June, 2011. Orchard commenced a foreclosure action in which the Debtor raised, *inter alia*, equitable estoppel defenses based upon assurances that the loan would be extended beyond March 1, 2011.

While the Debtor's counterclaims against Orchard were dismissed on appeal, the conduct of BFSB and Orchard still remains a viable issue, particularly since Orchard was denied summary judgment on its foreclosure complaint on March 21, 2014. The trial court (Judge Charles Ramos) found issues of fact with respect to the Debtor's equitable estoppel defenses relating to the extension of the maturity date. Thus, at the time of the bankruptcy, there had been no finding that Orchard is entitled to any specific amounts. The equitable defenses figure most prominently in evaluating the

final amount of Orchard's allowed claim, and will be raised to defeat Orchard's entitlement to interest, default interest and other fees and charges.

Although the principal debt is currently about \$14.4 million with protective advances, Orchard is seeking a claim of \$27 million or more based upon runaway default interest of 24% per annum and other inflated costs, such as millions of dollars of attorneys' fees. An important part of the Chapter 11 case will be a vigorous challenge to the "add-on" charges which have sent the debt soaring beyond any reasonable proportion. Indeed, since the Debtor was unfairly denied the ability to refinance or complete construction, there is a strong argument that Orchard is not entitled to any interest after November 2011, but certainly not at the default rate of 24% per annum. The upcoming objections to Orchard's Mortgage Claim are referenced as the "Claim Litigation" for purposes of the Plan.

The Debtor also seeks to use its Chapter 11 filing as the most expeditious way of selling the Property in the face of expiring rights under extensions granted by the BSA to complete construction. Pursuant to the last extension, the current deadline for construction expires on August 20, 2015. If this deadline is not met or further extended, the project is then put in jeopardy because of an intervening change in zoning regulations. When construction was first commenced, the Property was zoned C6-1 and a building permit was originally issued to build to a height of 191 feet. In late 2008, the zoning for the Property was changed to C4-4A, which carries reduced footage and height limitations. The extension of the construction permit protects against this intervening zoning change under various grandfathering provisions. The Debtor is keenly aware of this circumstance, which is a key reason why the Plan is being filed in advance of designating a stalking horse purchaser.



**SIGNIFICANT EVENTS IN THE CHAPTER 11 CASE**

Relatively speaking, the Chapter 11 case is still in its infancy, but the outline of the Chapter 11 case is already in place. To begin with, the Debtor negotiated a stipulation with Orchard to permit Simon Miller, as Receiver, to continue in place on a limited basis to supervise construction and hopefully quiet issues with the Building Department while the Debtor pursues a sale. A formal “Stipulation and Order Maintaining the Receiver on a Limited Basis” (the “Receiver Stipulation”) was “So Ordered” by the Bankruptcy Court on October 1, 2014 (ECF #39).

In conjunction with the Receiver Stipulation, the Debtor has also selected Massey Knakal to serve as broker for the Property. Massey Knakal’s retention was approved by the Bankruptcy Court on September 30, 2014, with a formal order to follow. Massey Knakal will aggressively market the Property to breathe life into the Plan.

**CLASSIFICATION OF CLAIMS UNDER THE PLAN**

The Plan classifies the various pre-petition claims against the Debtor into essentially three classes as outlined below. Administrative expense claims (i.e. post-petition claims) are not classified and shall be paid under the Receiver Stipulation or by separate Order of the Bankruptcy Court.

**Summary of Classification and Treatment of Claims and Equity Interests**

Class	Designation	Impaired
Class 1	City Real Estate Tax Claims	No
Class 2	Orchard Mortgage Claim	Potentially no, if the Sale generates sufficient funds to pay allowed claims in full.
Class 3	Unsecured Claims, including Receiver’s unpaid pre-petition fees and commissions and all unpaid claims of contractors, vendors and service providers.	Potentially no, if the Sale generates sufficient funds to pay allowed claims in full.
Class 4	Equity Interests	Yes

**Classification, Treatment and Voting**

**Class 1 — City Real Estate Tax Claims**

Classification: Class 1 is composed of the City Real Estate Tax Claims totaling approximately \$560,250.

