

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re:

Chapter 11

Case No.: 11-12560 (MG)

MADISON HOTEL, LLC,

Debtor.

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**THIRD AMENDED DISCLOSURE STATEMENT FOR  
CREDITOR'S PLAN OF LIQUIDATION OF THE DEBTOR  
UNDER CHAPTER 11 OF THE BANKRUPTCY CODE**

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Dated: As of February 1, 2013

**COURT APPROVAL OF THIS DISCLOSURE STATEMENT DOES  
NOT CONSTITUTE COURT APPROVAL OR RECOMMENDATION  
ON THE MERITS OF THE PLAN OF REORGANIZATION**

**I. INTRODUCTION**

Express Service Capital, Inc. ("**Express**"), the largest unsecured creditor of Madison Hotel, LLC (the "**Debtor**"), submits this Disclosure Statement (the "**Statement**") pursuant to section 1125 of title 11, United States Code (the "**Bankruptcy Code**"). The Statement is provided to all of the Debtor's known creditors and interest holders in order to disclose the information known to Express and deemed to be material, important and necessary for the Debtor's creditors and interest holders to arrive at a reasonably informed decision in exercising their rights to vote on the plan of liquidation proposed by Express (the "**Plan**")<sup>1</sup>. A copy of the Plan is annexed hereto as **Exhibit A**. Also accompanying the Plan and Statement is a creditor's voting ballot (the "**Ballot**") for the acceptance or rejection of the Plan, together with a copy of the Order approving the Statement and Scheduling a Hearing on Confirmation of the Plan.

The Plan is predicated upon the sale of the Debtor's assets at an auction and the appointment of a Liquidation Trustee that will, among other things, oversee the auction process. 62 Mad LLC is an entity formed to acquire the Debtor's Property. Graves Hospitality Corporation is one of its managing members. This entity, with no relation to the Debtor or to Express, executed an asset purchase agreement to open the auction with an initial bid of \$25.4 million.

On the Confirmation Date, the Liquidating Trustee will be appointed to administer the Plan and Estate. The Trustee will have the exclusive right sell property of the estate, enter into contracts for the Sale of the Property, retain professionals, pursue Causes of Action, review and possibly object to Claims and make Distributions. The Trustee will determine whether to terminate or retain the services of the of the Receiver (defined below) and operate the Property, using the current management company, pending the closing of the Sale of the Property. The Plan also provides for the continuation of adequate protection payments to Madison Lender through the closing of the Sale. A more detailed discussion of the sales process and associated risks may be found in Article VI below captioned: **Means for Implementing the Plan and Sale-Related Risks**.

**Definitions and Exhibits**

Definitions. The definitions and designations of terms and names in the Plan apply to the Statement, and you should refer to the Plan for such definitions and designations.

Exhibits. All Exhibits to the Statement are incorporated as if fully set forth and are a part of the Statement.

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<sup>1</sup> Capitalized terms not otherwise defined in this Statement shall have the meanings set forth in the Plan.

### **Notice to Creditors and Interest Holders**

Express believes that confirmation and implementation of the Plan is in the best interest of the Debtor, the Debtor's estate, its creditors, and the Debtor's interest holders. Express believes that the distributions provided for in this Plan exceed the distributions that unsecured creditors would receive if the Debtor's assets were liquidated under chapter 7 of the Bankruptcy Code. For this reason, Express believes that approval of the Plan is the best opportunity for Holders of Claims to receive a distribution in this Chapter 11 Case.

Pursuant to Bankruptcy Code section 1125, on \_\_\_\_\_, 2013, the Bankruptcy Court approved this Disclosure Statement for submission to the Holders of Claims against, or Interests in, the Debtor.

On \_\_\_\_\_, 2013 at \_\_:\_\_ .m., a hearing will be held to consider confirmation of the Plan before the Honorable Martin Glenn, United States Bankruptcy Judge, United States Bankruptcy Court, Alexander Hamilton U.S. Custom House, Room 501, One Bowling Green, New York, New York 10004. The Court has directed that objections, if any, to confirmation of the Plan be served and filed on or before \_\_\_\_\_, 2013. The Confirmation Hearing may be adjourned from time to time by the Court without further notice except for the filing of a notice of the adjourned date on the Court's docket, or the announcement of the adjourned date at the Confirmation Hearing (or at any subsequent adjourned date for the Confirmation Hearing). Creditors entitled to vote may vote on the Plan by filling out and mailing the accompanying Ballot to SilvermanAcampora LLP ("**SilvermanAcampora**"), counsel to the Express, 100 Jericho Quadrangle, Suite 300, Jericho, New York 11753, Attention: Christopher Rubino, so that the Ballot is actually received on or before \_\_\_\_\_, 2013 at 5:00 p.m. In the event a Creditor sends its Ballot by e-mail to [CRubino@SilvermanAcampora.com](mailto:CRubino@SilvermanAcampora.com), that e-mail must be actually received by no later than 11:59 p.m., on \_\_\_\_\_, 2013.

Under the Bankruptcy Code, acceptance of a plan by a class of claims occurs when holders of at least two-thirds (2/3) in dollar amount and more than one-half (1/2) in number of the allowed claims of that class that cast ballots for acceptance or rejection of the plan vote to accept the plan. Thus, acceptance of the Plan by a particular class will occur only if at least two-thirds (2/3) in dollar amount and a majority in number of the holders of the claims in that class cast their Ballots in favor of acceptance. A vote may be disregarded if the Court determines, after notice and a hearing, that such acceptance or rejection was not solicited or produced in good faith or in accordance with the provisions of the Bankruptcy Code.

Bankruptcy Code section 1129(b) permits confirmation of the Plan, notwithstanding rejection by one or more Classes of Claims, if: (i) at least one impaired Class has accepted the Plan; and (ii) the Court finds that the Plan does not "discriminate unfairly" and is "fair and equitable" with respect to each rejecting Class. This procedure is generally referred to as "cram-down."

The purpose of this Statement is to inform all Holders of Claims and Equity Interests of the information deemed to be material, important and necessary in order to make an informed judgment about the Plan, and to vote for the acceptance or rejection of the Plan, where voting is necessary.

The approval by the Bankruptcy Court of this Statement does not constitute a recommendation as to the merits of the Plan, only that the Statement contains "adequate information" from which creditors and interest holders may form an opinion as to the merits of the Plan.

The financial information contained in this Statement has not been subject to a certified audit. Accordingly, Express is unable to warrant or represent that the information is accurate and complete in all respects, although Express has used its best efforts to set forth information and disclosures which are complete and accurate. This Statement has been prepared on the basis of assumptions which the Express believes to be reasonable, however, there can be no assurance that these assumptions will prove to have been accurate.

## **II. EXPLANATION OF CHAPTER 11**

Chapter 11 is the principal business reorganization chapter of the Bankruptcy Code but can also be used to liquidate a business entity in an orderly manner, ensuring greater returns to Holders of Claims than liquidation under chapter 7 of the Bankruptcy Code. In addition to permitting debtor rehabilitation or orderly liquidation, chapter 11 promotes equality of treatment for similarly situated creditors and similarly situated equity interest holders, subject to the priority of distributions prescribed by the Bankruptcy Code.

The commencement of a chapter 11 case creates an estate that comprises all of the legal and equitable interests of the debtor as of the bankruptcy petition date. Consummating a plan is the principal objective of a chapter 11 case. The Bankruptcy Court's confirmation of a plan binds the debtor, any person acquiring property under the plan, any creditor or equity interest holder of a debtor, and any other person or entity as may be ordered by the Bankruptcy Court in accordance with the applicable provisions of the Bankruptcy Code. Subject to certain limited exceptions, the order issued by the Bankruptcy Court confirming a plan provides for the treatment of the debtor's liabilities in accordance with the terms of the confirmed plan.

Prior to soliciting acceptances of a proposed chapter 11 plan, Bankruptcy Code §1125 requires a plan proponent to prepare a disclosure statement containing information of a kind, and in sufficient detail, to enable a hypothetical reasonable creditor or investor to make an informed judgment regarding acceptance of the chapter 11 plan. This Disclosure Statement is being submitted in accordance with the requirements of Bankruptcy Code §1125.

## **III. DEBTOR PRIOR TO THE CHAPTER 11 CASE**

### **The Debtor's Business**

The Debtor is the owner and operator of "The MAve Hotel" a boutique hotel located at 62 Madison Avenue, New York, New York. The hotel is twelve (12) floors and has seventy-two (72) rooms.

The Debtor, a limited liability company (LLC), is solely owned by Madison Hotel Owners. LLC ("**Owners**"), a shell company created for the purpose of owning the Debtor. Owners filed its own chapter 11 petition, separate from the Debtor's case, on May 16, 2011. Neither Owner's chapter 11 case, nor any claims or equity interests involved in Owner's chapter 11 case, are treated under the terms of the Plan.

Through various filings with the Bankruptcy Court, the Debtor has asserted that its financial issues were caused by the recent recession, leading to a decline in both income and cash flow. In response, the Debtor filed for chapter 11 protection.

