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Hearing Date: November 16, 2017; 11:00 a.m.

Objection Deadline: November 9, 2017; 4:00 p.m.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:

GEK Realty and Home Improvement LLC,

Debtor.

Chapter 11

Case No. 1:17-40228-nhl

Hon. Nancy H. Lord

**MOTION FOR ENTRY OF AN ORDER, (I) APPROVING DISCLOSURE
STATEMENT; (II) SCHEDULING HEARING ON CONFIRMATION OF
THE PLAN; AND (III) APPROVING RELATED PROCEDURES AND RELIEF**

TO THE HONORABLE NANCY H. LORD,
UNITED STATES BANKRUPTCY JUDGE:

BHMPW Funding LLC, (the “Secured Creditor” and/or “Plan Proponent”), as a secured creditor and mortgagee of GEK Realty and Home Improvement LLC (the “Debtor”), and an interested party in this Chapter 11 case (the “Chapter 11 Case”), hereby moves (the “Motion”) before the United States Bankruptcy Court for the Eastern District of New York (the “Bankruptcy Court”) for the entry of an Order pursuant to §§ 105(a), 502, 1123(a), 1124, 1125, 1126, and 1128 of Title 11 of the United States Bankruptcy Code (the “Bankruptcy Code”), Rules 2002, 3003, 3016, 3017, 3018, 3019, and 3020 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Rules 3017-1, 3018-1, 3019-1, 3020-1 and 3020-2 of the Local Rules of this Court (the “Local Rules”), (i) approving the *Disclosure Statement to the Secured Creditor’s Plan of Reorganization for the Debtor* [ECF No. 32] (the “Disclosure Statement”); (ii) scheduling a hearing on confirmation (the “Confirmation Hearing”) of the *Secured Creditor’s Plan of Reorganization for the Debtor* [ECF No. 31] (the “Plan”); (iii) approving procedures relating to

the sale of the Debtor's real properties commonly known as (a) 2750 Pearsall Avenue, Bronx, New York 10469 (Block 4525; Lot 20) (the "Pearsall Property") and (b) 403 Jefferson Avenue, Brooklyn, New York 11221 (Block 1830; Lot 48) (the "Jefferson Property" and together with the Pearsall Property, the "Properties") and form of notice of the bid procedures, (iv) scheduling an auction and sale hearing (the "Sale Hearing") to approve the sale of the Properties to the successful bidder (the "Successful Bidder") pursuant to 11 U.S.C. § 105(a), 363 and Rule 2002 of the Bankruptcy Rules; (v) establishing a deadline and procedures for filing objections to confirmation of the Plan; (vi) establishing a deadline and procedures for voting; (vii) approving form and manner of Notice of Hearing on Confirmation and related issues and approving procedures for distribution of solicitation packages, and (viii) granting such other related relief as this Court deems just and proper. In support of the Motion, the Plan Proponent respectfully represents as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of this case and this Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are §§ 105(a), 502, 1123(a), 1124, 1125, 1126, and 1128 of the Bankruptcy Code, Rules 2002, 3003, 3016, 3017, 3018 and 3020 of the Bankruptcy Rules, and Rules 3017-1, 3018-1, 3019-1, 3020-1 and 3020-2 of the Local Bankruptcy Rules for the Eastern District of New York.

BACKGROUND

3. On January 19, 2017 (the "Petition Date"), the Debtor filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code, before the United States Bankruptcy Court for the Eastern District of New York (the "Bankruptcy Court"). The Debtor continues in possession of its assets and management of its business as debtor-in-possession pursuant to §§

1107 and 1108 of the Bankruptcy Code.

4. The Debtor's business consists of the ownership and operation of the Properties, and the Debtor is a New York Limited Liability Company having an address of 111-20 200th Street, St. Albans, New York 11412. As explained more fully below, the Properties which contain residential apartment units generate substantially all of the Debtor's income, and on which Properties, no substantial business is being conducted by the Debtor other than the business of operating the Properties and activities incidental thereto. The Plan Proponent makes no representations as to whether the residential units at the Property are subject to rent regulation such as the New York City Rent Stabilization Code. Upon information and belief, the Debtor's sole source of income is from rents generated by the Properties. Upon information and belief, the Debtor's members manage the Properties and the Debtor remains a debtor in possession for the duration of this matter.