Treatment: The Department of Finance or such other designated agency of the City of New York shall receive a cash distribution on the closing of the Sale equal to the allowed amount of all outstanding real estate taxes and related charges including any monetary ECB violations or water bills.

**Class 2 — Orchard Mortgage Claim.**

Classification: Class 2 is composed of the highly disputed Orchard Mortgage Claim.

Treatment: Orchard shall receive a cash dividend on the Closing Date equal to the allowed amount of the Orchard Mortgage, following a formal determination of the Debtor's adversary proceeding or claims objection challenging Orchard's entitlement to interest, default interest, legal fees and other costs and expenses accruing during the period from March 1, 2011 up to and including the Petition Date (defined as the "Claim Litigation"). In the event the Claim Litigation has not been finally determined on or prior to the Closing Date, the Debtor shall establish a reserve for all amounts then in dispute from the net proceeds of the Sale. This reserve shall be held by the Disbursing Agent in a separate interest bearing escrow account pending the final determination of the Claim Litigation and then disbursed to Orchard as directed by the Bankruptcy Court or such other appellate court having jurisdiction over the Claim Litigation. The Debtor shall pay the undisputed principal portion of the Orchard Mortgage Claim on the Closing Date, together with all documented and allowed pre-petition and post-petition protective advances. While the final amount of Orchard's Mortgage Claim is still unresolved, it suffices to say the Debtor believes that the claim is highly inflated and will ultimately be allowed in an

amount much less than claimed, resulting in full payment to other allowed claims and a surplus for the equity holders.

Voting: Class 2 is potentially impaired, depending on the final purchase price for the Property, and the final amount of the allowed Orchard Mortgage Claim, which ranges between \$14.4 million and \$27 million.

### **Class 3 —Unsecured General Claims**

Classification: Class 3 is composed of Unsecured General Claims, including the Receiver's unpaid pre-petition fees and commissions and all unpaid claims of contractors, vendors and service providers. The final amount of the Class 3 claims is likewise subject to reconciliation and possible objections, but could range between \$2-3 million.

Treatment: Each holder of an Allowed Unsecured General Claim shall receive, in full and final satisfaction of such Claims, a *pro rata* share of the net excess Sale proceeds and recoveries from Causes of Action, if any, up to 100%, after the prior payment of Administrative Expense Claims, and allowed Class 1 and Class 2 claims in full. In the event the allowed claims of all senior and priority creditors are paid in full and there is sufficient cash on hand, Class 3 General Unsecured Claims shall be entitled to post-petition interest at the Federal Judgment Rate, unless such holder consents to other treatment.

Voting: Class 3 is potentially impaired, depending on the final purchase price for the Property and the allowed amount of Claim 2 and Claim 3 claims.

### **Class 4 — Equity Interests**

Classification: Class 4 is composed of the Equity Interests.

Treatment: Each holder of an Equity Interest shall receive, Pro-Rata Share of the surplus Sale proceeds and recoveries from Causes of Action after payment in full of Administrative Expense Claims, and allowed Class 1, 2 and 3 Claims.

Voting: Class 4 is unimpaired.

### **IMPLEMENTATION OF THE PLAN**

**Implementation.** The Plan shall be implemented by the Sale of the Property and the establishment of the Confirmation Fund and related reserves on the Closing Date. The Confirmation Order shall constitute an order of the Bankruptcy Court authorizing the Debtor, for title purposes, to sell the Property for the approved purchase price, with all proceeds of the Sale and recoveries from the Debtor's other causes of action to be paid to creditors in accordance with the Plan.

The Confirmation Order shall authorize the Debtor to:

(a) convey title to the Property pursuant Sections 363(f), 1123(a)(5)(D) and 1141(a) and (c) of the Bankruptcy Code, free and clear of all Liens, Claims, Encumbrances or interests (other than permitted encumbrances, if any, specified in the APA), to the designated purchaser pursuant to this Plan and the APA;

(b) if applicable, on the Closing Date, assign any or all of the Orchard Mortgage to the designated purchaser's lender; and

(c) pay all allowed amounts required to creditors and then to Equity Holders, in accordance with the terms of this Plan.