### **The Creditor's Committee and the Interest of Unsecured Creditors**

Under Bankruptcy Code §1102, the United States Trustee must attempt to appoint an official committee of unsecured creditors to represent the collective interest of all of the unsecured creditors involved in the Chapter 11 Case. To date, an unsecured creditors committee has not been appointed, as interest in such committee is lacking. Express' Claim constitutes over ninety-one percent (91%) of all of the Debtor's unsecured debt. With an unsecured claim of over \$4,100,000.00, Express has a considerable stake in the Debtor's Chapter 11 Case and represents the overwhelming interest of unsecured creditors in maximizing the value to be returned to unsecured creditors.

### **The Debtor's Pre-Petition Credit Facility**

On or about August 28, 2009, the Debtor entered into a building loan agreement and project loan agreement (collectively, the "**Loan Agreements**") with Textron Financial Corporation ("**Textron**"). Under the Loan Documents Textron provided a senior loan (the "**Loan**") to the Debtors, secured by mortgages on the real property at 62 Madison Avenue, New York, New York, the location of The MAve Hotel.

On or about the date the Loan Agreements were executed, Owners, 62 Madison Partners LLC, Joseph Ben Moha, and Benzion Suky (the "**Guarantors**") executed and delivered to Textron a Guaranty Agreement (the "**Guaranty**"), as amended on February 11, 2009, in order to induce Textron to enter into the Loan Agreements. Under the Guaranty, the Guarantors guaranteed the full performance and payment of all of the Debtor's obligations under the Loan Agreements, including the payment of all principal, interest, costs, fees and expenses under the Loan Agreements. On or about April 5, 2010 Textron assigned and transferred all of the rights, title, and interest under the Loan Agreements to Madison Lender.

### **Loan Foreclosure Action**

On November 11, 2009, Textron informed the Debtor that it was in default under the Loan Agreements for failing to make monthly payments on October 1, 2009 and November 1, 2009. Pursuant to terms in the Loan Agreement, Textron accelerated payment of all obligations under the Loan.

Textron filed a summons and complaint in the Supreme Court for the State of New York, New York County (the "**State Court**") on February 16, 2010, seeking to foreclose on the mortgages securing the loan, and compelling payment by the Guarantors under the terms of the Guaranty. Textron also made an application to the State Court for the appointment of a temporary receiver (the "**Receiver**"). The State Court granted the application for the appointment of a receiver on February 17, 2010. The Receiver continues to operate The MAve Hotel pursuant to Bankruptcy Code §543(d)(1).

## **IV. THE DEBTOR'S CHAPTER 11 CASE**

### **Commencement and Conduct of the Chapter 11 Case**

After the Debtor filed its chapter 11 petition on May 26, 2011, the Debtor, as debtor in possession, was authorized to manage its business and assets in the ordinary course of business without specific Court authorization, subject to the role and duties of the Receiver in custody of The MAve Hotel.

### **Significant Motions and Orders**

Throughout the Chapter 11 Case, the Debtor has filed a number of significant motions and the Bankruptcy Court has issued a number of orders, including:

#### **Motion to Set Last Day to File Proofs of Claim**

On June 21, 2011, the Debtor filed a motion seeking entry of an order establishing deadlines and procedures for filing proofs of claim (ECF Doc. No. 13) (the "Bar Date Motion"). On June 29, 2011, the Court entered an Order approving the Bar Date Motion (ECF Doc. No. 15). Pursuant to the Order approving the Bar Date Motion, the General Bar Date was established as July 28, 2011 and the Governmental Bar Date was established as November 22, 2011.

#### **Consent Order Authorizing the Use of Cash Collateral, Providing Adequate Protection, and Continuing Receiver in Possession**

On August 17, 2011, the Debtor, Madison Lender, and the Receiver consented to an order whereby the Receiver was authorized to maintain and operate the MAve Hotel. As part of the order, Madison Lender consented to the Receiver's use of its cash collateral for the purposes of maintaining and operating the MAve Hotel.

### **Competing Plans**

On July 31, 2011 the Debtor filed a joint plan of reorganization and disclosure statement (respectively, ECF Doc. Nos. 22 and 21) attempting to reorganize both the Debtor and Owners. On September 20, 2011, Madison Lender objected to the disclosure statement filed by the Debtor (ECF Doc. No. 42). Following the objection, Debtor filed an amended plan of reorganization and amended disclosure statement (respectively, ECF Doc. Nos. 47 and 48) on October 19, 2011, and Second amended plan of reorganization and amended disclosure statement on December 9, 2011 (respectively, ECF Doc. Nos. 50 and 51).

Madison Lender then filed a joint plan of reorganization and disclosure statement on April 18, 2012 (respectively, ECF Doc. Nos. 57 and 58). On May 17, 2012 the Debtor objected to Madison Lender's disclosure statement. Following the objection, Madison Lender filed a first amended plan of joint reorganization and first amended disclosure statement on May 22, 2012 (respectively, ECF Doc. Nos. 76 and 77). Shortly thereafter Madison Lender filed a second amended joint plan of reorganization and second amended disclosure statement on May 24, 2012 (respectively, ECF Doc. Nos. 81 and 82). On May 25, 2012 the Court entered an order approving the Madison Lender's second amended disclosure statement (ECF Doc. No. 84). Express objected to Madison Lender's second amended joint plan of reorganization on June 28, 2012 (ECF Doc. No. 108). Madison Lender's second amended plan of joint reorganization was never confirmed.

Subsequently, Madison Lender filed its third amended plan of reorganization and third amended disclosure statement on September 5, 2012 (respectively, ECF Doc. Nos. 116 and 117) and modified third amended plan and modified third amended disclosure statement on October 12, 2012 (respectively, ECF Doc. Nos. 132 and 133). Madison Lender's modified third amended disclosure statement was approved by the Court at a hearing held on January 17, 2013. At that hearing the Court also directed the Madison Lender and the Debtor to provide certain due diligence information to the proposed Stalking Horse Bidder under this Plan. This

information was requested from the Madison Lender, the Debtor and the Receiver on numerous occasions. This information was necessary to allow the proposed Stalking Horse Bidder to be comfortable in executing a proposed Stalking Horse contract that does not contain any due diligence contingency.

## **Claims Process and Bar Dates**

### **Chapter 11 Claims**

In chapter 11, claims against a debtor are established either as a result of being listed in a debtor's schedules of assets and liabilities or through assertion by a creditor in a timely filed proof of claim. Claims asserted by a creditor are either allowed or disallowed. If allowed, a claim would be recognized and treated pursuant to a plan; if disallowed, a creditor would have no right to obtain any recovery on or otherwise enforce the claim against the debtor.

### **Bar Dates**

Pursuant to the Bankruptcy Court's Order entered on June 29, 2011, approving the Bar Date Motion, the bar date for filing proofs of claim against the Debtor was established as July 28, 2011, and the deadline for filing a proof of claim by a governmental unit (as defined by Bankruptcy Code §101(27)) was established as November 22, 2011.

## **V. SUMMARY OF PLAN OF LIQUIDATION AND TREATMENT OF CLAIMS AND INTERESTS**

Below is a summary of the Plan. Parties in interest are urged to review the Plan in its entirety to determine how the Plan affects their rights as Holders of Claims and Equity Interests.

The Plan provides for the Sale of the Property to be administered by a Liquidating Trustee, and the creation of a Liquidating Trust to hold and administer all of the Estate's assets, including Causes of Action, after Class 1 Claims have been paid at the closing of the Sale. Because Express believes that the Liquidating Trustee will enter into a stalking horse sale agreement, the Plan provides for estimated distributions to General Unsecured Claims of approximately thirty percent (30%) which could be increased if a higher sales price is obtained at the Auction. Absent a stalking horse sales agreement, there can be no certainty that a price for the Property will be obtained that will result in a distribution to General Unsecured Creditors. Express believes that the treatment of General Unsecured Claims under the Plan provides Holders of such Claims with greater value compared to what they would receive in a chapter 7 case. A further discussion of the sales process, the proposed Stalking Horse Bid and risks associated with the sales process may be found at Article VI. "Means for Implementing the Plan".

### **Unclassified Claims**

Certain types of claims are automatically entitled to specific treatment under the Bankruptcy Code. They are not considered impaired, and holders of such claims do not vote on the Plan. Holders of these claims may, however, object if, in their view, their treatment under the Plan does not comply with that required by the Bankruptcy Code. As such, Express has *not* placed the following claims in any class:

### Administrative Claims

Administrative Claims are Claims arising from the costs or expenses of administering the Debtor's chapter 11 case, which are allowed under Bankruptcy Code §503. These costs and expenses include Fee Claims for services rendered by Retained Professionals. Administrative Claims also include the value of any goods sold to the Debtor in the ordinary course of business and received within twenty (20) days prior to the Commencement Date, which are allowed under Bankruptcy Code §503(b)(9). The Bankruptcy Code requires that General Administrative Claims be paid on the Effective Date of the Plan, unless a particular claimant agrees to a different treatment under the Plan.