THE SECURED CREDITOR & THE LOAN

5. On or about April 21, 2015, TBG Funding LLC ("TBG"), made a loan to the Debtor, in the original principal sum of \$700,000.00 (the "Loan"). The Loan was evidenced by a Promissory Note (the "Note") dated April 21, 2015, which was executed by the Debtor, through its principals Karone Carmichael ("Karone") and Gregory Carmichael ("Gregory").

6. To secure repayment of the indebtedness evidenced by the Note, on or about April 21, 2015, the Debtor further executed and delivered to TBG, a Mortgage and Security Agreement (the "Mortgage"), which encumbered the Properties in the principal sum of \$700,000.00. The duly executed Mortgage was recorded with the Office of the City Register of the City of New York, Bronx County (the "City Register") on June 5, 2015 under CRFN 2015000189912.

7. The Debtor defaulted under the terms of the Note and Mortgage by, failing to tender

the balance due under the Loan which came due when the Loan matured on October 22, 2015 (the “Default”).

8. On or about December 22, 2015, the Note, Mortgage and all other documents evidencing the Loan were assigned by TBG to the Secured Creditor pursuant to that certain Assignment of Mortgage (the “Assignment”), which was recorded with the Register’s Office on January 24, 2017 under CRFN 2017000031195.

9. Additionally, in connection with the Assignment, TBG also executed an Assignment of Assignment of Leases and Rends (“ALR”), in favor of the Secured Creditor, pursuant to which all rents and/or other proceeds generate at the Properties became the Secured Creditor’s cash collateral.

10. As a result of the Default and the Debtor’s failure to cure same, on or about January 28, 2018, the Secured Creditor commenced an action to foreclose the Mortgage (the “Foreclosure Action”) under Index No. 32083/2016E, by filing a Summons, Verified Complaint and Notice of Pendency in the Bronx County Supreme Court, State of New York (the “State Court”).

11. By *Order of Reference Commercial Foreclosure* entered on November 4, 2016 (the “Referee Order”), I. Scott Edelstein, Esq. (the “Referee”) was appointed to compute the amount due to the Secured Creditor for principal, interest, and other disbursements advanced as provided for by statute and in the Note and Mortgage.

THE PROPERTIES

12. Upon information and belief, the Pearsall Property consists of a two (2) story single family home, and the Jefferson Property consists of a three-story, two-family, walk-up apartment building. It is impossible to determine based upon the monthly operating reports (“MOR’s”) filed by the Debtor, how rents are allocated between each of the apartment units at the Properties.

THE DEBTOR'S BANKRUPTCY FILING

13. On January 19, 2017 (the "Petition Date"), the Debtor filed a bare bones petition (the "Petition") for Chapter 11 bankruptcy relief before this Court under Case No. 1:17-40228-nhl, which was executed by Gregory, as Managing Member of the Debtor.

THE PETITION AND SCHEDULES

14. On the Petition Date, the Debtor filed a skeletal petition. On January 24, 2017, the Debtor filed its *Application For Order Extending Time for Filing Schedules of Assets and Liabilities and Statement of Financial Affairs* (the "Schedules Application"), which indicate that the Jefferson Property consists of a two-family home, the Jefferson Property consists of a single family home, and that the Debtor is involved in the purchase and remodeling of real property. Since the Schedules Application was never actually noticed for a hearing by the Bankruptcy, no ruling was ever made on account thereof. Nevertheless, on February 10, 2017, the Debtor filed all remaining schedules [ECF No. 13]. On that same date, the Debtor filed a list identifying the following Equity Security Holders Denise Duck, Glen Ettienne, Gregory and Karone.

15. In its Petition and Schedules, the Debtor identifies the Secured Creditor as its only secured creditor with an estimated claim of \$1,985,000.00. The Debtor's schedules further provide that other than the Secured Creditor, the Debtor has less than a dozen unsecured claims which total \$619,172.41, after consideration of three (3) large general unsecured claims in the amount of \$250,000.00 (to DIJ Realty), \$204,651.56 (ESF Property Management) and \$77,416.49 (Delux Gallery Inc.). Curiously, other than the Secured Claim filed by the Secured Creditor, no creditors have filed proofs of claims in this matter other than Consolidated Edison ("ConEd") (\$611.04 – general unsecured), and the Internal Revenue Service ("IRS") (\$6,240.00 – general unsecured). Indeed, the unsecured proof of claim filed by the IRS provides that the Debtor failed to file any

tax returns for the 2015 or 2016 years which is the basis of the IRS claim itself.