**Sources of Cash for Plan Distributions.** All Cash necessary to make payments required pursuant to this Plan will be obtained from the proceeds of the Sale of the Property and recoveries from Causes of Action. Cash payments to be made pursuant to this Plan will be made

by the Disbursing Agent on the Closing Date, or at such later date as shall be practicable in the sole opinion of the Disbursing Agent.

**Discharge of Obligations.** Except as otherwise expressly provided for and preserved herein, upon the occurrence of the Closing Date, as the case may be, any mortgages, liens, notes, bonds, agreements, instruments or documents, or otherwise, evidencing or creating any indebtedness, guaranties or other obligations of the Debtor that relate to claims under this Plan and relating to the Property, shall be cancelled, and the obligations of the Debtor under each of the foregoing shall be discharged; provided, however, that the preceding proviso shall not affect the discharge of claims pursuant to the Bankruptcy Code or this Plan or result in any expense or liability to the Debtor; provided further that, to the extent applicable, the Orchard Mortgage shall not be cancelled and shall instead be treated as set forth in the APA.

**Post-Closing Date Transactions.** On or after the Closing Date, the Disbursing Agent, on behalf of the Debtor, is hereby authorized to take all actions as may be necessary or appropriate to effect any transaction described in, approved by, contemplated by or necessary to effectuate the transfer of the Property, including the execution and delivery of appropriate instruments of transfer, assignment, assumption or delegation of any asset, property, right, liability, debt or obligation on terms consistent with the terms of this Plan and having other terms for which the applicable parties agree.

**Transfer of Assets.** On the Closing Date, title to the Property shall be transferred to the designated purchaser pursuant to and in furtherance of this Plan by means of the following:

(a) a Bargain and Sale Deed to the Property in form and substance reasonably acceptable to the designated purchaser to be recorded in the appropriate register's office (the *õDeedö*), together with any and all New York City closing documents, including all New York

State real property transfer tax returns and any and all affidavits, certificates and other documents which are usual and customary to facilitate a sale of real property in the City of New York; and

(b) a Bill of Sale, in form and substance reasonably acceptable to the designated purchaser, transferring all personal property of the Debtor used in or useful to the operation and maintenance of the Property.

**Transfer Taxes.** Pursuant to Section 1146(a) of the Bankruptcy Code, the Deed is an instrument of transfer in connection with or in furtherance of the Plan and shall not be subject to any deed or real estate transfer taxes arising under city or state law.

**Preservation of Other Rights and Causes of Action.** All other Causes of Action belonging to the Debtor against third parties, including pending counterclaims against Monty One, LLC, shall remain property of the Debtor's estate and shall be vested in the Reorganized Debtor (i.e. Debtor following Confirmation of the Plan) to the extent not otherwise liquidated prior to the Effective Date.

**Post-Confirmation Management.** The Reorganized Debtor shall continue to be managed by Zvi Benjamin Zhavian.

**Rights and Powers of the Debtor.** The Debtor shall be empowered to (i) effect all actions and execute all agreements, instruments and other documents necessary to perform its duties under the Plan, (ii) direct that all distributions contemplated hereby be made, (iii) prosecute, settle and enforce all causes of action and claims on behalf of the estate, and (iv) exercise such other powers as may be deemed by the Debtor to be necessary and proper to implement the provisions hereof.

## PROVISIONS GOVERNING DISTRIBUTIONS

**Disbursements.** All distributions under the Plan shall be made by the Disbursing Agent with appropriate reserves to be established with respect to Disputed Claims (i.e. those claims, in whole or part, under objection as of the Effective Date), as provided below.

**Claim Objection Deadline.** Unless otherwise ordered by the Bankruptcy Court, only the Debtor has standing to file and prosecute an objection to any claim in the bankruptcy case. The objections to claims shall be served no later than the Effective Date in accordance with the applicable provisions of the Bankruptcy Code and Rules.

**No Distribution Pending Allowance.** Notwithstanding any other provision of the Plan, no payment or distribution shall be made with respect to any portion of a Disputed Claim unless and until all objections to such Disputed Claim are resolved by stipulation or Final Order.

**Unclaimed Distributions.** If a distribution to the holder of any allowed claim is returned as undeliverable or unclaimed, no further distribution shall be made to such holder unless and until the Debtor is notified in writing of such holder's then current address within ninety (90) days of the Effective Date. Thereafter, the distribution shall be forfeited and revert back to the Reorganized Debtor (i.e. the Debtor after confirmation).