The chart below lists Express's estimates for the Debtor's Administrative Claims and Express's proposed treatment under the Plan:

<u>Type</u>	<u>Estimated Amount Owed</u>	<u>Proposed Treatment</u>
Expenses Arising in the Ordinary Course of Business After the Petition Date (including current goods purchases, wages, and rent).	\$150,000	To be paid in the ordinary course of business, in Cash, or upon such other terms as may be agreed upon by the holder of the Claim and the Trustee.
The Value of Goods Received in the Ordinary Course of Business Within 20 Days Before the Commencement Date	\$0	Paid in full on the Effective Date, or as soon as reasonably practicable, in Cash, or upon such other terms as may be agreed upon by the holder of the Claim and Trustee.
Professional Fees, as approved by the Court.	\$150,000	Paid in full on the Effective Date, or as soon as reasonably practicable, in Cash, or upon such other terms as may be agreed upon by the holder of the Claim and the Trustee, or according to Bankruptcy Court order if such fees have not been approved by the Court on the Effective Date of the Plan
Clerk's Office Fees	\$0	Paid in full on the Effective Date, or as soon as reasonably practicable of the Effective Date.
<b>TOTAL</b>	<b>\$300,000</b>	

### Priority Tax Claims

Priority tax claims are unsecured income, employment, and other taxes described by Bankruptcy Code section 507(a)(8). Unless the holder of such a section 507(a)(8) priority tax claim agrees otherwise, it must receive the present value of such claim, on the Effective Date.

The chart below lists Express's estimates for the Debtor's Bankruptcy Code §507(a)(8)



priority tax claims and Express's proposed treatment under the Plan:

<b>Description (name and type of tax)</b>	<b>Estimated Amount Owed</b>	<b>Date of Assessment</b>	<b>Treatment</b>
Priority Tax Claims (estimated)	\$325,000	11/27/12	Paid in full, in Cash, as of the Effective Date of the plan, or as soon as reasonably practicable, equal to the allowed amount of such claims.
<b>Total:</b>	<b>\$325,000</b>		

**Fees Payable to the United States Trustee**

The United States Trustee is entitled to payment, on a quarterly basis, of fees under chapter 123 of title 28, United States Code, including, but not limited to, all fees required to be paid by 28 U.S.C. §1930(a)(6) and interest, if any, required to be paid by 31 U.S.C. §3717 (collectively, "**U.S. Trustee Fees**"). U.S. Trustee Fees will accrue and be timely paid until the Case is closed, dismissed, or converted to a chapter 7 case. Any U.S. Trustee Fees owed on or before the Effective Date of this Plan will be paid in full on the Effective Date of the Plan, or as soon as reasonably practicable. The Liquidating Trustee shall remain responsible for any and all U.S. Trustee fees that become due and shall pay such fees on a timely basis.

The following chart lists Express's estimates of the Debtor's U.S. Trustee Fees and Express's proposed treatment under the Plan:

<b>Type</b>	<b>Estimated Amount Owed</b>	<b>Proposed Treatment</b>
Office of the U.S. Trustee Fees	Less than \$20,000	Paid in full in Cash on the Effective Date of the Plan, or as soon as reasonably practicable.

**Classes of Claims and Equity Interests**

The following are the classes set forth in the Plan, and the proposed treatment that each class will receive under the terms of the Plan.

**Class 1- Madison Lender's Secured Claim**

Allowed Secured Claims are claims secured by property of the Debtor's bankruptcy estate to the extent allowed as secured claims under Bankruptcy Code section 506. If the value of the collateral securing the creditor's claim is less than the amount of the creditor's allowed claim, the deficiency will be treated as a General Unsecured Claim, unless otherwise provided for in the Plan. In the Debtor's Chapter 11 Case, Madison Lender is the only secured claim, and represents the only Class 1 Claim under the Plan.

The following chart lists the description of the Class 1 Claim of Madison Lender and

Express's proposed treatment of the Class 1 Claim:

<u>Description</u>	<u>Impairment</u>	<u>Treatment</u>
Class 1 Claim- Madison Lender's Secured Claim in the total amount of \$23,549,732.45, including all interest, and costs and expenses owed and unpaid under the Loan, including attorneys' fees through the Effective Date	Unimpaired	Madison Lender will receive \$23,549,732.45, plus accrued interest and fees through the closing of the Sale, in full and final satisfaction of its Class 1 Claim upon the Effective Date. Madison Lender will be required to cooperate with the Trustee in the Sale process and provide the Trustee with a Pay off letter at least three days before the scheduled closing date of the Sale.

### Class 2- Priority (Non-Tax) Claims

Certain priority claims that are referred to in Bankruptcy Code §§507(a)(1), (4), (5), (6), and (7) are required to be placed in classes. The Bankruptcy Code requires that each holder of a priority claim receive Cash on the Effective Date of the Plan equal to the allowed amount of such claim; however, a class of holders of such claims may vote to accept different treatment.

The following chart lists the description of Class 2 Claims and Express's proposed treatment of Class 2 Claims:

<u>Description</u>	<u>Impairment</u>	<u>Treatment</u>
Class 2 Claims- Priority non-tax claims, estimated at \$0	Unimpaired	Paid in full upon the Effective Date, or as soon as reasonably practicable.

### Class 3- General Unsecured Claims

General Unsecured Claims are Claims that are not secured by property of the estate and are not entitled to priority under Bankruptcy Codes section 507(a).

The following chart lists the description of Class 3 Claims and Express's proposed treatment of Class 3 Claims:

<u>Description</u>	<u>Impairment</u>	<u>Treatment</u>
Class 3 Claims- General Unsecured Claims (estimated at \$4,700,000.00)	Impaired	Holders of Class 3 Claims shall receive their pro rata share of the proceeds remaining from the Sale, after Classes 1 and 2 have been paid in full. The Trustee will distribute funds from the Liquidating Trust to Holders of Class 3 Claims.

### Class 4- Equity Interest

Equity Interest holders are entities with ownership interests in the Debtor, issued by the Debtor prior to the Petition Date.

The following chart lists the description of Class 4 Claims and Express's proposed treatment of Class 4 Claims:

<u>Description</u>	<u>Impairment</u>	<u>Treatment</u>
Class 4 Claims- Equity Interests	Impaired	Holders of Class 4 Claims shall not receive distributions on account of their equity interest unless and until all claims in other classes are paid in full with interest.

#### **Claims and Interests Unimpaired Under the Plan**

The term "impaired" shall have the same meaning as it has under Bankruptcy Code §1124. Holders of Administrative Expenses and Priority Tax Claims are unimpaired, however, based on the nature of their claim, are not entitled to vote.

Classes 1 and 2 are unimpaired under the Plan and shall be deemed to have accepted the Plan.

#### **Claims and Interests Impaired Under the Plan**

Class 3 is impaired under the Plan and is entitled to vote to accept or reject the Plan.

Class 4 is impaired under the Plan, is not entitled to vote, and is deemed to have rejected the plan because Holders of Class 4 Claims are not receiving a distribution under the Plan.

### **VI. MEANS FOR IMPLEMENTING THE PLAN AND SALE-RELATED RISKS**

The Plan is predicated upon the sale of the Debtor's assets at an auction and the appointment of a Liquidation Trustee that will, among other things, oversee the auction process. The Liquidation Trustee will determine whether or not to displace the Receiver. In either event, the Hotel will be operated using the same management company approved by Madison Lender through the closing of the sale. To the extent funds are available from such operations, the Trustee will continue to make adequate protection payments to Madison Lender. 62 Mad LLC an entity with no relation to the Debtor or to Express executed an asset purchase agreement (the "Mad Hotel Stalking Horse Bid") to open the auction with an initial bid of \$25.4 million.

On the Confirmation Date, the Liquidating Trustee will be appointed to administer the Plan and Estate. The Trustee will have the exclusive right sell property of the estate, enter into contracts for the Sale of the Property, retain professionals, pursue Causes of Action, review and possibly object to Claims and make Distributions.

The Liquidation Trustee will retain Savills, LLC ("Savills") to manage the sales process. Savills is familiar with the Property and believes that the Property can be effectively marketed, an auction held and a sale approved within the time frames contemplated in the Plan. Although a number of entities have expressed interest in acquiring the Debtor's assets, there is no certainty that a higher or better offer than the Mad Hotel Stalking Horse Bid will be received.

Express wanted the Liquidation Trustee to set a floor price for the sale and enter into a Stalking Horse Bid due to the uncertainty of a higher or better offer being received. In addition, Express has concerns that under the Madison Lender's Plan, its initial bid was only \$23.0 million. The balance of the Madison Lender's claim will have to be satisfied from Hotel Cash. This means that, unless there was more than one other bidder, there is a substantial risk that the Property will not sell for an amount sufficient to satisfy the Madison Lender Claim.

