UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
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| In re: | : | Chapter 11 |
| LIC CROWN MEZZ BORROWER LLC, et al. | : | Case No. 13-13304(MG) |
| | : | Jointly Administered |
| Debtors. | : | |

**MEMORANDUM OF LAW IN SUPPORT OF ENTRY OF AN ORDER (I) APPROVING THE DEBTORS' DISCLOSURE STATEMENT, (II) APPROVING THE DEBTORS' SOLICITATION PROCEDURES, AND (III) CONFIRMING THE DEBTORS' JOINT PREPACKAGED PLAN OF LIQUIDATION**

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LIC Crown Mezz Borrower LLC ("Mezz Borrower"), LIC Crown Fee Owner, LLC ("Fee Owner"), and LIC Crown Leasehold Owner LLC ("Leasehold Owner," and together with Mezz Borrower and Fee Owner, the "Debtors") submit this *Memorandum of Law in Support of Entry of an Order (I) Approving the Debtors' Disclosure Statement, (II) Approving the Debtors' Solicitation Procedures, and (III) Confirming the Debtors' Joint Prepackaged Plan of Liquidation* (the "Memorandum of Law") and respectfully state as follows:

## I. PRELIMINARY STATEMENT

1. The *Debtors' Prepackaged Liquidating Chapter 11 Plan*, dated October 7, 2013 [Docket No. 8] (together with any subsequent modifications, the "Plan") represents the culmination of substantial efforts by multiple parties to reach an expeditious, fair and equitable resolution of the business and legal issues in these jointly administered cases. These efforts have resulted in a plan of liquidation that provides significant value for the Debtors' stakeholders.

2. As discussed more fully below, the prepetition solicitation conducted by the Debtors and their agents satisfied all applicable non-bankruptcy law requirements governing the solicitation of a chapter 11 plan prior to the commencement of a chapter 11 case, as well as all applicable requirements of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "Bankruptcy Code"), the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Local Bankruptcy Rules for the Southern District of New York (the "Local Rules"), and the Amended Procedural Guidelines for Prepackaged Chapter 11 Cases in the United States Bankruptcy Court for the Southern District of New York ("General Order M-454").

3. The Plan has been accepted by all parties entitled to vote on the Plan in accordance with section 1126 of the Bankruptcy Code. Factory Mezz LLC (the "Mezzanine Lender") is the only creditor in Class 3 under the Plan, and it voted to accept the Plan. 30th Place Holdings LLC is the only holder of a Class 5 equity interest, and it voted to accept the

Plan. Thus, all Voting Classes (defined below) voted to accept the Plan, and no creditor voted against the Plan. No objections to confirmation of the Plan have been filed as of the date hereof. *See Declaration of Tracy L. Klestadt in Support of Entry of an Order (I) Approving the Debtors' Disclosure Statement, (II) Approving the Debtors' Solicitation Procedures, and (III) Confirming the Debtors' Joint Prepackaged Liquidating Chapter 11 Plan* filed concurrently herewith (the "Klestadt Declaration") ¶ 3.

4. As evidenced by the level of support obtained by the Voting Classes and the lack of any objections asserted by the members of any creditor constituencies, the Plan is in the best interests of the Debtors' estates, creditors and other stakeholders.

5. The Debtors are required to demonstrate by a preponderance of the evidence that (a) the *Disclosure Statement for the Debtors' Prepackaged Liquidating Chapter 11* Plan, dated October 7, 2013 [Docket No. 9] (the "Disclosure Statement"), which was disseminated to voting creditors and equity interest holders in conjunction with the Debtors' prepetition solicitation of votes on the Plan, contains adequate information of a kind that would enable holders of claims and interests to make an informed decision about the Plan in compliance with section 1125(a) of the Bankruptcy Code, (b) the prepetition solicitation procedures employed by the Debtors (the "Solicitation Procedures") were reasonable under the circumstances, and (c) the Plan satisfies the requirements of section 1129 of the Bankruptcy Code for confirmation. The Debtors submit this Memorandum of Law in support of the foregoing.

## II. BACKGROUND AND OVERVIEW OF THE PLAN

### A. The Debtors' Businesses

6. Fee Owner is the owner of certain improved real property (the "Property") located at 47-44 31st Street, Block 282, Lot 1, Long Island City, County of Queens, New York, known as the "Factory Building." Fee Owner and Leasehold Owner are parties to an Amended and

Restated Net Lease pursuant to which Fee Owner leases the Property to Leasehold Owner. Leasehold Owner in turn leases portions of the Property to various commercial tenants (collectively, the "Tenants") pursuant to various leases (the "Leases"). There are approximately forty (40) Tenants occupying the Property pursuant to the Leases.

7. The Property is managed by Newmark & Company Real Estate d/b/a Newmark Grubb Knight Frank (the "Manager"). The Manager will continue to manage the Property in coordination with the CRO (defined below). Pursuant to their respective limited liability company agreements, each of the Debtors' principal business office is 601West 26th Street, Suite 1260, New York, New York 10001.

8. Each of the Debtors is a limited liability company formed under the laws of the state of Delaware. The sole member of each of Fee Owner and Leasehold Owner is Mezz Borrower, holding one hundred percent (100%) of the ownership interests therein. The sole member of Mezz Borrower is 30th Place Holdings LLC, a non-debtor, holding one hundred percent (100%) of the ownership interests therein.

B. The Mortgage and Mezzanine Loans

9. Fee Owner and Leasehold Owner are parties to a certain Mortgage Spreader and Amended, Restated and Consolidated Fee and Leasehold Mortgage, Assignment of Leases and Rents and Security Agreement dated as of May 31, 2006 in the original principal amount of $77,000,000.00 (the "Mortgage Loan"). Fee Owner and Leasehold Owner granted liens and security interests in substantially all of their properties to the original lender, CIBC Inc. The Mortgage Loan is currently held by the Mortgage Lender[1]. Fee Owner and Leasehold Owner are jointly and severally liable for the Senior Mortgage. The principal balance on the Mortgage Loan as of October 7, 2013 was approximately $71,559,083.40.

[1] Capitalized terms not defined herein shall have the meaning ascribed to them in the Plan.

10. Mezz Borrower is party to a certain Mezzanine Loan Agreement, dated as of May 31, 2006, with Petra Mortgage Capital Corp. LLC ("Petra") in the original principal amount of $28,300,000 (the "Mezzanine Loan"), pursuant to which Mezz Borrower pledged to Petra one hundred percent (100%) of its ownership interests in Fee Owner and Leasehold Owner. The Mezzanine Loan is currently held by the Mezzanine Lender, as successor to Petra, and is serviced by Atlas Servicing. The principal balance on the Mezzanine Loan as of October 7, 2013 was approximately $57,022,400.72.