16. Furthermore, the Petition appears to list several a general unsecured claims of insiders, including, but not limited to those claims to Gregory Carmichael (\$19,900.00) and Misja Carmichael (\$5,000.00) and Glen Ettienne (\$11,742.63). Further discovery is required to determine the nature of the aforementioned insider claims as well as the three (3) largest claims which were listed in the Petition, but for which no proof of claim was filed, as discussed hereinabove.

BAR DATE

17. On May 26, 2017, the Bankruptcy Court entered an Order (the “Bar Date Order”) [ECF No. 23] fixing July 18, 2017 as the last date for filing any and all claims (including governmental claims) in this matter (the “Bar Date”).

18. Only three (3) proofs of claim were filed by creditors in this case, which include, claims filed by (1) Consolidated Edison Company of New York, Inc. (“Cond Ed”) on February 3, 2017 [Claim No. 1]; Internal Revenue Services (“IRS”) on March 27, 2017 [Claim No. 2]; and

THE EXPIRATION OF THE EXCLUSIVE PERIOD

19. The Debtor’s exclusive right to file a plan of reorganization in this Case expired on May 19, 2017, and no application to extend such time period has been filed by the Debtor prior thereto.

20. On September 2, 2017, the Secured Creditor filed and served copies of its Plan and Disclosure Statement upon all parties entitled to notice.

RELIEF REQUESTED

21. The Plan Proponent respectfully requests entry of the proposed order (the “Disclosure Statement Order”), substantially in the form annexed hereto as **Exhibit A**, granting the following relief and such other relief as is just and proper:

- (a) Disclosure Statement: approving the Disclosure Statement as containing “adequate information” under § 1125 of the Bankruptcy Code;
- (b) Confirmation Hearing: establishing the date of the Confirmation Hearing;
- (c) Solicitation Procedures: approving procedures for solicitation and tabulation of votes to accept or reject the Plan, including (i) approving the form and manner of the solicitation packages to be sent to parties in interest in this Chapter 11 Case, (ii) approving the form and manner of notice of the Confirmation Hearing, (iii) establishing a voting record date and approving procedures for the distribution of solicitation packages, (iv) approving the form of ballots, (v) establishing a voting deadline for receipt of ballots, (vi) establishing procedures for disputed Claims for voting purposes, (vii) approving procedures for tabulating acceptances and rejections of the Plan; (viii) establishing the deadline and procedures for filing objections to confirmation of the Plan; and (ix) granting related relief.

22. As noted above, on September 2, 2017 the Plan Proponent filed the Plan and Disclosure Statement. In accordance with § 1126 of the Bankruptcy Code, the Plan classifies holders of claims into certain classes for all purposes, including with respect to voting to accept or reject the Plan, as follows:

SUMMARY AND STATUS OF VOTING RIGHTS			
Class	Class Description	Status	Voting Rights
1	Priority Claims	Unimpaired	Presumed to Accept
2	Secured Creditor	Impaired	Plan Proponent
3	NY Claims	Unimpaired	Presumed to Accept
4	Allowed Unsecured Claims	Impaired	Entitled to Vote
5	Equity Interests	Impaired	Not Entitled to Vote

23. Based on the foregoing, (a) the Plan Proponent will solicit votes to accept or reject the Plan from holders of claims in Class 4 (the “**Voting Class**”) and (b) the Plan Proponent will not solicit votes from holders of claims in Classes 1, 3 and 5 as such claims are unimpaired

and/or are deemed to have accepted the Plan, as discussed more fully below.

BASIS FOR RELIEF

Approval of Disclosure Statement

24. The Disclosure Statement should be approved in accordance with the provisions of § 1125 of the Bankruptcy Code. Under § 1125(b) of the Bankruptcy Code, prior to soliciting acceptances with respect to a chapter 11 plan, a proponent must provide holders of claims against the debtor with the proposed plan and a written disclosure statement which has been approved by the Bankruptcy Court as containing “adequate information”. Specifically, § 1125(b) of the Bankruptcy Code provides, in pertinent part, that:

[a]n acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information

11 U.S.C. § 1125(b). Section 1125(a) of the Bankruptcy Code further defines adequate information to mean:

information 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).