The Madison Lender asserts that the existence of the Mad Hotel Stalking Horse Bid, providing bid protections such as the Break Up Fee and Expense Reimbursement as the proposed Stalking Horse Bidder, might have the effect of "chilling" competitive bids that may be made in the same price range. Express believes that the benefit of an initial bid that provides certainty of a recovery to unsecured creditors, coupled with the risk inherent in the Madison Lender's plan that a competing bidder may never have to bid as high as \$25.4 million, justifies providing a Stalking Horse bidder with such protections.

Consequently, the Plan provides that the Liquidating Trustee will enter into a Stalking Horse Bid for the Sale of the Property. The Trustee, working in conjunction with Savills, shall implement the Auction and Sales Procedures in connection with the marketing of the Property and solicitation of bids, whereby the Trustee will accept bids higher or better than the Stalking Horse Bid. In the event that the Stalking Horse Bidder is not the successful bidder at the Auction, the Stalking Horse Bidder will receive a Break Up Fee of 1.5% of the Stalking Horse Bid and reimbursement of out-of-pocket expenses, including but not limited to legal fees and expenses, in an amount up to an additional ½ of 1% of the Stalking Horse Bid. In the event that the successful bidder or the second highest bidder fails to close on the purchase Madison Lender shall be entitled to be a back up bidder, even if the bid is less than the Stalking Horse Bid, provided that such back up bid includes value to creditors on terms no less than what Madison Lender was proposing in its Third Amended Plan. Savills, working with the Liquidation Trustee, may entertain other back up bidders to be available in the event that there are no higher or better offers received and the Stalking Horse Bidder fails to close on the sale of the Property. Nothing herein shall prevent the Madison lender from credit bidding its secured claim as part of a higher or better offer for the Property.

The timing of marketing process and sales procedures is described in the chart below:

Event	Timing
Marketing Activities	Commences on the Confirmation Date and concludes 30 days after the Confirmation Date
Bid Solicitation and Review	Commences upon the conclusion of the marketing period and concludes 15 days thereafter
Competitive Bid Auction	To be held on the first business day on or after the 46 <sup>th</sup> day after the Confirmation Date
Bankruptcy Court Approval Hearing	At the election of the Liquidating Trustee, 1 day after the Auction (subject to the Bankruptcy Court's availability)

The Plan will be primarily funded by the proceeds from the Sale of the Property. After the Confirmation Date, the Trustee will hold an Auction for the Sale of the Property. Following the Auction, Madison Lender's Class 1 Claim will receive payment from the proceeds of the Sale at the Sale closing. The remaining net proceeds from the Sale will be deposited into an account established by the Trustee in accordance with section 345 of the Bankruptcy Code.

The proceeds of the Sale will be used to pay the following expenses and Claims in the following order:

- **Allowed Class 1 Claim-** Madison Lender's Secured Claim, including interest and attorney's fees.
- **U.S. Trustee Fees**, including applicable interest.
- **Broker Commissions** due to Savills.
- **Allowed Administrative Claims.**
- **Allowed Class 2 Claims-** Priority Non-Tax Claims.
- **Allowed Class 3 Claims-** General Unsecured claims, paid on a Pro Rata Basis.<sup>2</sup>

All net proceeds remaining after payment of Class 1 Claims will be included in the Liquidating Trust. All payments to Classes 2 and 3 will be from proceeds included in the Liquidating Trust. All other funding for the Plan will come from the resolution of Causes of Action pursued by the Trustee, and included in the Liquidating Trust for payment to Class 3 Claims.

The Sale of the Property is exempt from all stamp tax or similar tax or governmental assessment in the United States. Additionally, the Sale is exempt from any such state or local taxes and assessments.

## **VII. TREATMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

In order to facilitate the sale, transfer and conveyance of the Property by the Liquidation Trustee, the Plan constitutes and incorporates a motion by the Debtor, in accordance with Section 365 of the Bankruptcy Code, to assume and assign to the highest and/or best offeror as may be identified following the sale process, those Executory Contracts and Unexpired Leases that are designated and identified by such successful bidder, excluding such contracts and leases that (a) have already been assumed or have been rejected pursuant to a Final Order of the Bankruptcy Court in accordance with Section 365 of the Bankruptcy Code, (b) are specifically treated otherwise in this Plan, or (c) are the subject of a motion to reject that is pending before the Bankruptcy Court on the Effective Date. The Confirmation Order shall represent and reflect an order of the Bankruptcy Court approving such assumptions and assignments as of the Effective Date. To the extent necessary or appropriate, the Plan constitutes and incorporates a motion by the Debtor, in accordance with Section 365 of the Bankruptcy Code, to extend the Debtor's time to assume or reject Executory Contracts and Unexpired Leases through and including the designation date with respect to a sale of the

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<sup>2</sup> Equity Interests, Class 4 Claims, are not likely to be receiving a distribution and will not likely share in the proceeds from the Sale.

Property. Counter parties to such Executory Contracts and Unexpired Leases shall be entitled to adequate assurance of future performance from any proposed assignee.

Any entity with a Claim that arises from the rejection of an Executory Contract or Unexpired Lease must file its Claim within the later of thirty (30) days after the date of the order rejecting the Executory Contract or Unexpired Lease or the first business day that is 30 days after the Effective Date. Any entity with a Claim arising from the rejection of an Executory Contract of Unexpired Lease shall have the same rights as a Class 3 Claimant to the extent such Claim becomes an Allowed General Unsecured Claim.

#### **VIII. PROCEDURES FOR RESOLVING DISPUTED, CONTINGENT, AND UNLIQUIDATED CLAIMS OR EQUITY INTERESTS**

After the Confirmation Date, the Trustee will have the exclusive authority to object to Claims and settle, compromise, withdraw or litigate objections to Claims. The Trustee may also file omnibus Claims objections and request that the Bankruptcy Court estimate any disputed Claims. Objections to Claims, other than Administrative Claims, must be filed by the Claims Objection Bar Date. For additional information on procedures for resolving Claims, see Article VIII of the Plan.

#### **IX. CONDITIONS PRECEDENT TO CONFIRMATION AND CONSUMMATION OF THE PLAN**

##### **Conditions Precedent to Confirmation**

It shall be a condition precedent to Confirmation of the Plan that all provisions, terms and condition of the Plan, including but not limited to the Liquidating Trust Agreement, the Auction and Sales Procedures, the Break Up Fee and Expense Reimbursement, are approved in the Confirmation Order and 62 Mad Hotel LLC shall have delivered the executed Mad Hotel Stalking Horse Bid and the deposit required therein.

##### **Condition Precedent to Consummation and Occurrence of the Effective Date**

It shall be a condition to Consummation of the Plan and occurrence of the Effective Date that the following conditions shall have been satisfied or waived pursuant to the provisions of the Plan:

1. the Auction shall have been conducted and the Trustee has selected the highest or best offer;
2. the closing of the Sale of the Property to the Buyer shall have occurred;
3. the Confirmation Order shall have been entered and become a Final Order in form and substance satisfactory to Express;
4. all documents and agreements necessary to implement the Plan shall have (a) been tendered for delivery, and (b) been effected or executed;
5. all actions, documents, certificates and agreements necessary to implement this Plan shall have been effected or executed and delivered to the required parties and, to the extent required, Filed with the applicable governmental units in accordance with applicable laws;

6. all necessary documents shall have been executed and delivered to the Trustee sufficient to permit the Trustee to carry out his duties in administering the Plan and Estate.

**X. SETTLEMENT, INJUNCTION AND RELATED PROVISIONS**

**Compromise and Settlement**

After the Effective Date, and in accordance with the Plan, Bankruptcy Code §363, and Bankruptcy Rule 9019, the Trustee may compromise and settle Claims against the Debtor and Causes of Action against other Entities, in his sole and absolute discretion without notice or approval by the Bankruptcy Court.

**Discharge**

**PURSUANT TO BANKRUPTCY CODE §1141(d)(3), CONFIRMATION OF THE PLAN WILL NOT DISCHARGE CLAIMS AGAINST THE DEBTOR; PROVIDED, HOWEVER, THAT NO HOLDER OF A CLAIM AGAINST THE DEBTOR MAY, ON ACCOUNT OF SUCH CLAIM, SEEK OR RECEIVE ANY PAYMENT OR OTHER DISTRIBUTION FROM, OR SEEK RECOURSE AGAINST PROPERTY OF THE DEBTOR'S ESTATE, EXCEPT AS EXPRESSLY PROVIDED IN THE PLAN.**