11. Both the Mortgage Loan and the Mezzanine Loan are guaranteed by Mark Karasick, the president of each of the Debtors, and 30th Place Holdings LLC, the sole member of Mezz Borrower, under certain circumstances pursuant to the applicable loan documents.

12. In addition to the Mortgage Loan and the Mezzanine Loan, Leasehold Owner has unsecured indebtedness to various vendors, professionals and others in the aggregate amount of approximately $1,243,796.49. Pursuant to the terms of the Plan, claims totaling $598,298.26 of this amount will be waived.

C. Events Leading to Chapter 11 Filing

13. During the period from 2006 to 2008, the Factory Building was successful in leasing a significant portion of its vacant space. The Factory Building undertook a series of necessary capital repairs and improvements in connection with these leases. The 2008 recession had a devastating impact on many of the tenants that lease property in the Factory Building, resulting in many tenants vacating the Property. The Factory Building's cash flow decreased substantially as a result of tenant departures and difficulty in attracting new tenants. In the wake of the financial crisis, the Factory Building has barely generated sufficient revenues to pay debt service on the Mortgage Loan and operating expenses on a current basis, and there was insufficient income to pay interest on the Mezzanine Loan.

14. Efforts to restructure the Mortgage Loan and the Mezzanine Loan were unsuccessful, and the Debtors defaulted on both the Mortgage Loan and the Mezzanine Loan when they matured in June 2013.

D. Decision to Pursue Chapter 11 Filing

15. Beginning in May 2013, the Debtors entered into negotiations with the Mortgage Lender and the Mezzanine Lender to determine the best course of action for all of the Debtors' stakeholders. The parties determined that a prepackaged, voluntary chapter 11 bankruptcy filing would result in the greatest recovery for the Debtors' general unsecured creditors and other stakeholders.

16. On October 2, 2013, each of the Debtors, 30th Place Holdings LLC, Mark Karasick, the Mortgage Lender and the Mezzanine Lender entered into the PSA (defined below) in relation to the Plan. The Debtors simultaneously executed an engagement letter which provides for, among other things, the appointment of Steven A. Carlson as the chief restructuring officer of the Debtors (the "CRO") effective as of October 2, 2013. The CRO acts as the sole representative of the Debtors.

17. On October 10, 2013, each of the Debtors filed a voluntary petition under Chapter 11 of the Bankruptcy Code, commencing the above-captioned Chapter 11 Cases (the "Chapter 11 Cases").

E. The Proposed Prepackaged Plan

18. In connection with the Plan, the Debtors prepared the Disclosure Statement describing the proposed liquidation and its effects on holders of Claims against and Equity Interests in the Debtors. As discussed in greater detail below, as part of the prepetition solicitation of votes on the Plan, the Debtors caused copies of the Disclosure Statement and its appendices, which included the Plan, the PSA, and the appropriate ballot (the "Ballot") to be

transmitted to the holders of Claims and Equity Interests in the Voting Classes – Class 3 Mezzanine Lender Claim and Class 5 Equity Interests. As discussed in greater detail below, these two Voting Classes voted to accept the Plan and no votes against the Plan were received by the Debtors. *See* Klestadt Declaration ¶ 3.

## III. THE DISCLOSURE STATEMENT SHOULD BE APPROVED

19. Under section 1126(b) of the Bankruptcy Code, prepetition disclosure statements are subject to requirements distinct from postpetition disclosure statements. First, the solicitation must be "in compliance with any applicable non-bankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation." 11 U.S.C. § 1126(b)(1). Second, "if there is not any such law, rule, or regulation, ... acceptance or rejection [of the Plan must have been] solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of [the Bankruptcy Code]." 11 U.S.C. § 1126(b)(2). The Debtors are not public companies and are not subject to any non-bankruptcy law, rule, or regulation governing the adequacy of their disclosures; thus the "adequate information" standard applies to the Debtors' Disclosure Statement.

20. Section 1125(a) of the Bankruptcy Code defines "adequate information" as:

> [I]nformation of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan ....

11 U.S.C. § 1125(a)(1). The adequacy of a disclosure statement "is to be determined on a case specific basis under a flexible standard that can promote the policy of Chapter 11 towards fair settlement through a negotiation process between informed interested parties." *In re Copy*

*Crafters Quickprint, Inc.*, 92 B.R. 973, 979 (Bankr. N.D.N.Y. 1988). As such, in examining the adequacy of the information contained in a disclosure statement, the bankruptcy court enjoys broad discretion. *See Texas Extrusion Corp. v. Lockheed Corp. (In re Texas Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988).

21. The Debtors submit that the Disclosure Statement contains adequate information within the meaning of section 1125(a) of the Bankruptcy Code. The Disclosure Statement is extensive and comprehensive. Indeed, the Disclosure Statement contains descriptions and summaries of, among other things, (a) the Plan; (b) certain events preceding the commencement of these Chapter 11 Cases; (c) risk factors affecting the Plan; (d) a liquidation analysis setting forth the estimated return that creditors would receive in a hypothetical case under chapter 7 of the Bankruptcy Code; and (e) the federal tax law consequences of the Plan.

22. Accordingly, the Debtors submit that the Disclosure Statement contains adequate information within the meaning of section 1125(a) of the Bankruptcy Code and should be approved.

## IV. THE DEBTORS' SOLICITATION AND VOTING PROCEDURES SHOULD BE APPROVED

23. The Bankruptcy Rules and General Order M-454 require, among other things, that a debtor distribute its plan and disclosure statement to all affected creditors and equity security holders, that it adopt effective procedures for the transmission of its plan and disclosure statement to beneficial owners of securities, and that creditors and equity security holders be permitted a reasonable period of time in which to accept or reject the proposed plan. Fed. R. Bankr. P. 3017 and 3018. The Debtors respectfully submit that they have met all such requirements and, as of the date hereof, no party in interest has objected with respect to these matters.

A. The Debtors Have Complied With Applicable Requirements with Respect to the Solicitation Packages And The Form Of Ballots

24. The Plan provides for the classification of certain classes of Claims and Equity Interests as Impaired or Unimpaired. The classification scheme is set forth in the table below.

| Class | Type of Claim or Equity Interest | Impairment | Entitled to Vote |
|---|---|---|---|
| N/A | Administrative Claims | Unimpaired | No; deemed to accept |
| N/A | Priority Tax Claims | Unimpaired | No; deemed to accept |
| N/A | Fee Claims | Unimpaired | No; deemed to accept |
| 1 | Other Priority Claims | Unimpaired | No; deemed to accept |
| 2 | Mortgage Lender Claim | Unimpaired | No; deemed to accept |
| 3 | Mezzanine Lender Claim | Impaired | Yes |
| 4 | General Unsecured Claims | Unimpaired | No; deemed to accept |
| 5 | Equity Interests | Impaired | Yes |

25. Specifically, as shown above, the Plan provides for five different classes of Claims and Equity Interests. Under the Plan, Class 3 Mezzanine Lender Claim and Class 5 Equity Interests (collectively, the "Voting Classes" or the "Impaired Classes") are Impaired under the Plan. Holders of Claims in the Voting Classes had their votes solicited prior to the Petition Date. Class 1 Other Priority Claims, Class 2 Mortgage Lender Claim and Class 4 General Unsecured Claims (collectively, the "Unimpaired Classes") are Unimpaired under the Plan. The holders of Claims in the Unimpaired Classes are conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code, and therefore the Debtors did not solicit their votes prior to the Petition Date. *See* Klestadt Declaration ¶ 5. The Voting Classes both unanimously voted in favor of the Plan. *Id.* ¶ 3.