25. Thus, a disclosure statement must, as a whole, provide such information as is “reasonably practicable” to permit an “informed judgment” by creditors and interest holders entitled to vote on the plan. *See In re Momentum Mfg. Corp.*, 25 F.3d 1132, 1136 (2d Cir. 1994);

see also In re Adelphia Commc'ns Corp., 352 B.R. 592, 600 (Bankr. S.D.N.Y. 2006) (noting that “an adequate disclosure determination requires a bankruptcy court to find not just that there is enough information, but also what is said is not misleading”).

26. Section 1125 of the Bankruptcy Code further provides “in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information...” 11 U.S.C. § 1125(a)(1). To that end, courts are granted broad discretion when reviewing the adequacy of the information contained in a disclosure statement. *See In re Ionosphere Clubs, Inc.*, 179 B.R. 24, 29 (Bankr. S.D.N.Y. 1995); *In re A.H. Robins Co., Inc.*, 880 F.2d 694, 696 (4th Cir. 1989); *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1157 (5th Cir. 1988); *Kirk v. Texaco, Inc.*, 82 B.R. 678, 682 (Bankr. S.D.N.Y. 1988) (noting that “[t]he legislative history could hardly be more clear in granting broad discretion to bankruptcy judges under § 1125(a)”). This grant of discretion was intended to accommodate the broad range of circumstances that accompany chapter 11 cases. *See* H.R. Rep. No. 595-95, 1st Sess. 408-09 (1977).

27. Accordingly, the determination of whether a disclosure statement contains adequate information is to be made on a case-by-case basis, focusing on the unique facts and circumstances of each case. *See In re Phoenix Petroleum Co.*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001); *In re Dakota Rail, Inc.*, 104 B.R. 138, 143 (Bankr. D. Minn. 1989) (holding that the bankruptcy court has “wide discretion to determine on a case by case basis whether a disclosure statement contains adequate information, without burdensome, unnecessary and cumbersome detail”).

28. The Plan Proponent respectfully submits that the proposed Disclosure Statement

contains “adequate information” with respect to the Plan within the meaning of § 1125(a) of the Bankruptcy Code, and provides holders of impaired claims that are entitled to vote to accept or reject the Plan with sufficient information to make an informed judgment regarding the Plan. Among other things, the Disclosure Statement includes:

- (a) a summary of the Plan, including classification and treatment of Claims against the Debtor;
- (b) general information regarding the Debtor, including an overview of the sale of the Debtor’s assets;
- (c) certain events leading to the filing of this Chapter 11 Case;
- (d) the relief requested and events occurring during the course of this Chapter 11 Case to date;
- (e) a description of the means of implementation, including, without limitation, a detailed background and description of the proposed post-confirmation sales;
- (f) potential risk factors affecting the Plan.

29. Accordingly, the Plan Proponent seeks this Court’s approval of the Disclosure Statement as containing adequate information required by § 1125 of the Bankruptcy Code. The Plan Proponent also requests that pursuant to § 1125(b) of the Bankruptcy Code, the Plan Proponent be authorized to transmit copies of the Disclosure Statement (together with all exhibits, including the Plan, and related documents), as approved, in the manner and upon such persons as set forth below.

Procedures for Solicitation

Notice to Creditors

30. Pursuant to Bankruptcy Rule 3017(d), the following materials are required to be distributed to creditors upon the approval of a disclosure statement.

- (1) the plan, or court-approved summary of the plan;
- (2) the disclosure statement approved by the Bankruptcy Court;

(3) notice of the time within which acceptances and rejections of such plan may be filed; and

(4) any other information as the Bankruptcy Court may direct, including any court opinion on approving the disclosure statement or a court-approved summary of the opinion.

31. Bankruptcy Rule 3017 and Local Rule 3017-1 also require that notice of the time fixed for filing objections and the hearing on confirmation be mailed to all creditors in accordance with Rule 2002(b), and that a form of ballot (conforming to the appropriate Official Form) be mailed to creditors who are entitled to vote on the Plan.