**Exculpation**

**TO THE EXTENT PERMISSIBLE THOSE PERSONS AND ENTITIES IDENTIFIED IN BANKRUPTCY CODE §1125(e), SHALL NEITHER HAVE, NOR INCUR ANY LIABILITY TO ANY ENTITY FOR ACTS BEFORE THE EFFECTIVE DATE TAKEN OR OMITTED TO BE TAKEN IN CONNECTION WITH, OR RELATED TO FORMULATING, NEGOTIATING, PREPARING, DISSEMINATING, IMPLEMENTING, ADMINISTERING, CONFIRMING OR EFFECTING THE CONSUMMATION OF THE PLAN, THE DISCLOSURE STATEMENT, OR ANY CONTRACT, INSTRUMENT, RELEASE OR OTHER AGREEMENT OR DOCUMENT CREATED OR ENTERED INTO IN CONNECTION WITH THE PLAN, OR ANY ACT BEFORE THE EFFECTIVE DATE TAKEN OR OMITTED TO BE TAKEN IN CONNECTION WITH OR IN CONTEMPLATION OF THE LIQUIDATION OF THE DEBTOR; PROVIDED, HOWEVER, THAT THE FOREGOING "EXCULPATION" SHALL HAVE NO EFFECT ON THE LIABILITY OF ANY PERSON OR ENTITY THAT RESULTS FROM ANY SUCH ACT OR OMISSION THAT IS DETERMINED IN A FINAL ORDER TO HAVE RESULTED FROM SUCH PERSON'S OR ENTITY'S GROSS NEGLIGENCE, WILLFUL MISCONDUCT, BREACH OF FIDUCIARY DUTY, CRIMINAL CONDUCT, ULTRA VIRES ACTIONS, OR THE DISCLOSURE OF CONFIDENTIAL INFORMATION THAT CAUSES DAMAGES, AND, IN ALL RESPECTS, THE DEBTOR SHALL BE ENTITLED TO RELY UPON THE ADVICE OF COUNSEL WITH RESPECT TO THEIR DUTIES AND RESPONSIBILITIES UNDER THE PLAN.**

**NOTHING IN THE PLAN OR THE CONFIRMATION ORDER SHALL ENJOIN THE UNITED STATES GOVERNMENT OR ANY OF ITS AGENCIES OR ANY STATE AND LOCAL AUTHORITY, FROM BRINGING ANY CLAIM, SUIT, ACTION OR OTHER PROCEEDINGS (WHETHER DIRECTLY, INDIRECTLY, DERIVATIVELY OR OTHERWISE) AGAINST THE DEBTOR, OR ANY OF THE DEBTOR'S OFFICERS, DIRECTORS, MEMBERS, EMPLOYEES, ATTORNEYS, ADVISORS, AGENTS, REPRESENTATIVES AND ASSIGNS, OR THE DEBTOR'S PROPERTY, FOR ANY LIABILITY, INCLUDING UNDER THE INTERNAL REVENUE CODE, THE ENVIRONMENTAL LAWS (OR ANY CRIMINAL LAWS) OF THE UNITED STATES OR ANY STATE OR LOCAL AUTHORITY. IN ADDITION, THE**

**INJUNCTION PROVIDED FOR IN THE PLAN SHALL NOT RELEASE ANY ATTORNEY FROM ANY OBLIGATIONS OWED UNDER RULE 1.8(h) OF THE NEW YORK STATE RULES OF PROFESSIONAL CONDUCT.**

**Preservation of Rights of Action/ Reservation of Rights**

After the Confirmation Date, the Trustee may commence, pursue, litigate or settle, as appropriate, any and all Causes of Action, whether existing as of the Petition Date or thereafter arising, in any court or other tribunal including in an adversary proceeding Filed in the Chapter 11 Case, in his sole and absolute discretion without consent or approval by the Bankruptcy Court or any other party.

**Injunction**

**EXCEPT AS OTHERWISE PROVIDED IN THE PLAN, ALL ENTITIES WHO HAVE HELD, HOLD OR MAY HOLD CLAIMS, EQUITY INTERESTS, CAUSES OF ACTION, OR LIABILITIES AGAINST THE DEBTOR OR THE PROPERTY ARE PERMANENTLY ENJOINED AND PRECLUDED, FROM AND AFTER THE EFFECTIVE DATE, FROM: (A) COMMENCING OR CONTINUING IN ANY MANNER ANY ACTION OR OTHER PROCEEDING OF ANY KIND AGAINST THE BUYER, OR THE PROPERTY, AND ANY ENTITY ENTITLED TO EXCULPATION UNDER THIS PLAN, ON ACCOUNT OF OR IN CONNECTION WITH OR WITH RESPECT TO ANY CLAIMS, EQUITY INTERESTS, CAUSES OF ACTION OR LIABILITIES OF THE DEBTOR; (B) ENFORCING, ATTACHING, COLLECTING OR RECOVERING BY ANY MANNER OR MEANS ANY JUDGMENT, AWARD, DECREE OR ORDER AGAINST THE PROPERTY, AND ANY ENTITY ENTITLED TO EXCULPATION ON ACCOUNT OF OR IN CONNECTION WITH OR WITH RESPECT TO ANY CLAIMS, EQUITY INTERESTS, CAUSES OF ACTION OR LIABILITIES OF THE DEBTOR; (C) CREATING, PERFECTING OR ENFORCING ANY LIEN, CLAIM OR ENCUMBRANCE OF ANY KIND AGAINST THE PROPERTY, AND ANY ENTITY ENTITLED TO EXCULPATION ON ACCOUNT OF OR IN CONNECTION WITH OR WITH RESPECT TO ANY SUCH CLAIMS, EQUITY INTERESTS, CAUSES OF ACTION OR LIABILITIES OF THE DEBTOR; AND (D) ASSERTING ANY RIGHT OF SETOFF, SUBROGATION OR RECOUPMENT OF ANY KIND AGAINST THE PROPERTY AND ANY ENTITY ENTITLED TO EXCULPATION ON ACCOUNT OF OR IN CONNECTION WITH OR WITH RESPECT TO ANY SUCH CLAIMS, EQUITY INTERESTS, CAUSES OF ACTION OR LIABILITIES, UNLESS SUCH HOLDER HAS FILED A MOTION REQUESTING THE RIGHT TO PERFORM SUCH SETOFF ON OR BEFORE THE CONFIRMATION DATE, AND NOTWITHSTANDING ANY INDICATION IN A PROOF OF CLAIM OR INTEREST OR OTHERWISE THAT SUCH HOLDER ASSERTS, HAS OR INTENDS TO PRESERVE ANY RIGHT OF SETOFF PURSUANT TO BANKRUPTCY CODE §553 OR OTHERWISE.**

**XI. RETENTION OF JURISDICTION**

Notwithstanding the entry of the Confirmation Order and the occurrence of the Effective Date, to the extent legally permissible, the Bankruptcy Court shall, after the Effective Date, retain such jurisdiction over the Chapter 11 Case and all Entities with respect to all matters related to the Chapter 11 Case, the Debtor and the Plan, including jurisdiction to:

1. allow, disallow, determine, liquidate, classify, estimate or establish the priority or secured or unsecured status of any Claim, including the resolution of any request for payment of



any Administrative Claim and the resolution of any and all objections to the allowance or priority of any Claim;

2. grant or deny any applications for allowance of compensation or reimbursement of expenses authorized pursuant to the Bankruptcy Code or the Plan, for periods ending on or before the Effective Date;

3. resolve any matters related to the assumption, assignment or rejection of any Executory Contract or Unexpired Lease to which the Debtor is party or with respect to which the Debtor may be liable and to adjudicate and, if necessary, liquidate, any Claims arising under any Executory Contract or Unexpired Lease;

4. resolve any issues related to any matters adjudicated in the Chapter 11 Case;

5. resolve any issues related to any order entered by the Bankruptcy Court in the Chapter 11 Case;

6. ensure that distributions to Holders of Allowed Claims are accomplished pursuant to the provisions of the Plan;

7. decide or resolve any motions, adversary proceedings, contested or litigated matters and any other Causes of Action that are pending as of the Effective Date or that may be commenced in the future, and grant or deny any applications involving a Debtor that may be pending on the Effective Date or instituted by the Trustee after the Effective Date; provided that the Trustee shall reserve the right to commence actions in all appropriate forums and jurisdictions;

8. enter such orders as may be necessary or appropriate to implement or consummate the provisions of the Plan and all other contracts, instruments, and other agreements or documents adopted in connection with the Plan, the Auction and Sale Procedures, the closing of the sale of the Property, or the Disclosure Statement;

9. resolve any cases, controversies, suits or disputes that may arise in connection with the Consummation, interpretation or enforcement of the Plan or any Entity's obligations incurred in connection with the Plan or the Auction;

10. issue injunctions and enforce them, enter and implement other orders or take such other actions as may be necessary or appropriate to restrain interference by any Entity with Consummation or enforcement of the Plan, except as otherwise provided in the Plan;

11. enforce the exculpations and injunctions contained in this Plan;

12. resolve any cases, controversies, suits or disputes with respect to any injunction, exculpation or other provisions contained in this Plan, and enter such orders or take such others actions as may be necessary or appropriate to implement or enforce all such provisions;

13. enter and implement such orders or take such others actions as may be necessary or appropriate if the Confirmation Order is modified, stayed, reversed, revoked or vacated;

14. resolve any other matters that may arise in connection with or relate to the Plan, the Disclosure Statement, the Confirmation Order, the Auction and Sale Procedures, the Auction, the sale or the closing of the sale of the Property to the Buyer, or any contract, instrument, release or other agreement or document adopted in connection with the Plan, the Disclosure Statement, the Auction, the sale of the Property to the Buyer, or the closing of the sale; and

15. enter an order closing the Chapter 11 Case.