26. In connection with the Plan, the Debtors prepared the Disclosure Statement describing, among other things, the proposed Plan's provisions and its effects on holders of Claims against and Equity Interests in the Debtors.

27. On October 8, 2013, the Debtors commenced their solicitation (the "Solicitation") of votes on the Plan by transmitting to the members of Class 3 and Class 5, a package containing (a) the Disclosure Statement, (b) the Plan, and (c) the Ballots.

28. Based upon the foregoing, the Debtors submit that they have complied with the applicable requirements governing prepetition solicitations and that the Solicitation was reasonable under the circumstances. Further, the Debtors submit that the form of the Ballots complies with Bankruptcy Rule 3017(d)(4), which provides that the form of ballot must "confor[m] to the appropriate Official Form[.]" Fed. R. Bankr. P. 3017(d)(4). Official Form No. 14 served as the form of the Ballots.

B. Voting Classes Were Provided A Reasonable Time To Accept Or Reject The Plan

29. Bankruptcy Rule 3018(b) provides that prepetition acceptances or rejections of a plan are valid only if the plan was transmitted to substantially all the holders of claims or interests in each solicited class and the time for voting was not unreasonably short. Fed. R. Bankr. P. 3018(b). General Order M-454 provides that the Bankruptcy Court will approve as reasonable a "fourteen (14) day voting period, measured from the date of commencement of mailing" for debt for borrowed money and securities which are not Publicly Traded Securities (as defined in the Prepack Guidelines), and a twenty-one (21) day voting period for Publically Traded Securities as well as all other claims and interests. The Class 3 Mezzanine Lender Claim and Class 5 Equity Interests are not on account of Publicly Traded Securities.

30. As noted above, the Debtors commenced the Solicitation for approval of the Plan on October 8, 2013 and established 5:00 p.m. Eastern Time on October 28, 2013 as the Voting Deadline for holders of Claims and Equity Interests in the Voting Classes which is twenty-one days. *See* Klestadt Declaration ¶ 4. The Ballots, both accepting the Plan, were returned to Klestadt & Winters, LLP on October 10, 2013. *Id.*

31. Accordingly, the time period for creditors to accept or reject the Plan was not "unreasonably short" as required by Bankruptcy Rule 3018(b) and complied with General Order M-454. The Debtors therefore request that the Bankruptcy Court find that the voting period was sufficient and ratify the Voting Deadline consistent with Bankruptcy Rule 3017(c), which provides that, on or before approval of a disclosure statement, the court "shall fix a time within which the holders of claims and equity interests may accept or reject the plan." Fed. R. Bankr. P. 3017(c).

C. The Debtors Have Complied With The Applicable Notice Requirements With Respect To The Confirmation Hearing

32. On October 17, 2013, the Bankruptcy Court entered the *Order Scheduling Joint Hearing on Confirmation of the Debtors' Proposed Plan or Liquidation and Adequacy of Related Disclosure Statement* [Docket No. 18] (the "Scheduling Order"). *See* Klestadt Declaration ¶ 6. In accordance with the Scheduling Order and General Order M-454, the *Summary of Plan of Liquidation and Notice of Hearing to Consider (I) the Debtors' Compliance with Disclosure Requirements and (II) Confirmation of Plan of Liquidation* (the "Confirmation Notice"), indicating that the cases had been commenced, the date, time and place of the Confirmation Hearing, briefly summarizing the Plan's provisions, detailing the procedure and deadline for filing objections, and providing information on how a party in interest may request a copy of the Plan and Disclosure Statement, was mailed by first class mail, postage prepaid to all parties in interest, including the Debtors' creditors, contract counterparties and the United States Trustee for the Southern District of New York (the "United States Trustee") on November 6, 2013. *See* Klestadt Declaration ¶ 7; Certificate of Service [Docket No. 33].

33. Further, on November 6, 2013, the Debtors provided supplemental notice of the Confirmation Hearing by causing a copy of the Confirmation Notice (modified as to format as

necessary for publication) to be published in the New York Times. *See* Klestadt Declaration ¶ 8; Certification of Publication [Docket No. 35].

34. The Bankruptcy Court set the date of the Confirmation Hearing for 4:00 p.m. on Tuesday, December 10, 2013 and set an objection deadline of seven (7) days before the Confirmation Hearing. Notice of the dates and times for the Combined Hearing and the objection deadline was included in the Confirmation Notice. *See* Klestadt Declaration ¶ 7.

35. The Debtors respectfully submit that the foregoing noticing with respect to the Confirmation Hearing complies with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, General Order M-454 and the Scheduling Order and should be approved as reasonable.

## V. THE PLAN SHOULD BE CONFIRMED

36. To confirm the Plan, the Bankruptcy Court must find that both the Plan and the Debtors are in compliance with each of the requirements of section 1129(a) of the Bankruptcy Code. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 648 (2d Cir. 1988) (plan must comply with section 1129(a) requirements). As set forth below, the Debtors and the Plan presented by the Debtors satisfy all of the requirements of section 1129(a) of the Bankruptcy Code. Accordingly, the Plan should be confirmed.

### A. The Plan Complies With The Applicable Provisions Of Title 11 (Section 1129(a)(l))

37. Section 1129(a)(1) of the Bankruptcy Code provides that a plan may be confirmed only if "[t]he plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1).

38. Section 1122 of the Bankruptcy Code provides:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122.

39. In addition to the Administrative Claims, Priority Tax Claims and Fee Claims, which need not be designated, the Plan designates 5 Classes of Claims and Equity Interests. The Claims and Equity Interests placed in each Class are substantially similar to other Claims and Equity Interests, as the case may be, in each such Class. Valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Equity Interests created under the Plan, and such Classes do not unfairly discriminate between holders of Claims and Equity Interests. The Plan satisfies sections 1122 and 1123(a)(1) of the Bankruptcy Code. The Classes of Claims against and Interests in the Debtors under the Plan are as follows: Class 1 – Other Priority Claims, Class 2 – Mortgage Lender Claim, Class 3 – Mezzanine Lender Claim, Class 4 –General Unsecured Claims, Class 5 – Equity Interests.