32. In accordance with Bankruptcy Rules 2002 and 3017(d), the Plan Proponent will transmit to certain creditors who are entitled to vote (the “Voting Parties”), as set forth below, no later than seven (7) days after entry of the Disclosure Statement Order, a solicitation package (the “Solicitation Package”) containing a copy or conformed version of: (a) a notice (the “Confirmation Hearing Notice”), substantially in the form attached hereto as **Exhibit B**, of: (i) the approval of the Disclosure Statement, (ii) a copy of the Disclosure Statement Order, as approved by the Bankruptcy Court, the Disclosure Statement, and the Plan, all as may be amended or supplemented, (iii) contact information for parties wishing to request a hard copy of such documents from the Plan Proponent; (iv) the date of the Confirmation Hearing, (v) the deadline and procedures for filing objections to confirmation of the Plan, (vi) the voting deadline for receipt of ballots; and (vii) an appropriate ballot with instructions attached thereto (and a pre-addressed return envelope) in the form annexed hereto as **Exhibit C**. The Plan Proponent shall not be required to provide the Solicitation Package or Confirmation Hearing Notice or any other notice on account of claims that have been satisfied, waived, withdrawn, disallowed or expunged as of the date of the solicitation. The Plan Proponent submits that the proposed Solicitation Package and manner of service satisfy the requirements of Bankruptcy Rule 3017(d).

33. The Plan Proponent also proposes to provide copies of Confirmation Hearing Notice to those persons who have requested notice pursuant to Bankruptcy Rule 2002 and hard copies of the Disclosure Statement Order, the Disclosure Statement, the Plan, and the Confirmation Hearing Notice to the Office of the United States Trustee and counsel to the Committee.

34. Pursuant to § 1126(f) of the Bankruptcy Code, classes of creditors that are not impaired under the Plan are “conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class...is not required.” 11 U.S.C. § 1126(f). Accordingly, the Plan Proponent respectfully submits that the transmittal of a Solicitation Package to the holders of unimpaired claims, who are not entitled to vote and are deemed to have accepted the Plan, is not necessary. Specifically, the Plan Proponent proposes that they are not required to provide the following categories and classes of claims with a Solicitation package: Administrative Claims, claims for professional fees, Priority Claims (Class 1) and NY Claims (Class 3) (collectively, the “**Non-Voting Parties**”). The Plan Proponent proposes instead, that the Non-Voting Parties receive a notice (the “**Non-Voting Notice**”), substantially in the form attached hereto as **Exhibit D**, of: (i) the approval of the Disclosure Statement, (ii) the Disclosure Statement, and the Plan, all as may be amended or supplemented, (iii) contact information for parties wishing to request a hard copy of such documents from the Plan Proponent; (iv) the date of the Confirmation Hearing, and (v) the deadline and procedures for filing objections to confirmation of the Plan.

35. The Plan Proponent believes that transmittal and mailing of the Solicitation Package and/or the Non-Voting Notice, as applicable, provides adequate notice to creditors and complies with all applicable Bankruptcy Rules.

Voting Record Date

36. The Plan Proponent also requests that the Court establish a record date (the

“Voting Record Date”) with respect to the solicitation of votes from the Voting Parties. Accordingly, the Plan Proponent will have no obligation to recognize (for purposes of voting on the Plan) any claimant in the Voting Class on account of a Claim transferred after the Voting Record Date. Instead, the Plan Proponent will be entitled to recognize and deal for voting purposes with only those record holders set forth in the claims register as of the Voting Record Date, provided, however, that with respect to transfers of claims filed pursuant to Bankruptcy Rule 3001, the transferors of claims shall be deemed holders of such claims as of the Voting Record Date unless the documentation evidencing such transfer was docketed by the Bankruptcy Court on or before twenty-one (21) days prior to the Voting Record Date and no timely objection with respect to such transfer was filed by the transferor.

37. The Plan Proponent anticipates that some of the Solicitation Packages or Non-Voting Notices will be returned as undeliverable by the United States Postal Service. To the extent any Solicitation Packages or Non-Voting Notices are returned as undeliverable, the Plan Proponent also seeks the Bankruptcy Court’s approval for a departure from the strict notice rule, and request that they be excused from re-mailing or otherwise re-sending Solicitation Packages and Non-Voting Notices to entities whose mail is returned as “undeliverable” at such addresses or “moved - no forwarding address” or similar marking, unless the Plan Proponent is provided with, or obtains, accurate addresses for such entities by the date that is no less than two weeks before the date of the Confirmation Hearing.