## **XII. PLAN-RELATED RISK FACTORS AND ALTERNATIVES TO CONFIRMATION AND CONSUMMATION OF THE PLAN**

THE IMPLEMENTATION OF THE PLAN IS SUBJECT TO A NUMBER OF RISKS, INCLUDING THOSE ENUMERATED BELOW AND SET FORTH IN ARTICLE VI. PRIOR TO VOTING TO ACCEPT OR REJECT THE PLAN, ALL HOLDERS OF CLAIMS AND EQUITY INTERESTS THAT ARE IMPAIRED AND ENTITLED TO VOTE ON THE PLAN SHOULD READ AND CONSIDER CAREFULLY THE FACTORS SET FORTH HEREIN, AS WELL AS ALL OTHER INFORMATION SET FORTH OR OTHERWISE REFERENCED IN THIS DISCLOSURE STATEMENT AND OTHER DOCUMENTS DELIVERED TOGETHER HERewith AND/OR INCORPORATED BY REFERENCE HEREIN. THESE RISK FACTORS SHOULD NOT, HOWEVER, BE REGARDED AS CONSTITUTING THE ONLY RISKS INVOLVED IN CONNECTION WITH THE PLAN AND ITS IMPLEMENTATION, OR ALTERNATIVES TO THE PLAN.

### **General Bankruptcy Law and Plan-Related Considerations**

#### **Parties in Interest May Object to Classifications of Claims and Equity Interests**

Bankruptcy Code §1122 provides that a plan may place a Claim or an Equity Interest in a particular class only if such claim or equity interest is substantially similar to the other Claims or Equity Interests in such class. Express believes that the classification of Claims and Equity Interests under the Plan complies with the requirements set forth in the Bankruptcy Code because Express created certain Classes of Claims and Equity Interests, each encompassing Claims or Equity Interests, as applicable, that are substantially similar to the other Claims and Equity Interests in each such Class. Nevertheless, there can be no assurance that the Bankruptcy Court will reach the same conclusion.

#### **Failure to Satisfy the Vote Requirement**

If votes are received in number and amount sufficient to enable the Bankruptcy Court to confirm the Plan, Express intends to seek, as promptly as practicable thereafter, Confirmation of the Plan. In the event that sufficient votes are not received, Express may seek to accomplish an alternative chapter 11 plan.

Additionally, other parties in interest have proposed alternative plans to the Plan. There can be no assurance that the terms of other such alternative chapter 11 plans would be as favorable to the Holders of Allowed Claims as those proposed in the Plan.

*Express May Not Be Able to Secure Confirmation of the Plan or Confirmation May Be Delayed*

Bankruptcy Code §1129 sets forth the requirements for confirmation of a chapter 11 plan, and requires, among other things, a finding by the Bankruptcy Court that the value of distributions under the Plan to non-accepting holders of claims and equity interests within a particular class not be less than the value of distributions such holders would receive if the debtor was liquidated under chapter 7 of the Bankruptcy Code.

There can be no assurance that the requisite acceptances to confirm the Plan will be received. Even if the requisite acceptances are received, there can be no assurance that the Bankruptcy Court will confirm the Plan. A non-accepting Holder of an Allowed Claim might challenge either the adequacy of this Disclosure Statement or whether the solicitation procedures and voting results satisfy the requirements of the Bankruptcy Code or Bankruptcy Rules. Even if the Bankruptcy Court determined that the Disclosure Statement, the solicitation procedures and voting results were appropriate, the Bankruptcy Court could still decline to confirm the Plan if it found that any of the statutory requirements for Confirmation had not been met.

The Confirmation and Consummation of the Plan also are subject to certain other conditions. No assurance can be given that these conditions will be satisfied.

If the Plan is not confirmed in a timely manner, it is unclear what Holders of Claims would ultimately receive in respect of their Claims. Express, subject to the terms and conditions of the Plan, reserves the right to modify the terms and conditions of the Plan as necessary for Confirmation. Any such modifications could result in a less favorable treatment of any non-accepting Class, as well as of any Classes junior to such non-accepting Class, than the treatment currently provided in the Plan. Such a less favorable treatment could include a distribution of property to the Class affected by the modification of a lesser value than currently provided in the Plan or no distribution of property whatsoever under the Plan.

*Objection to the Amount or Classification of a Claim*

Express and the Liquidation Trustee reserve the right to object to the amount or classification of any Claim. The estimates set forth in this Disclosure Statement cannot be relied on by any Holder of a Claim where such Claim is subject to an objection. Any Holder of a Claim that is subject to an objection thus may not receive its expected share of the estimated distributions described in this Disclosure Statement.

*Risks of Non-Occurrence of the Effective Date*

Although Express believes that the Effective Date may occur quickly after the Confirmation Date, there can be no assurance as to such timing, or as to whether the Effective Date will, in fact, occur. The Auction and Sale Procedures provide that the Auction will take place after the Confirmation Hearing, but the Effective Date cannot occur unless and until the sale of the Property closes. It is in the best interests of all parties that the Sale close as soon as possible after the Auction. Express, or the Trustee as applicable, reserves the right to seek approval by the Bankruptcy Court to extend the time after the Confirmation Date for which the Effective Date must occur.

**Risks Affecting Potential Recoveries**

Express cannot state with any degree of certainty what recovery will be available to Holders of Claims. The first variable is the price that will be obtained for the Property. The second variable is the continued accrual of interest by Madison Lender through the date of a closing of the Sale. Consequently, Express cannot know with certainty, at this time, how much money will remain after paying all Allowed Claims which are senior to the Claims of Class 3. Express also cannot know with certainty, at this time, the number or size of Claims in Class 3 that will ultimately be Allowed or the number or size of Claims in Classes senior to Class 3, or Claims that are unclassified, which will ultimately be Allowed.

**No Bond Posted By Trustee**

The Trustee will not be required to post a bond in connection with the performance of his duties. If, however, the Court or the Office of the United States Trustee requires the Trustee to post a bond, the expense of such bond will be payable from the Liquidating Trust.

**Risks Associated with Forward Looking Statements**

The financial information contained in this Disclosure Statement has not been audited. In preparing this Disclosure Statement, Express, and its professionals, relied on financial data that was publically available at the time of such preparation. Although Express, and its professionals, have used their reasonable business judgment to ensure the accuracy of the financial information provided in this Disclosure Statement, and while Express, and its professionals, believe that such financial information fairly reflects the financial condition of the Debtor, Express, and its professionals, are unable to warrant or represent that the financial information contained herein is without inaccuracies.

**Disclosure Statement Disclaimer**

**The Information Contained Herein is for Soliciting Votes**

The information contained in this Disclosure Statement is for purposes of soliciting acceptances of the Plan and may not be relied upon for any other purposes.

**The Disclosure Statement Was Not Reviewed or Approved by the Securities and Exchange Commission**

This Disclosure Statement was not filed with the Securities and Exchange Commission under the Securities Act or applicable state securities laws. Neither the Securities and Exchange Commission nor any state regulatory authority has passed upon the accuracy or adequacy of this Disclosure Statement, or the exhibits or the statements contained herein, and any representation to the contrary is unlawful.

**The Disclosure Statement May Contain Forward Looking Statements**

This Disclosure Statement may contain "forward looking statements" within the meaning of the Private Securities Litigation Reform Act of 1995. Such statements consist of any statement other than a recitation of historical fact and can be identified by the use of forward looking terminology such as "may," "believe," "expect," "anticipate," "estimate" or "continue" or the negative thereof or other variations thereon or comparable terminology. The reader is

cautioned that all forward looking statements are necessarily speculative and there are certain risks and uncertainties that could cause actual events or results to differ materially from those referred to in such forward looking statements. The information contained herein and attached hereto are estimates only, and the timing and amount of actual distributions to Holders of Allowed Claims may be affected by many factors that cannot be predicted. Therefore, any analyses, estimates or recovery projections may or may not turn out to be accurate.

*No Legal or Tax Advice is Provided to You by this Disclosure Statement*

*This Disclosure Statement is not legal advice to you.* The contents of this Disclosure Statement should not be construed as legal, business or tax advice. Each Holder of a Claim or an Equity Interest should consult his or her own legal counsel and accountant with regard to any legal, tax and other matters concerning his Claim or Equity Interest. This Disclosure Statement may not be relied upon for any purpose other than to determine how to vote on the Plan or object to Confirmation of the Plan.

*No Admissions Made*

The information and statements contained in this Disclosure Statement will neither (a) constitute an admission of any fact or liability by any Entity, nor (b) be deemed evidence of the tax or other legal effects of the Plan on the Debtor, Holders of Allowed Claims or Equity Interest or any other parties in interest.

*Failure to Identify Litigation Claims or Projected Objections*

No reliance should be placed on the fact that a particular Cause of Action or projected objection to a particular Claim or Equity Interest is, or is not, identified in this Disclosure Statement. The Trustee may seek to investigate, File, and prosecute Causes of Action and objections to Claims and Equity Interests after the Confirmation Date of the Plan irrespective of whether the Disclosure Statement identifies such Claims or Objections to Claims.