40. Section 1123(a) of the Bankruptcy Code identifies seven requirements for the contents of a plan. The Plan fully complies with each requirement of section 1123(a).

a. <u>The Plan Designates Classes Of Claims And Interests</u>

41. Section 1123(a)(1) of the Bankruptcy Code requires that a chapter 11 plan designate classes of claims and interests other than claims of a kind specified in section 507(a)(2) of the Bankruptcy Code (administrative expense claims), section 507(a)(3) of the Bankruptcy Code (claims arising during the "gap" period in an involuntary bankruptcy case), and section 507(a)(8) of the Bankruptcy Code (priority tax claims). 11 U.S.C. § 1123(a)(1). Article IV of the Plan complies with this requirement by expressly classifying all Claims and Interests, other than Administrative Claims, Priority Tax Claims and Fee Claims.

b. The Plan Identifies Unimpaired Classes Of Claims And Interests

42. Section 1123(a)(2) of Bankruptcy Code requires that a plan "specify any class of claims or interests that is not impaired under the plan." 11 U.S.C. § 1123(a)(2). Article IV of the Plan satisfies this requirement by specifying that Class 1, Class 2 and Class 4 are Unimpaired under the Plan.

c. The Plan Specifies The Treatment Of Impaired Classes

43. Section 1123(a)(3) of the Bankruptcy Code requires that a plan "specify the treatment of any class of claims or interests that is impaired under the plan." 11 U.S.C. § 1123(a)(3). Article IV of the Plan satisfies this requirement by specifying the treatment of the Claims and Equity Interests in Class 3 – Mezzanine Lender Claim and Class 5 –Equity Interests.

d. The Plan Provides The Same Treatment Within Each Class

44. Section 1123(a)(4) of the Bankruptcy Code requires that a plan "provide the same treatment for each claim or interest of a particular class." 11 U.S.C. § 1123(a)(4). Article IV of the Plan satisfies this requirement by providing the same treatment to each Claim or Equity Interest in each respective Class.

e. The Plan Provides Adequate Means For Implementation

45. Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means" for its implementation. 11 U.S.C. § 1123(a)(5). Adequate means for implementation of a plan may include retention by the debtor of all or part of its property; the transfer of property of the estate to one or more entities; curing or waiving of any default; extension of a maturity date or change in an interest rate or other term of outstanding securities; amendment of the debtor's charter; or the issuance of securities in exchange for cash, property, or existing securities, all in

exchange for claims or interests or for any other appropriate purpose. *See generally, In re Spiegel, Inc.*, No. 03-11540, 2005 LEXIS 1113 (Bankr. S.D.N.Y. May 25, 2005).

46. Articles IV and V of the Plan and the documents contemplated by the Plan provide adequate and proper means for the implementation of the Plan. Specifically, section 4.2 of the Plan provides that on the Effective Date in full and complete satisfaction of the Mortgage Lender Allowed Secured Claim, the Mezzanine Lender or the Mezzanine Acquisition Entity will make a payment in Cash to the Mortgage Lender in the amount of the Mortgage Loan Amount. Also on the Effective Date, the Debtors will transfer and convey the Property to the Mezzanine Acquisition Entity. The Plan will be implemented by the Manager and the CRO. To the extent that the Debtors' estates lack sufficient funds for the payments and distributions contemplated by the Plan, the Mezzanine Lender or the Mezzanine Acquisition Entity will fund the Plan pursuant to the Cash Collateral Order. The Plan contemplates the complete dissolution of the Debtors as soon as practicable after the Effective Date, which shall occur on January 2, 2014, or as soon as reasonably practicable thereafter. The Debtors are authorized to implement the Plan in accordance with its terms and as detailed herein.

f. Prohibition Of The Issuance Of Non-Voting Securities

47. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate constituent documents prohibit the issuance of non-voting equity securities. 11 U.S.C. §1123(a)(6). The Debtors are not corporations; therefore, section 1123(a)(6) of the Bankruptcy Code does not apply. In any event, however, no non-voting equity interests will be issued. Accordingly, section 1123(a)(6) is not applicable, but if it was determined that it is, it is satisfied.

g. Selection Of Trustees, Member And Manager

48. Finally, section 1123(a)(7) of the Bankruptcy Code requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan," 11 U.S.C. § 1123(a)(7). This provision is supplemented by section 1129(a)(5) of the Bankruptcy Code, which directs the scrutiny of the Bankruptcy Court to the methods by which the management of a reorganized corporation is to be chosen to provide adequate representation of those whose investments are involved in the bankruptcy – i.e., creditors and equity holders. *See* 7 Collier on Bankruptcy ¶1123.01[7] (Alan N. Resnick & Henry J. Sommer, eds. 16th ed. 2010). No individuals will be selected to serve as officers, directors or trustees of the Debtors after the Effective Date. Rather, the Plan contemplates that the CRO will continue to serve as CRO after the Effective Date and until the closing of the Chapter 11 Cases; therefore, the Plan satisfies section 1123(a)(7) of the Bankruptcy Code.

49. Section 1123(b) of the Bankruptcy Code identifies various discretionary provisions that may be included in a plan, but are not required. For example, a plan may impair or leave unimpaired any class of claims or interests and provide for the assumption or rejection of executory contracts and unexpired leases. 11 U.S.C. § 1123(b)(1), (2). A plan also may provide for: (a) "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate;" (b) "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;" or (c) "the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." 11 U.S.C. §§ 1123(b)(3)(A)-(B), 1123(b)(4). Finally, a plan may "modify the rights of holders of secured claims ... or ... unsecured claims, or

leave unaffected the rights of holders of any class of claims" and may "include any other appropriate provision not inconsistent with the applicable provisions of [Title 11]." 11 U.S.C. §§1123(b)(5)-(6).

h. Approval of Settlements, Releases, Transactions and Agreements

50. Under section 1123(b)(3)(A) of the Bankruptcy Code, a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). Section 4.3 of the Plan provides for (i) a waiver of the Mezzanine Lender Allowed Deficiency Claim as well as any postpetition unsecured administrative claim held by the Mezzanine Lender and (ii) on the Effective Date, the transfer of the Property to the Mezzanine Acquisition Entity pursuant to the terms of section 4.3 of the Plan and sections 363(b) and (f) and 1123(b) of the Bankruptcy Code. The Plan further provides that, on the Effective Date, (i) in full and complete satisfaction of Mortgage Lender Allowed Secured Claim, the Mezzanine Lender or the Mezzanine Acquisition Entity shall make a payment in Cash to Mortgage Lender in the amount of the Mortgage Loan Amount, in full satisfaction of the Mortgage Loan, (ii) all holders of allowed General Unsecured Claims shall receive 100% distribution of their Claim plus postpetition interest, and (iii) the Mezzanine Lender shall transfer to the Debtors for the benefit of holders of Equity Interests $5,000,000.00, without set-offs or offset for any Claims or deductions not specifically contemplated under the PSA. The inclusion of these proposed transactions within the Plan is clearly permissible under section 1123(b) of the Bankruptcy Code.