**Disputed Claims Reserves.** From and after the Effective Date, and until such time as a Disputed Claim(s) has been compromised, settled or determined by Final Order, the Debtor shall establish and maintain a reserve account (the "Claims Reserve") necessary to ensure that each holder of a Disputed Claim shall receive, payment in full in accordance with the provisions of the Plan in the event such Claim is allowed in the maximum amount claimed. At such time as, and to the extent that, any Disputed Claim becomes Allowed by Final Order, in whole or in part, the Debtor shall utilize amounts held by the Debtor to make payment to the holder of such claim

as provided for herein. Following the payment, satisfaction or resolution of all Disputed Claims any amounts remaining in the Claim Reserve shall be transferred to the Disbursing Agent for distribution under the Plan to other creditors or equity interests.

**PROCEDURES FOR RESOLUTION OF DISPUTED,  
CONTINGENT AND UNLIQUIDATED CLAIMS**

**Prosecution of Objections to Disputed Claims.** The Debtor shall (i) be responsible for pursuing any objection to the allowance of claims and (ii) receive all rights of setoff and recoupment and other defenses that any of the Debtor or the Estate may have with respect to any Disputed Claim. After the Effective Date, the Debtor shall also have the authority to file, settle, compromise or withdraw any objections to any Disputed Claims without approval of the Bankruptcy Court.

**Estimation of Claims.** The Debtor shall have the right to seek an order of the Bankruptcy Court, after notice and a hearing (which notice may be limited to the holder of a Disputed Claim and the United States Trustee, and which hearing may be held on an expedited basis), estimating for final distribution purposes any Disputed Claim pursuant to Section 502(c) of the Bankruptcy Code, regardless of whether the Debtor previously objected to such claim.

**CONDITIONS PRECEDENT TO THE PLAN**

**Conditions Precedent to the Effective Date.** The following are conditions precedent to the Effective Date of the Plan that must be satisfied:

- (a) The Sale Order shall have been entered by the Bankruptcy Court, the APA approved in all material respects, and the Debtor shall have designated a purchaser for the Property;
- (b) Confirmation shall have occurred and the Confirmation Order shall have been entered by the Bankruptcy Court;



(c) The Confirmation Order shall have become a Final Order, unless the Bankruptcy Court waives the period set forth in Bankruptcy Rule 6004(h);

(d) The Closing Date shall have occurred, the purchase price received by the Debtor, and title to the Property shall have been conveyed to the designated purchaser in accordance with this Plan and the Confirmation Order;

(e) There shall not be in effect on the Effective Date any Order entered by a court of competent jurisdiction staying, restraining, enjoining or otherwise prohibiting or making illegal the consummation of any of the transactions contemplated by the Plan; and

(f) All other actions and documents necessary to implement the Plan shall have been effected or executed in form and substance satisfactory to the Debtor.

#### **COMPLIANCE WITH TAX REQUIREMENTS**

In connection with the Plan, the Debtor shall comply with all withholding and reporting requirements imposed by federal, state and local taxing authorities and distributions under the Plan shall be subject to such withholding and reporting requirements; providing, however, that the transfer of the Property or other interest hereunder shall be exempt from any federal, state or local recording tax as permitted by Section 1146(a) of the Bankruptcy Code.

#### **EFFECTIVE DATE**

The Effective Date of the Plan is defined to mean the date following approval of the Plan upon which the Sale of the Property actually closes and the full purchase price is paid to the Debtor's estate.

### **MODIFICATION AND REVOCATION OF THE PLAN**

The Plan may be altered, amended or modified by the Debtor at any time before the substantial consummation of the Plan, as provided in Sections 1101(a) and 1127 of the Bankruptcy Code and Bankruptcy Rule 3019. Indeed, the Debtor expects to modify the Plan as circumstances develop. Section 1127 of the Bankruptcy Code authorizes the proponent of a plan of reorganization to modify such plan at any time prior to confirmation of the plan so long as the plan, as modified, continues to meet the requirements of the Bankruptcy Code.