*No Waiver of Right to Object or Right to Recover Transfers and Assets*

The vote by a Holder of an Allowed Claim for or against the Plan does not constitute a waiver or release of any Claims or rights of Express or the Trustee to object to that Holder's Allowed Claim, or recover any preferential, fraudulent or other voidable transfer or assets, regardless of whether any Claims or Causes of Action of the Debtor or its Estate are specifically or generally identified herein.

*Information in the Plan was Publically Known Information*

In preparation of this Disclosure Statement, the professionals retained by Express relied solely upon information that was publically known at the time this Disclosure Statement was prepared. The professionals retained by Express did not rely on information provided by the Debtor in any form when preparing this Disclosure Statement and have not verified independently the information contained herein.

*Potential Exists for Inaccuracies, and Express Has No Duty to Update*

The statements contained in this Disclosure Statement are made by Express as of the date this Disclosure Statement was prepared, unless otherwise specified herein. The delivery of

this Disclosure Statement after that date does not imply that there has not been a change in the information set forth herein since that date.

While Express has used its reasonable business judgment to ensure the accuracy of all of the information provided in this Disclosure Statement and in the Plan, Express nonetheless cannot, and does not, confirm the current accuracy of all statements appearing in this Disclosure Statement. Further, although Express may subsequently update the information in this Disclosure Statement, Express has no affirmative duty to do so unless ordered to by the Bankruptcy Court.

### **Alternatives to Confirmation and Consummation of the Plan**

As set forth above, if the Plan is not confirmed, the Debtor's Chapter 11 Case could be converted to a liquidation case under chapter 7 of the Bankruptcy Code. Alternatively, the Debtor, or other parties in interest may seek confirmation of an alternative plan of reorganization under chapter 11 of the Bankruptcy Code. The Class 1 Secured creditor is trying to proceed with an alternative plan with itself as the stalking horse bidder bidding an amount less than its Claim.

In chapter 7, a chapter 7 trustee would be appointed to promptly liquidate the assets of the Debtor. Express believes that in a liquidation under chapter 7, before creditors received any distributions, additional administrative expenses involved in the appointment of a chapter 7 trustee and attorneys, accountants, and other professionals to assist such trustee, could cause a delay in Distributions and a diminution in the value of the Estate. The assets available for distribution to creditors and equity holders would be reduced by such additional expenses and by Claims, some of which would be entitled to priority, ultimately resulting in decreased recovery for general unsecured claims.

### **XIII. CERTAIN FEDERAL INCOME TAX CONSEQUENCES OF THE PLAN**

The following discussion summarizes certain federal income tax consequences of the Plan to the Holders of Claims and Holders of Equity Interests based upon the Internal Revenue Code, the Treasury Regulations promulgated thereunder, judicial authorities and current administrative rulings and practices now in effect, all of which are subject to change at any time by legislative, judicial or administrative action. Any such change could be retroactively applied in a manner that could adversely affect the Holders of Claims and Holders of Equity Interests. In addition, certain aspects of the following discussion are based on proposed Treasury Regulations.

The tax consequences of certain aspects of the Plan may be subject to administrative or judicial interpretations that differ from the discussion below. Express has not requested, nor does it intend to request, a tax ruling from the Internal Revenue Service (the "IRS"), nor will Express, with respect to the federal income tax consequences of the Plan, obtain any opinion of counsel. Consequently, there can be no assurance that the treatment set forth in the following discussion will be accepted by the IRS. Further, matters not discussed below may affect the federal income tax consequences to the Holders of Claims and Holders of Equity Interests.

**THE DISCUSSION SET FORTH BELOW IS INCLUDED FOR GENERAL INFORMATION ONLY. EXPRESS AND ITS PROFESSIONALS ARE NOT MAKING ANY REPRESENTATIONS REGARDING THE PARTICULAR TAX CONSEQUENCES OF CONFIRMATION AND CONSUMMATION OF THE PLAN, WITH RESPECT TO THE**

**HOLDERS OF CLAIMS OR HOLDERS OF EQUITY INTERESTS, NOR ARE THEY RENDERING ANY FORM OF LEGAL OPINION OR TAX ADVICE ON SUCH TAX CONSEQUENCES. THE TAX LAWS APPLICABLE TO CORPORATIONS OR LIMITED LIABILITY COMPANIES IN BANKRUPTCY ARE EXTREMELY COMPLEX, AND THE FOLLOWING SUMMARY IS NOT EXHAUSTIVE. HOLDERS OF CLAIMS AND HOLDERS OF EQUITY INTERESTS ARE STRONGLY URGED TO CONSULT THEIR OWN TAX ADVISORS REGARDING TAX CONSEQUENCES OF THE PLAN, INCLUDING FEDERAL, FOREIGN, STATE AND LOCAL TAX CONSEQUENCES.**

#### **Federal Income Tax Consequences to Holders of Claims**

The federal income tax consequences of the implementation of the Plan to a Holder of a Claim will depend, among other things, upon the origin of the Holder's Claim, when the Holder's Claim becomes an Allowed Claim, when the Holder receives payment in respect of such Claim, whether the Holder reports income using the accrual or cash method of accounting, and whether the Holder has taken a bad debt deduction or worthless security deduction with respect to such Claim.

#### **Claims for Accrued Interest**

Notwithstanding the general rules described above, Holders of Claims who receive any consideration under the Plan in respect of Allowed Claims for accrued but not previously taxed interest must treat the amount of such consideration as ordinary income. A Holder of a Claim whose Allowed Claim for accrued and previously taxed interest is not fully satisfied generally may take an ordinary deduction for the unsatisfied portion of such Allowed Claim, even if the underlying Claim is held as a capital asset.

The proper allocation, between principal and interest, of consideration to be distributed under the Plan is unclear. Express intends to take the position that such consideration is allocated to principal, to the extent thereof, before any amount is allocated to accrued but unpaid interest. Creditors should be aware, however, that the IRS may take a different position with respect to the proper allocation.

### **XIV. VOTING PROCEDURES AND REQUIREMENTS**

#### **Ballots and Voting Deadlines**

IT IS IMPORTANT THAT THE HOLDERS OF CLAIMS IN CLASS 3 TIMELY EXERCISE THEIR RIGHT TO VOTE TO ACCEPT OR REJECT THE PLAN. Holders of Class 3 Claims have been sent a Ballot together with this Disclosure Statement. Such Holders should read the Ballot carefully and follow the instructions contained therein. Please use only the Ballot that accompanies this Disclosure Statement.

Express's attorneys shall serve as voting agent (the "**Voting Agent**") to assist in the transmission of voting materials and in the tabulation of votes with respect to the Plan. FOR YOUR VOTE TO BE COUNTED, YOUR VOTE MUST BE RECEIVED BY THE VOTING AGENT AT THE ADDRESS SET FORTH BELOW BEFORE THE VOTING DEADLINE OF **5:00 P.M. ON \_\_\_\_\_, 2013**, EXCEPT IF YOU SEND YOUR SIGNED BALLOT BY E-MAIL. IF YOU SUBMIT YOUR SIGNED BALLOT BY E-MAIL, THEN THAT E-MAIL MUST BE

RECEIVED BY NO LATER THAN **11:59 P.M.** ON \_\_\_\_\_, **2013**. THE E-MAIL ADDRESS TO SUBMIT SIGNED BALLOTS IS [CRubino@SilvermanAcampora.com](mailto:CRubino@SilvermanAcampora.com).

IF A BALLOT IS DAMAGED OR LOST, YOU MAY CONTACT THE VOTING AGENT AT THE ADDRESS SET FORTH BELOW. ANY BALLOT THAT IS EXECUTED AND RETURNED BUT WHICH DOES NOT INDICATE AN ACCEPTANCE OR REJECTION OF THE PLAN WILL NOT BE COUNTED.

IF YOU HAVE ANY QUESTIONS CONCERNING VOTING PROCEDURES, YOU MAY CONTACT THE VOTING AGENT AT:

SilvermanAcampora LLP  
100 Jericho Quadrangle, Suite 300  
Jericho, New York 11753  
(516) 479-6300  
Attn: Christopher J. Rubino

Additional copies of this Disclosure Statement are available upon request made to the Voting Agent.

### **Holders of Claims Entitled to Vote**

Class 3 is the only class of Claims under the Plan that is both impaired and entitled to vote to accept or reject the Plan. All holders of Class 3 Claims should complete the enclosed Ballot and return it to the Voting Agent so that it is received by the Voting Agent before the voting deadline on \_\_\_\_\_.<sup>3</sup>

### **Withdrawal of Ballots**

Any voter that has delivered a valid Ballot may withdraw its vote by delivering a written notice of withdrawal to the Voting Agent before the voting deadline on \_\_\_\_\_. To be valid, the notice of withdrawal must (a) be signed by the party who signed the Ballot to be revoked, and (b) be received by the Voting Agent before the voting deadline on \_\_\_\_\_. Express may contest the validity of any withdrawals.