51. Further, the settlements embodied in the Plan are well within the standards imposed by this Bankruptcy Court for the approval of compromises and settlements. Bankruptcy Rule 9019(a) provides, in relevant part, that "[o]n motion by the trustee and after notice and a

hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a). This rule empowers bankruptcy courts to approve settlements "if they are in the best interests of the estate." *Vaughn v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991). In determining whether to approve a settlement pursuant to Rule 9019, the Second Circuit has stated that it has a "clear purpose . . . to prevent the making of concealed agreements which are unknown to the creditors and unevaluated by the court." *Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 461-62 (2d Cir. 2007) (citing *In re Masters, Inc.*, 141 B.R. 13, 16 (Bankr. E.D.N.Y. 1992)). A bankruptcy court need not be convinced that a settlement is the best possible compromise or that the parties have maximized their recovery. Rather, the responsibility of the judge "is not to decide the numerous questions of law and fact raised by appellants, but rather to canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness.'" *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983). Without the waiver of the Mezzanine Lender Allowed Deficiency Claim, no other creditors would be able to receive any recovery. Further, the settlements embodied in the Plan were negotiated among the Debtors, the Mortgage Lender, the Mezzanine Lender and the Debtors' Equity Interest holders in good faith, and are in the best interests of the Debtors' estates. *See Declaration of Steven A. Carlson in Support of Confirmation of Debtors' Joint Prepackaged Plan of Liquidation* filed concurrently herewith (the "Carlson Declaration") ¶ 7. It is thus well within the standards imposed by the courts within this Circuit.

i. Releases, Exculpations and Injunctions

(i) The Plan's Debtor Release Provisions Are Permissible and Should Be Approved

52. In reviewing plan releases, courts frequently use the benchmark for approval of a settlement under Bankruptcy Rule 9019, the standards for which are discussed above. *See, e.g., Bally Total Fitness,* No. 07-12395, 2007 WL 2779438, at *12 (Bankr. S.D.N.Y. Sept. 17, 2007) ("To the extent that a release or other provision in the Plan constitutes a compromise of a controversy, this Confirmation Order shall constitute an order under Bankruptcy Rule 9019 approving such compromise."); *In re Spiegel, Inc.,* 2005 WL 1278094, at * 11 (Bankr. S.D.N.Y. May 25, 2005) (approving releases pursuant to section 1123(b)(3) and Bankruptcy Rule 9019(a)).

53. Here, section 6.1 of the Plan (the "Debtor Release") provides that in exchange for, among other things, the service of the Released Parties in facilitating the expeditious implementation of the liquidation contemplated by the Plan and the other consideration set forth therein, on the Effective Date the Released Parties are deemed released and discharged by each of the Debtors and their estates from any and all obligations, liabilities, claims, counterclaims, crossclaims, offsets, demands, and causes of action, whether known or unknown, direct or derivative, contingent or absolute, that any of the Debtors would have been legally entitled to assert, or, now or hereafter can, shall or may have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of time to the date of the Plan including, but not limited to, any claim or cause of action arising from or relating to the Debtors, the Chapter 11 Cases, the Plan, the subject matter of, or the transactions or events giving rise to, any Claim or Equity Interest of the Released Parties that is treated in the Plan, the business or contractual arrangements between any Debtor and any Released Party, the negotiation, formulation or

preparation of the Plan and the Disclosure Statement, or upon any other act or omission, transaction, agreement, event or other occurrence taking place, in each case to the extent incurred on or prior to the Effective Date, other than (i) in each case claims or liabilities arising out of or relating to any act or omission of a Released Party that constitutes willful misconduct or gross negligence; and (ii) liability of any released person for any debt owed to the United States Government, any state, city or municipality arising under (w) the Internal Revenue Code or any state, city or municipal tax code, (x) the environmental laws of the United States or any state, city or municipality or (y) laws regarding the regulation of securities administered by the Securities and Exchange Commission and (z) any criminal laws of the United States, any state, city or municipality. From and after the Effective Date, a copy of the Confirmation Order and the Plan shall constitute, and may be submitted as, a complete defense to any claim or liability released pursuant to Article 6 of the Plan.

54. As set forth in the Carlson Declaration, the Debtors have proposed the Debtor Release based on their sound business judgment and submit that the Debtor Release is reasonable and satisfies the standard that courts generally apply when reviewing settlements. *See* Carlson Declaration ¶ 21. The Debtors do not believe, and no party in interest has asserted, that there are any valid claims or causes of action against the Released Parties. *Id.* Moreover, because the Mortgage Lender, as well as holders of General Unsecured Claims, are Unimpaired by the Plan, and the Mezzanine Lender and holder of Equity Interests have voted in favor of the Plan, there are no Classes that could potentially benefit from any such claims or causes of action that have not voted to support the Plan and the releases contained therein. *Id.* The Debtors submit that the Debtor Release is well considered, reasonable and represents a valid settlement of any potential

claims or causes of action the Debtors may have against the Released Parties pursuant to section 1123(a)(3)(A) of the Bankruptcy Code and, for this reason, should be approved.

55. In addition, section 6.1(b) contemplates that on the Effective Date, the parties to the PSA will execute and deliver certain releases in favor of each other as described in the PSA and Plan. These releases are reasonable and necessary for the implementation of the Plan.

(ii) The Plan's Corresponding Injunction Provisions Are Permissible and Should Be Approved

56. Section 6.2 of the Plan sets out the Plan's injunction provision with respect to the Debtor Release (the "Debtor Injunction") which provides that the Debtors shall be permanently enjoined from commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind, including asserting any setoff, right of subrogation, contribution, indemnification or recoupment of any kind, directly or indirectly, or proceeding in any manner in any place inconsistent with the releases granted by the Debtors and their estates to the Released Parties pursuant to the Plan.

57. Lastly, as provided in the Confirmation Order, as of the Effective Date, all Persons that have held, currently hold, or may hold, a claim or other debt or liability against or interests in the Debtors or their estates, will be permanently enjoined from taking any of the following actions in any Court or forum, other than the Bankruptcy Court, against or affecting the Debtors, the estates, their assets or property, with respect to such claim or interests (the "Claim Injunction"): (i) commencing or continuing any judicial or administrative proceeding or employing any process against the Debtors, their estates, with the intent or effect of interfering with the consummation and implementation of the Plan and the transfers, payments and distributions to be made thereunder; (ii) commencing or continuing of any action, employment of process, or act to collect, offset, or recover any Claim or cause of action against the Debtors or

the estates; (iii) pursuing the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree or order against the Debtors or the estates; (iv) creating, perfecting or enforcing any encumbrance of any kind against the Debtors or the estates; (v) asserting any right of setoff, counterclaim, exculpation, subrogation or recoupment of any kind against the Debtors or the estates.