### **RETENTION OF JURISDICTION**

The Plan contains detailed provisions providing for the retention of jurisdiction by the Bankruptcy Court over the Chapter 11 case for the purposes of, inter alia, determining all disputes relating to claims, resolving all matters relating to the Sale, and other issues presented by or arising under the interpretation, implementation or enforcement of the Plan, and to determine all other matters pending on the date of confirmation, including final disposition of the Orchard Claim Litigation.

### **RISK FACTORS**

The Plan is premised on the belief that the rights of all concerned are best served by the ultimate sale of the Property even if the Claim Litigation process takes longer to resolve, or the Debtor is compelled to undertake construction in advance of a sale transaction to flush out the best price and address concerned of the BSA. However, until this actually unfolds, the Plan carries inherent risks that a suitable stalking horse purchaser may not immediately materialize, or the clock continues to run on the BSA extension. Nevertheless, there is still obvious benefit of proceeding with the Plan, since the alternatives are far less attractive. Lifting the automatic stay is not a solution since the litigation with Orchard is highly contested and could take years to

resolve, while the BSA extension is running. Appointment of a Chapter 7 trustee would also necessarily delay disposition of the Property, add a layer of administrative expenses, and forfeit the transfer tax exemption available to the Debtor under Chapter 11.

### **REQUIREMENTS FOR CONFIRMATION**

The Debtors' expectation is that all classes of claims will ultimately be deemed unimpaired, or will vote to accept to the Plan so that confirmation can proceed consensually under 11 U.S.C. §1129(a). Confirmation of the Plan is important because it will provide tax exemptions upon a transfer of the Property, and insure the expeditious Sale of the Property and concomitant distribution to creditors.

At the Confirmation Hearing, the Bankruptcy Court will determine whether the requirements of Section 1129 of the Bankruptcy Code have been satisfied. These requirements include determinations by the Bankruptcy Court that: (i) the Plan has classified claims and interests in a permissible manner; (ii) the contents of the Plan comply with various technical requirements of the Bankruptcy Code; (iii) the Debtor have proposed the Plan in good faith; (iv) the Debtor has made disclosures concerning the Plan that are adequate and include information concerning all payments made or promised in connection with the Plan; (v) the Plan is in the "best interest" of all Creditors, in that it provides a better recovery than a liquidation; and (vi) the Plan is feasible. The Debtor believes that all of these requirements will be met prior to the Confirmation Hearing.

**Best Interest Test.** The so-called "best interest" test requires that each impaired class of creditors either (a) accepts the Plan, or (b) receives or retains under the Plan property of a value, as of the Effective Date of the Plan, that is not less than the value such entity would receive or if the Debtor were to be liquidated under Chapter 7 of the Bankruptcy Code.

Under the Plan, Unsecured Creditors will be paid a *pro rata* share of the Sale proceeds remaining after payment to Administrative Priority Expenses, and the allowed secured claims of Classes 1 and 2. While this distribution should be 100%, whatever the final dividend to Unsecured Creditors, it will be more than they would receive in a liquidation given the factors discussed above. Thus, the Debtor submits that the Plan provides to unsecured creditors a better recovery than they would receive if the Debtor were liquidated under Chapter 7 of the Bankruptcy Code.

**Feasibility.** For the Plan to be confirmed, it must be demonstrated that consummation of the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of the Debtor. The Debtor, of course, will not proceed with confirmation until the Sale is approved and the Court can properly assess the purchaser's credentials and purchase price, so feasibility can be assured.

#### **ADDITIONAL INFORMATION**

The Plan and Disclosure Statement shall be amended and supplemented from time to time so creditors have the most up-to-date information before the need to vote arises. Requests for additional information should be directed to the Debtor's counsel, Goldberg Weprin Finkel Goldstein, LLP, 1501 Broadway, 22<sup>nd</sup> Floor, New York, New York 10036, Attn: Kevin J. Nash, Esq. at (212) 221-5700, [KNash@GWFGlaw.com](mailto:KNash@GWFGlaw.com).

## CONCLUSION

The Plan process provides the best approach to maximize value for the Debtors' estate, and thus all creditors are urged to vote favorably on the Plan.

Dated: New York, New York  
October 8, 2014

D.A.B GROUP LLC

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By: /s/ Zvi Benjamin Zhavian

By: /s/ Kevin J. Nash