Any Holder of a Claim that has delivered a valid Ballot may change its vote by delivering to the Voting Agent a properly completed subsequent Ballot so as to be received before the voting deadline on \_\_\_\_\_. In the case where more than one timely, properly completed Ballot is received, only the Ballot that bears the latest date will be counted.

### **Rejections of Plan and Cram Down**

For purposes of voting on the Plan, if any Class of Creditors votes to reject the Plan, then the Debtor intends to utilize the provisions of Bankruptcy Code §1129(b) to satisfy the requirements for confirmation of the Plan over the rejections of such Class.

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<sup>3</sup> The voting deadline for "mailed" ballots, as stated above, is \_\_\_\_\_ at 5:00 p.m. The voting deadline for "emailed" ballots, as stated above, is \_\_\_\_\_ at 11:59 p.m.



**XV. CONFIRMATION OF THE PLAN**

The Bankruptcy Court will confirm the plan only if all of the requirements of Bankruptcy Code §1129 are met.

**Acceptance of the Plan**

Under the Bankruptcy Code, acceptance of a plan by a class of claims occurs when holders of at least two-thirds (2/3) in dollar amount and more than one-half (1/2) in number of the allowed claims of that class, that cast ballots for acceptance or rejection of the plan, vote to accept the plan. Thus, acceptance of the Plan by a particular class will occur only if at least two-thirds in dollar amount and a majority in number of the holders of the claims in that class cast their Ballots in favor of acceptance. A vote may be disregarded if the Court determines, after notice and a hearing, that such acceptance or rejection was not solicited or produced in good faith or in accordance with the provisions of the Bankruptcy Code.

**Best Interests Test**

The Bankruptcy Code provides that the Plan will not be confirmed, regardless of whether or not any holders of claims object to confirmation, unless the Court finds that the Plan is in the “best interests” of all Classes of Claims which are impaired. The “best interests” test will be satisfied by a finding of the Court that either (i) all holders of impaired Claims have accepted the Plan or (ii) the Plan will provide such a holder that has not accepted the Plan with a recovery at least equal in value to the recovery such holder would receive if the Debtor were liquidated under chapter 7 of the Bankruptcy Code.

The starting point in determining whether the Plan meets the “best interests” test is a determination of the amount of proceeds that would be generated from the liquidation of the Debtor’s assets in the context of a chapter 7 liquidation. Such value must then be reduced by the costs of such liquidation, including costs incurred during the Chapter 11 Case and allowed under chapter 7 of the Bankruptcy Code (such as professionals’ fees and expenses), a chapter 7 trustee’s fee, and the fees and expenses of professionals retained by a chapter 7 trustee. The potential chapter 7 liquidation distribution in respect of each Class would be further reduced by costs imposed by the delay caused by conversion to chapter 7.

For the reasons set forth above, Express submits that any impaired Class will receive under the Plan a recovery at least equal in value to the recovery such Class would receive pursuant to a liquidation of the Debtor under chapter 7 of the Bankruptcy Code.

**Feasibility of the Plan**

Bankruptcy Code section 1129(a)(11) provides that a chapter 11 plan may be confirmed only if the Court finds that such plan is feasible. A feasible plan is one which will not lead to a need for further reorganization or liquidation of the Debtor. Express anticipates that the Estate will have sufficient Cash on hand on the Effective Date to make all of the payments required to be made on the Effective Date under the Plan.

In addition, Express believes that the \$25,400,000.00 Mad Hotel Stalking Horse Bid, or such higher or better bid that wins at the Auction, will be more than sufficient to fund full payment of Class 1 and 2 Claims, while still making a distribution to Class 3 General Unsecured Claims. For these reasons, Express believes that the Court will find the Plan to be feasible.

### **Classification of Claims Under the Plan**

Express believes that the Plan meets the classification requirements of the Bankruptcy Code which requires that a plan of reorganization place each claim into a class with other claims that are "substantially similar." The Plan establishes classes of Claims as required by the Bankruptcy Code and summarized above. Administrative Expense Claims and Priority Tax Claims are not classified.

### **Confirmation of a Plan if a Class Rejects the Plan**

The Bankruptcy Code contains provisions for confirmation of a plan even if it is not accepted by all impaired classes, as long as it is accepted by at least one impaired class of claims. The Plan may be confirmed under the so-called "cram-down" provisions set forth in section 1129(b) of the Bankruptcy Code if, in addition to satisfying the other requirements for confirmation, the Plan is determined to be "fair and equitable" and "does not discriminate unfairly" with respect to each class of Claims that has not accepted the Plan. If the Holders of Claims in \_\_\_\_\_ Class votes to reject the Plan, then the Court may only confirm the Plan if the Plan "does not discriminate unfairly" and is "fair and equitable" with respect to such Class 3.

Under the Bankruptcy Code, "fair and equitable" has different meanings for secured and unsecured claims. With respect to a secured claim, "fair and equitable" means (i) the impaired secured creditor retains its liens to the extent of its allowed claim and receives deferred cash payments at least equal in value to the allowed amount of its claim with a present value as of the effective date of the plan at least equal in value to such creditor's interest in the debtor's property securing its claim, (ii) if property subject to the lien of the impaired secured creditor is sold free and clear of that lien, the lien attaches to the proceeds of the sale, and such lien proceeds are treated in accordance with subparagraph (i) or (iii) of Bankruptcy Code §1129(b)(ii)(A), or (iii) the impaired secured creditor realizes the "indubitable equivalent" of its claim under the plan.

With respect to an unsecured claim, the "fair and equitable" standard, also known as the "absolute priority rule," requires that a dissenting class receive full payment for its Allowed Claim before any junior class receives or retains any property under the Plan. If the Holders of Claims in any impaired class vote to reject the Plan, the Plan may be confirmed under Bankruptcy Code § 1129(b) if all holders of Claims junior to those of the impaired class do not receive or retain any property under the Plan.

In the Plan, the absolute priority rule is being followed. The Holders of Class 4 Equity Interests are not retaining their ownership interests in the Debtor, while Class 3 Claims are receiving a pro rata distribution of available sale proceeds after Classes 1 and 2 have received full payment.

IF ALL OTHER CONFIRMATION REQUIREMENTS ARE SATISFIED AT THE CONFIRMATION HEARING, EXPRESS WILL ASK THE COURT TO RULE THAT THE PLAN MAY BE CONFIRMED ON THE GROUND THAT THE SECTION 1129(b) REQUIREMENTS HAVE BEEN SATISFIED.

### **Confirmation Hearing**

Bankruptcy Code §1128 requires the Court, after notice, to hold a hearing on confirmation of the Plan (the “**Confirmation Hearing**”). Section 1128(b) provides that any party in interest may object to confirmation of a plan.

By order of the Court dated \_\_\_\_\_, 2013, the Confirmation Hearing has been scheduled for \_\_\_\_\_ at \_\_\_\_ a.m. before the Honorable Martin Glenn, United States Bankruptcy Court, Alexander Hamilton U.S. Custom House, Room 501, One Bowling Green, New York, NY 10004. The Confirmation Hearing may be adjourned from time to time by the Bankruptcy Court without further notice except for an announcement made at the Confirmation Hearing or any adjourned hearing. Any objection to confirmation of the Plan must (a) be in writing, (b) state the name and address of the objecting party and the amount and nature of the claim or interest of such party, (c) state with particularity the basis and nature of any objection or proposed modification, and (d) be filed with the Clerk of the Court, with a copy delivered to chambers, and served so that they are received on or before \_\_\_\_\_, upon (i) SilvermanAcampora LLP, 100 Jericho Quadrangle, Suite 300, Jericho, New York 11753, Attn: Gerard R. Luckman, (ii) \_\_\_\_\_, (iii) \_\_\_\_\_, and (iv) the Office of the United States Trustee, 33 Whitehall Street, 21<sup>st</sup> Floor, New York, New York 10004. Attn: Greg Zipes.

Objections to confirmation of the Plan are governed by Bankruptcy Rule 9014. Unless an objection to confirmation is timely served and filed, it will not be considered by the Bankruptcy Court.

At the Confirmation Hearing, the Bankruptcy Court must determine whether the requirements of Bankruptcy Code section 1129 have been satisfied and, upon demonstration of such compliance, the Bankruptcy Court will enter the Confirmation Order.

**XVI. CONCLUSION**

This Statement was approved by the Bankruptcy Court pursuant to Bankruptcy Code section 1125. The Bankruptcy Court has determined that the Statement contains "adequate information" as that term is defined in Bankruptcy Code section 1125(a). Express believes that confirmation of the Plan is preferable to the alternatives described above because it provides the best opportunity for Distributions to General Unsecured Creditors.

Dated: New York, New York  
February 1, 2013

**Express Service Capital, Inc.**

By: s/ Benjamin Ellis

Benjamin Ellis EVP  
Authorized Signatory

**SILVERMANACAMPORA LLP**

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