Confirmation Hearing Date

38. Bankruptcy Rule 3017(c) provides that “[o]n or before approval of the disclosure statement, the court shall fix a time within which the holders of claims and interests may accept

or reject the plan and may fix a date for the hearing on confirmation.” Fed. R. Bankr. P. 3017(c).

39. In addition, Bankruptcy Rule 2002(b) requires at least twenty-eight (28) days’ notice by mail to be given to all creditors of the time fixed for filing objections to, and the hearing to consider, confirmation of a plan. In accordance with Bankruptcy Rules 2002(b) and 3017(c), the Plan Proponent requests that the Confirmation Hearing be scheduled for on or about December 15, 2017. The proposed date of the Confirmation Hearing will enable the Plan Proponent to pursue confirmation of the Plan in accordance with all applicable Bankruptcy Rules.

40. In accordance with the Bankruptcy Rules, the Plan Proponent proposes to provide within the Confirmation Hearing Notice or the Non-Voting Notice information regarding (i) the Voting Deadline, (ii) the time fixed for filing objections to confirmation of the Plan, (iii) certain disclosures regarding the releases, injunctions, and exculpation provided for in the Plan and (iv) the time, date, and place for the Confirmation Hearing.

41. The Plan Proponent also requests that the Bankruptcy Court order that the Confirmation Hearing may be continued from time to time by announcing such continuance in open court or by filing a notice of adjournment, and that the Plan may be modified pursuant to § 1127 of the Bankruptcy Code prior to, during, or as a result of the Confirmation Hearing, in each case, without further notice to parties in interest; provided, however, that any such modification does not materially and adversely affect any class of claims under the Plan.

Objections to Confirmation

42. Under Bankruptcy Rules 2002(b) and (d), all creditors and indenture trustees must be given not less than twenty-eight (28) days’ notice of the time fixed for filing objections and

the hearing to consider confirmation of a chapter 11 plan. Pursuant to Bankruptcy Rule 3020(b)(1), objections to confirmation of a plan must be filed and served “within a time fixed by the court.” Fed. R. Bankr. P. 3020(b)(1).

43. The Plan Proponent requests that the Bankruptcy Court fix the last date for filing and serving objections to confirmation of the Plan as seven (7) days before the Confirmation Hearing (the “Objection Deadline”). Setting the Objection Deadline at seven (7) days before the Confirmation Hearing will provide parties in interest with sufficient time to consider whether to interpose any objections to the Plan, while providing the Bankruptcy Court, the Plan Proponent and all parties in interest with sufficient time to consider and, if necessary, respond to any objections before the Confirmation Hearing. To the extent objections to confirmation are filed, the Plan Proponent requests it, and other parties in interest, be authorized to file and serve a reply to any such objections no later than the day prior to the Confirmation Hearing.

44. In addition, the proposed Confirmation Hearing Notice provides, and the Plan Proponent requests that the Bankruptcy Court direct, any objections or responses to the proposed confirmation of the Plan to: (i) be in writing; (ii) state the name, address, and nature of the claim of the objecting or responding party; (iii) state with particularity the basis and nature of any objection or response and, if practicable, a proposed modification to the Plan that would resolve such objection; (iv) conform to the Bankruptcy Rules and the Local Rules; and (v) be filed electronically no later than the Objection Deadline with the Clerk of the United States Bankruptcy Court for the Eastern District of New York, with a courtesy copy delivered to Judge Lord’s Chambers and served so that objections and responses are actually received on or before the Objection Deadline by: (a) the Debtor, (b) counsel for the Debtor, (c) counsel for the Committee, and (d) Office of the United States Trustee (collectively, the “Notice Parties”).

45. The Plan Proponent submits that the foregoing procedures will provide adequate

notice of the Confirmation Hearing and, accordingly, request that the Bankruptcy Court approve these procedures for filing objections to the Plan and any responses thereto.