58. The Debtor Injunction is necessary to preserve and enforce the Debtor Release and the intent and purpose of the Plan, and is narrowly tailored to achieve that purpose. Further, the Debtor Injunction and the Claim Injunction are key components of the deal and transaction that form the basis for the liquidating Plan. *See* Carlson Declaration ¶ 45. Thus, the Bankruptcy Court should approve the Debtor Injunction to the same extent it approves the Debtor Release, and should also approve the Claim Injunction to the extent set forth in the proposed Confirmation Order.

j. Executory Contracts and Unexpired Leases

59. As noted above, section 1123(b) of the Bankruptcy Code also provides that a plan may, subject to section 365 of the Bankruptcy Code, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section. 11 U.S.C. § 1123(b)(2). The Plan provides that any and all prepetition leases and executory contracts (not otherwise previously rejected or the subject of a motion to reject pending on the Confirmation Date), shall be deemed assumed by the Debtors and assigned to Mezzanine Acquisition Entity effective as of the Effective Date. *See* Plan, Art. VIII.

60. Under section 8.1 of the Plan, without limiting the foregoing, on the Effective Date, all executory contacts and leases of non-residential property with tenants will be assumed by the Debtors and assigned to the Mezzanine Acquisition Entity. All Security Deposits, held by

the Debtors as of the Petition Date, as well as the letters of credit will be transferred to the Mezzanine Acquisition Entity, and the Mezzanine Acquisition Entity will transfer $280,100.92 (an amount equal to the cash Security Deposits) to the Guarantors in consideration of the transfer of such cash Security Deposits. The Mezzanine Acquisition Entity will maintain custody and control of all Security Deposits and letters of credit, if any, posted by Tenants in accordance with the terms of their Leases and applicable non-bankruptcy law; provided, however, the transfer of any Security Deposits to the Mezzanine Acquisition Entity are subject to (i) payment of the Mortgage Loan Amount to the Mortgage Lender in full and (ii) Mortgage Lender's rights pursuant to the Mortgage Loan Documents and the Intercreditor Agreement. All collective bargaining agreements, including but not limited to that with 32BJ, shall be assumed and assigned to the Mezzanine Acquisition Entity. The Mezzanine Acquisition Entity shall continue to make pension and benefit payments consistent with past practices.

61. Although the Debtors will not be rejecting any executory contracts or Leases, section 8.2 of the Plan sets for a reasonable procedure for filing proofs of claims relating to the rejection of executory contracts or Leases.

62. The Debtors respectfully submit that the foregoing provisions of the Plan regarding the treatment of executory contracts and unexpired leases are fair and reasonable under the circumstances, and comply with section 1123(b) of the Bankruptcy Code.

k. The Plan Includes Additional Appropriate Provisions That Are Not Inconsistent With Applicable Sections Of The Bankruptcy Code

63. Finally, in accordance with section 1123(b)(6) of the Bankruptcy Code, the Plan includes additional appropriate provisions that are not inconsistent with applicable sections of the Bankruptcy Code, including: (i) Plan, Art. X (the Bankruptcy Court's retention of jurisdiction as to specified matters); (ii) Plan, Art. VII (distributions on account of Allowed claims and

procedures for resolving disputed claims and making distributions thereto); and (iii) Plan, Art. VI and section 11.7 (releases and exculpation). None of these provisions is inconsistent with the Bankruptcy Code, and thus, the requirements of section 1123(b) of the Bankruptcy Code are satisfied. Accordingly, the Plan complies with the applicable provisions of the Bankruptcy Code and, therefore, meets the requirements of section 1129(a)(1) of the Bankruptcy Code.

B. The Debtors Have Complied With The Applicable Provisions Of Title 11 (Section 1129(a)(2))

64. Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent "compl[y] with the applicable provisions of [title 11 of the Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). The principal purpose of section 1129(a)(2) is to ensure that a plan proponent has complied with the requirements of sections 1125 and 1126 of the Bankruptcy Code. *See In re WorldCom, Inc.*, No. 02-13533 (AJG), 2003 LEXIS 1401, *137 (Bankr. S.D.N.Y. Oct. 31, 2003) ("The legislative history to section 1129(a)(2) reflects that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code."). As discussed above, the Debtors have complied with all applicable disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code and, thus, have complied with the requirements of section 1129(a)(2) of the Bankruptcy Code.

C. The Plan Was Proposed In Good Faith (Section 1129(a)(3))

65. Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law," 11 U.S.C. § 1129(a)(3). The Second Circuit has held that the standard of good faith requires "a showing that the plan was proposed with 'honesty and good intentions.'" *Koelbl v. Glessing (In re Koelbl)*, 751 F.2d 137, 139 (2d Cir. 1984) (quoting *Manati Sugar Co. v. Mock*, 75 F.2d 284, 285 (2d Cir. 1935)). In the context of a chapter 11 plan, courts have held that "a plan is proposed in good faith 'if there is a likelihood

that the plan will achieve a result consistent with the standards prescribed under the [Bankruptcy] Code.'" *In re Leslie Fay Cos.*, 207 B.R. 764, 781 (Bankr. S.D.N.Y. 1997) (quoting *In re Texaco Inc.*, 84 B.R. 893, 907 (Bankr. S.D.N.Y. 1988)).

66. In determining whether the good faith requirement has been satisfied, the court will focus on "the plan itself and whether such plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re Granite Broad. Corp.*, 369 B.R. 120, 128 (Bankr. S.D.N.Y. 2007) (quoting *In re Plus Holding Corp.*, 228 F.3d 224, 242 (3d Cir. 2000)). Accordingly, bankruptcy courts have asserted that the good faith requirement is satisfied if the plan has been proposed for the purpose of preserving the value of the bankruptcy estate and distributing that value to creditors. *In re Source Enters., Inc.*, No. 06-11707, 2007 LEXIS 4996, at *16 (Bankr. S.D.N.Y. Oct. 1, 2007) (finding that good faith requirement was satisfied in plan filed with legitimate and honest purposes of maximizing value of estate and effectuating equitable distribution), *aff'd*, 392 B.R. 541 (S.D.N.Y. 2008).

67. The Plan has been proposed by the Debtors in good faith, with the legitimate and honest purposes of maximizing the value of the Debtors' estates. *See* Carlson Declaration ¶ 7.