Voting on the Plan and Related Matters

Approval of Ballots

46. The Plan Proponent also requests that the Bankruptcy Court approve the ballot (with instructions attached thereto), substantially in the form of the proposed ballot annexed hereto as **Exhibit C**, to be used in connection with the solicitation of acceptances of the Plan. The form of the ballot complies with Bankruptcy Rule 3018(c) and is based substantially on Official Form No. 14; with modifications thereto to address the particular aspects of the Debtor's Chapter 11 Case and to include certain additional information that the Plan Proponent believes to be relevant and appropriate for voting purposes. The appropriate ballot form will be distributed to the Voting Parties, the only class of claims entitled to vote under the Plan. All classes of Claims that are unimpaired under the Plan are conclusively presumed to have accepted the Plan.

Voting Deadline for Receipt of Ballots.

47. Pursuant to Bankruptcy Rule 3017(c), at the time of or before the approval of the Disclosure Statement, "the court shall fix a time within which the holders of claims and interests may accept or reject the plan." Fed. R. Bankr. P. 3017(c). The Plan Proponent respectfully requests that the Bankruptcy Court establish December 8, 2017, the date that is approximately 7 days from the hearing to consider approval of the Disclosure Statement, as the last date by which ballots for accepting or rejecting the Plan must be received by the Plan Proponent in order to be counted (the "**Voting Deadline**"). This deadline will afford creditors sufficient time to vote and will provide the Plan Proponent with adequate time to tabulate the ballots expected to be returned. Ballots must be received by the Plan Proponent by the Voting Deadline, at an address indicated thereon, by first class mail in the provided return envelope, by overnight courier, by personal delivery,

by facsimile, or by electronic mail, unless otherwise approved in advance by the Plan Proponent in writing.

Summary of Ballots and Notice of Cramdown

48. Pursuant to Local Bankruptcy Rule 3018-1, the Plan Proponent will file a preliminary summary of ballots and notice of cramdown seven (7) days prior to the Confirmation Hearing Date (the “Summary of Ballots”) which shall set forth setting forth the following information:

- (a) a preliminary summary of the ballots received;
- (b) an initial indication of whether the Plan Proponent proposes to confirm the plan over the objection of one or more impaired classes; and
- (c) whether any witnesses other than the Plan Proponent’s witness(es) in favor of the plan are expected to testify as to any facts relevant to confirmation.

Procedures for Vote Tabulation

Ballots Counted as Acceptances

49. The Plan Proponent requests that, with regard to the tabulation of ballots, the Voting Parties shall be entitled to vote in the dollar amount determined in accordance with the following hierarchy:

- (a) if an Order has been entered by the Bankruptcy Court determining the amount of such holder’s claim, whether pursuant to Bankruptcy Rule 3018 or otherwise, or if a claim is deemed allowed in accordance with the Plan, then in the amount prescribed by said Order or the Plan;
- (b) if no such Order has been entered, then in the non-contingent, liquidated amount contained in a timely filed proof of claim that is not the subject of an objection on the Voting Record Date, disregarding the portion of the claim, if any, that is contingent or unliquidated, provided, however, that if an objection to the claim is pending as of the Voting Record Date, then in the amount and/or the classification sought in said objection, and claims subject to an objection seeking expungement shall not be entitled to vote unless otherwise ordered by the Bankruptcy Court;
- (c) if no such proof of claim has been timely filed, then in the non-contingent,

non-disputed, liquidated amount contained in the Debtor's schedule, disregarding the portion of the claim, if any, that is contingent or unliquidated; and

- (d) if a filed claim is in whole or in part unliquidated, contingent or in an unknown or zero amount, then the claim shall be valued in the amount of \$1.00 for voting purposes only. For the avoidance of doubt, any personal injury or tort claim that has not been allowed, irrespective of whether an objection has been filed to such claim, shall be valued at \$1.00 for voting purposes only.

50. Additionally, if a scheduled or filed claim was paid prior to the Voting Record Date, the Plan Proponent requests that such claim shall be disallowed for voting purposes.

51. Allowance of a claim in accordance with these procedures shall be solely for the purpose of voting to accept or reject the Plan and not for the purpose of the allowance of, or distribution on account of, such claim and without prejudice to the rights of the Debtor in any other context.