68. The support of the Debtors' primary constituencies and the unanimous acceptance of the Plan by holders of Claims and Equity Interests that voted on the Plan reflect the overall fairness of the Plan and the acknowledgment by the Voting Classes that the Plan has been proposed in good faith and for proper purposes. Accordingly, the requirements of section 1129(a)(3) of the Bankruptcy Code have been satisfied.

D. <u>All Payments To Be Made By The Debtors In Connection With These Cases Are Subject To The Approval Of The Court (Section 1129(a)(4))</u>

69. Section 1129(a)(4) of the Bankruptcy Code requires that:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for

> services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

11 U.S.C. § 1129(a)(4). In essence, this subsection requires that any and all fees promised or received from the estate in connection with or in contemplation of a chapter 11 case must be disclosed and subject to the court's review. *See In re Johns-Manville Corp.*, 68 B.R. 618, 632 (Bankr. S.D.N.Y. 1986) (implying that court must be permitted to review and approve reasonableness of professional fees made from estate assets). In this case, the only Fee Claims will be filed by Klestadt & Winters, LLP, counsel to the Debtors. The proposed Confirmation Order provides that all requests for payment of Fee Claims in accordance with the PSA incurred through the Effective Date must be filed and served on the United States Trustee, all persons who have filed a notice of appearance in these cases and the notice parties identified in the PSA no later than thirty (30) days after the Effective Date. Fee Claims will only be allowed as approved by the Bankruptcy Court. Furthermore, Article X of the Plan provides that the Bankruptcy Court will retain jurisdiction after the Effective Date to hear and determine all applications for professional fees.

70. Accordingly, the Plan complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

E. Disclosure Of All Required Information Regarding Post-Confirmation Directors, Management And Insiders (Section 1129(a)(5))

71. Section 1129(a)(5)(B) of the Bankruptcy Code provides that a plan may be confirmed if the proponent discloses the identity of those individuals who will serve as management of the reorganized debtor, the identity of any insider to be employed or retained by the reorganized debtor and the compensation proposed to be paid to such insider. 11 U.S.C. § 1129(a)(5)(B). Because the Plan contemplates the liquidation and dissolution of the Debtors

without the appointment of any director, officer or insider following the confirmation of the Plan, section 1129(a)(5) is inapplicable to these Chapter 11 Cases. For the avoidance of doubt, Steven A. Carlson will continue to serve as CRO to the Debtors until the Chapter 11 Cases are closed. This is consistent with interests of all stakeholders to achieve an orderly liquidation.

F. The Plan Does Not Provide For Any Rate Change Subject To Regulatory Approval (Section 1129(a)(6))

72. Section 1129(a)(6) of the Bankruptcy Code requires, with respect to a debtor whose rates are subject to governmental regulation following confirmation, that appropriate governmental approval has been obtained for any rate change provided for in the plan, or that such rate change be expressly conditioned on such approval. 11 U.S.C. §1129(a)(6). Section 1129(a)(6) of the Bankruptcy Code does not apply to the Plan, however, because there is no governmental regulatory commission that has jurisdiction over the Debtors.

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

73. The "best interests of creditors" test as set forth in section 1129(a)(7) of the Bankruptcy Code requires that, with respect to each impaired class of claims or interests, each holder of a claim or interest has accepted the plan or will receive property of a value not less than what such holder would receive if the debtor were liquidated under chapter 7. *See In re Leslie Fay Cos.*, 207 B.R. 764, 787 (Bankr. S.D.N.Y. 1997).

74. As section 1129(a)(7) of the Bankruptcy Code makes clear, the liquidation analysis applies only to non-accepting impaired claims or equity interests. If a class of claims or equity interests unanimously accepts the plan, the best interests test is deemed satisfied automatically for all members of that accepting class. *See* 11 U.S.C. § 1129(a)(7). The test requires that each holder of a claim or interest either accepts the plan or will receive or retain under the plan property having a present value, as of the effective date of the plan, not less than

the amount that such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code.

75. The Debtors performed a liquidation analysis, attached to the Disclosure Statement as Exhibit B (the "Liquidation Analysis"), to determine whether the Plan satisfies the "best interests" test. *See* Disclosure Statement Exhibit B. As set forth the Liquidation Analysis as well as in the Carlson Declaration, the overall values that may be realized by the holders of Claims in hypothetical chapter 7 cases are less than the value of the recoveries to stakeholders under the Plan. *See* Carlson Declaration ¶ 31.

76. Under the Plan, the holders of Class 1 Other Priority Claims, Class 2 Mortgage Lender Claim and Class 4 General Unsecured Claims are Unimpaired. The "best interests of creditors" test does not apply to Classes of Claims that are Unimpaired. Furthermore, in view of the unanimous acceptance of the Plan by all holders of Class 3 Mezzanine Lender Claim and Class 5 Equity Interests, the "best interests of creditors" test does not apply to those Classes.

77. Indeed, recoveries to all of the Debtors' creditors are maximized under the Plan. The Debtors' estates have value that would not be fully realized in a chapter 7 liquidation primarily because, among other reasons, (i) the Mezzanine Lender is undersecured, (ii) additional administrative expenses would be incurred in a chapter 7 liquidation, specifically those of a chapter 7 trustee charging statutory fees of up to 3% of disbursements and any costs of counsel to the chapter 7 trustee to become familiar with the facts and circumstances of these cases, and (iii) the remaining assets of the Debtors would have to be sold or otherwise disposed of in a less orderly fashion over a shorter period of time. Thus, the holders of Claims and Equity Interests in the Impaired Classes are not receiving or retaining any less value under the Plan than they would in chapter 7. Accordingly, the "best interests of creditors" test is satisfied as to each

Impaired Class of Claims and Interests because each dissenting holder of a Claim or Equity Interest in each such Class will receive or retain under the Plan, on account of such Claim, property of a value, as of the Effective Date of the Plan, that is not less than the amount that it would receive in a chapter 7 liquidation of the Debtors' assets on such date. As a result, the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code. *Id.*

H. The Plan Has Been Accepted By The Requisite Voting Classes Of Creditors And Interest Holders (Section 1129(a)(8))

78. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests under a plan has either accepted the plan or is not impaired under the plan. 11 U.S.C. § 1129(a)(8). With respect to an unimpaired class of claims, under section 1126 of the Bankruptcy Code, such unimpaired class of claims is "conclusively presumed" to have accepted the plan and need not be further examined under section 1129(a)(8). 11 U.S.C. § 1126(f). Thus, the Unimpaired Classes are presumed to have accepted the Plan.

79. With respect to an impaired class of claims, acceptance of a plan is determined by reference to section 1126 of the Bankruptcy Code, which identifies the members of a class that may vote on a plan and the number and amount of votes necessary for the acceptance of a plan by a class of claims or interests. In particular, section 1126 of the Bankruptcy Code provides that a plan is accepted by an impaired class of claims if the class members accepting hold at least two-thirds in amount and more than one-half in number of the claims held by the class members that have cast votes on the plan. 11 U.S.C. § 1126(c). In these Chapter 11 Cases, holders of the Class 3 Mezzanine Lender Claim and Class 5 Equity Interests (the only Impaired Classes entitled to vote under the Plan) unanimously voted to accept the Plan in accordance with section 1126 of the Bankruptcy Code.

I. The Plan Provides For The Payment Of Priority Claims (Section 1129(a)(9))

80. Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full on the effective date of a plan and that the holders of certain other priority claims receive deferred cash payments. The Plan satisfies each of the requirements of section 1129(a)(9). First, consistent with section 1129(a)(9)(A), the Plan, in section 3.1, provides for all Allowed Administrative Claims (i.e., § 507(a)(2) claims) to be paid in full in Cash as soon as practicable after the later of (i) the Effective Date and (ii) the date on which such Claim becomes an Allowed Administrative Claim, or upon such other terms as may be agreed to by the holder of such Allowed Administrative Claim, or (b) such lesser amount as the holder of such Allowed Administrative Claim, the Debtors and Mezzanine Lender might otherwise agree.

81. Second, the Plan provides that Priority Tax Claims will be treated consistently with section 1129(a)(9)(C), in that each holder of an Allowed Priority Tax Claim shall be paid in respect of such Allowed Priority Tax Claim the full amount thereof, without post-Petition Date interest or penalty, in Cash, as soon as practicable after the later of (i) the Effective Date and (ii) the date on which such Claim becomes an Allowed Claim or upon such other terms as may be agreed upon by the holder of such Allowed Priority Tax Claim, the Debtors and Mezzanine Lender.

82. Thus, the Plan complies with the requirements of section 1129(a)(9) of the Bankruptcy Code.

J. The Plan Has Been Accepted By At Least One Impaired, Non-Insider Class (Section 1129(a)(10))

83. Section 1129(a)(10) of the Bankruptcy Code provides that:

> If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

11 U.S.C. § 1129(a)(10).

84. The Debtors have satisfied this requirement. As described above and in the Klestadt Declaration, the Plan has been accepted by Classes 3 and 5, the only impaired Classes entitled to vote on the Plan. The Mezzanine Lender, the only party in Class 3, is not an insider of the Debtors. As a result, at least one Class of Claims that is Impaired under the Plan has accepted the Plan, determined without including any acceptance of the Plan by any insider, as required by section 1129(a)(10) of the Bankruptcy Code.

K. The Plan Is Feasible (Section 1129(a)(11))

85. Pursuant to section 1129(a)(11) of the Bankruptcy Code, a plan may be confirmed only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). Because the Plan provides for the complete liquidation of the Debtors' estates for the benefit of creditors that hold Claims against the Debtors, the requirements of section 1129(a)(11) are not applicable. However, to the extent it applies to implementation of the Plan, the feasibility requirement of section 1129(a)(11) is satisfied under the circumstances. The transactions contemplated by the Plan will maximize the value of the Debtors' estates and enable the Debtors to pay all holders of Allowed General Unsecured Claims in full, including postpetition interest. As set forth in section 4.2 of the Plan, to the extent the Debtors have insufficient funds to make the distributions contemplated under the Plan, the Mezzanine Lender or the Mezzanine Acquisition Entity will cover the shortfall.

L. The Plan Provides For The Payment Of Certain Fees (Section 1129(a)(12))

86. Section 1129(a)(12) of the Bankruptcy Code requires that certain fees listed in 28 U.S.C. § 1930, determined by the court at the hearing on confirmation of a plan, be paid or that provision be made for their payment. 11 U.S.C. § 1129(a)(12). The Plan provides that all fees payable pursuant to section 1930 of Title 28 of the United States Code shall be paid on the Effective Date (if due) by the Debtors. The Debtors will pay when due all United States Trustee quarterly fees under 28 U.S.C. § 1930(a)(6), plus interest, if any, due under 31 U.S.C. § 3717, on all disbursements, including plan payments and disbursements in and outside of the ordinary course of business, until the earliest of the entry of a final decree closing the Chapter 11 Cases, dismissal of the Chapter 11 Cases, or conversion of the Chapter 11 Cases to cases under chapter 7. *See* Plan, section 11.5.

M. Sections 1129(a)(13), (14),(15) & (16) are not Applicable to the Debtors

87. Section 1129(a)(13) of the Bankruptcy Code requires that a plan provide for the continuation, after the plan's effective date, of all retiree benefits at the level established by agreement or by court order pursuant to section 1114 of the Bankruptcy Code at any time prior to confirmation of the plan, for the duration of the period that the debtor has obligated itself to provide such benefits. The Debtors have no obligation to provide any retiree benefits, and accordingly, section 1129(a)(13) of the Bankruptcy Code is inapplicable to the Plan. However, even if it did apply as a result of the Debtors' obligation make payments to a pension fund for current union employees, that the Plan satisfies the provisions of section 1129(a)(13) as the Mezzanine Acquisition Entity will assume all obligations under any collective bargaining agreements, including but not limited to that with 32BJ. The Mezzanine Acquisition Entity will continue to make pension and benefit payments consistent with past practices.

88. The Debtors do not have any domestic support obligations, are not individuals, and are not corporations or trusts that are not moneyed, business or commercial corporations or trusts. Thus, sections 1129(14), (15) and (16) of the Bankruptcy Code are inapplicable to these Chapter 11 Cases.

N. Fair and Equitable; No Unfair Discrimination (Section 1129(b))

89. Section 1129(b)(1) of the Bankruptcy Code provides that, if certain requirements are met, a plan shall be confirmed notwithstanding that one or more classes does not accept the Plan. As set forth above and in the Klestadt Declaration, no class of impaired Claims or Equity Interests has voted to reject the plan. The legal rights of holders of Claims or Equity Interests are treated consistently with the treatment of other classes whose legal rights are substantially similar, and such holders of Claims or Equity Interest holders do not receive more than they legally are entitled to receive for their Claims or Equity Interests. Therefore, the Plan is fair and equitable as required by section 1129(b) of the Bankruptcy Code.

## VI. CONCLUSION

90. The Plan and Disclosure Statement comply with and satisfy all applicable requirements, including those under sections 1122, 1123, 1125, 1126 and 1129 of the Bankruptcy Code. Accordingly, the Debtors request that the Bankruptcy Court (a) approve the Disclosure Statement, (b) approve the Solicitation Procedures, (c) confirm the Plan, (d) overrule any Objections, if necessary, and (e) grant the Debtors such other and further relief as is just and proper.

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