52. The Plan Proponent further requests that the following voting procedures apply when tabulating the Ballots:

- (a) For purposes of the numerosity requirement of § 1126(c) of the Bankruptcy Code, separate claims held by a single creditor in a particular class will be aggregated as if such creditor held one claim against the Debtor in such class, and the votes related to such claims will be treated as a single vote to accept or reject the Plan.
- (b) Creditors must vote all of their claims within a particular class either to accept or reject the Plan and may not split their vote. Accordingly, an individual ballot or multiple ballots with respect to multiple claims within a single class that partially rejects and partially accepts the Plan will not be counted.¹
- (c) Ballots that fail to indicate an acceptance or rejection of the Plan or that indicate both acceptance and rejection of the Plan, but which are

¹ To the extent that any creditor entitled to vote in a particular class has filed a proof of claim that (i) is duplicative of a previously filed proof of claim (a claim in the same amount, with the same classification and asserting the same basis of claim), or (ii) amends or supersedes a prior proof of claim filed by or on behalf of the same creditor prior to the Voting Record Date, such proof of claim shall supersede the prior proof of claim for voting and tabulation purposes, and such creditor shall be provided, to the extent possible, with only one Solicitation Package and one ballot which shall reflect the vote of only one such claim.

otherwise properly executed and received prior to the Voting Deadline, will not be counted.

- (d) Only ballots that are timely received with signatures will be counted. Unsigned ballots will not be counted.
- (e) Ballots postmarked prior to the Voting Deadline, but received by the Plan Proponent after the Voting Deadline, will not be counted, unless the Plan Proponent has granted in writing an extension of the voting deadline with respect to such ballot.
- (f) Ballots which are illegible, or contain insufficient information to permit the identification of the creditor, will not be counted.
- (g) Ballots cast by a person or entity that does not hold a claim in a class that is entitled to vote to accept or reject the Plan will not be counted.
- (h) Whenever a creditor casts more than one ballot voting the same claim prior to the Voting Deadline, the last valid ballot received prior to the Voting Deadline shall be deemed to reflect the voter's intent and supersede any prior ballots.
- (i) If a creditor simultaneously casts inconsistent duplicate ballots with respect to the same claim, such ballots shall not be counted.
- (j) Each creditor shall be deemed to have voted the full amount of its claim. Unless otherwise ordered by the Bankruptcy Court, questions as to the validity, form, eligibility (including time of receipt), acceptance, and revocation or withdrawal of ballots shall be determined by the Plan Proponent in its sole discretion, which determination shall be final and binding.

53. If any creditor seeks to challenge the allowance of its claim for voting purposes in accordance with the above procedures, the Plan Proponent requests that the Bankruptcy Court direct such creditor to serve upon the Plan Proponent and file with the Bankruptcy Court a Temporary Allowance Motion. The Plan Proponent further proposes, in accordance with Bankruptcy Rule 3018, that as to any creditor filing a Temporary Allowance Motion, such creditor's Ballot should not be counted unless temporarily allowed by the Bankruptcy Court for voting purposes.

54. Ballots may be preprinted with the dollar amounts of claims as reflected in the Debtor's records at the Voting Record Date. If they are so preprinted, then the preprinted amount shall be used in tabulating the votes unless the holder of the claim obtains an Order from the Bankruptcy Court under Bankruptcy Rule 3018(a) or there was a clerical error in printing the ballot. The amount and classification of a claim listed on a ballot shall be without prejudice to the Plan Proponent's right to file an objection to such claim.

Non-Substantive Changes

55. The Plan Proponent seeks authorization from the Bankruptcy Court to make non-substantive changes to the Disclosure Statement, the Plan, and related documents without further order of the Bankruptcy Court, including without limitation changes to correct typographical and grammatical errors and to make conforming changes among the Disclosure Statement, the Plan, and any other materials in the Solicitation Package prior to their mailing.

NOTICE

56. Notice of this Motion has been given to (i) counsel to the Debtor, (ii) the United States Trustee; (iii) all creditors; and (iv) all parties who have filed a notice of appearance in this case pursuant to Bankruptcy Rule 2002. The Plan Proponent submits that no other or further notice need be provided, except to the extent sought in this Motion and approved by the Bankruptcy Court.

NO PRIOR REQUEST

No previous application for the relief sought herein has been made by the Plan Proponent to this or any other court.

WHEREFORE, the Plan Proponent respectfully requests that the Bankruptcy Court approve this Motion in all respects, enter the Disclosure Statement Order, substantially in the form of **Exhibit A** attached hereto, and grant such other and further relief as is just and proper.

Dated: New York, New York
October 16, 2017

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