

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION**

<b>IN RE:</b>  <b>WM SIX FORKS, LLC,</b>  <b>DEBTOR</b>	<b>CASE NO. 12-05854-8-JRL</b> <b>CHAPTER 11</b>
<b>DISCLOSURE STATEMENT FOR PLAN OF LIQUIDATION DATED DECEMBER 10, 2012</b>	

NOW COMES WM Six Forks, LLC (the “Debtor”), pursuant to 11 U.S.C. § 1125 of the Bankruptcy Code (the “Bankruptcy Code” or “Code”) and Rule 3016 of the Federal Rules of Bankruptcy Procedure, and respectfully submits this Disclosure Statement in connection with the solicitation of acceptances and rejections with respect to the Plan of Liquidation Dated December 10, 2012 (the “Plan”). Capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Plan. **A copy of the Plan is attached hereto as Exhibit 1 and incorporated herein by reference.**

**I. INTRODUCTION**

On August 12, 2012 (the “Petition Date”), the Debtor filed a voluntary petition seeking relief under Chapter 11 of the Bankruptcy Code and an Order for relief was entered in the proceeding. The Debtor is the sole owner of an apartment and retail/office building located in Raleigh, North Carolina known as Manor Six Forks (the “Project”). The Project includes 298 residential apartments and approximately 14,000 square feet of retail/office space on the ground floor of the building.

The Debtor has filed the Plan as a plan of orderly liquidation pursuant to which the Debtor will sell the Project to Lenox Mortgage XVII LLC (“Lenox”)<sup>1</sup> or the successful bidder pursuant to a sale process and procedures to be used to determine the highest or otherwise best bid for the Project. Except as otherwise provided in the Plan, the Project would be sold to the successful bidder free and clear of liens, claims, encumbrances, and interests pursuant to section 363(b), 363(f) and 1123(a)(5) (D) of the Code.

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<sup>1</sup> The term Lenox includes Lenox Mortgage XVII LLC and/or its affiliates, designees, successors and assigns.

All creditors and other parties in interest are encouraged to read the Plan carefully and thoroughly, and to review the Plan with their attorneys or other advisors to ascertain its terms, provisions, and conditions and the effect of the Plan on any Claims or Equity Interests which such persons may possess. The Debtor believes that confirmation of the Plan is in the best interests of creditors and equity interest holders and that no feasible alternatives to the Plan exist.

## **II. PROCEDURAL INFORMATION**

Pursuant to the Bankruptcy Code, this Disclosure Statement must be approved by the Court. Such approval is required by statute and does not constitute a determination by the Court as to the desirability of, or the value, adequacy, or suitability of any consideration offered under the Plan, but does indicate that the Disclosure Statement contains adequate information to permit those claimants and other parties in interest whose acceptance of the Plan is solicited pursuant to this Disclosure Statement to make an informed judgment about the Plan.

The Debtor prepared this Disclosure Statement to disclose that information available which, in the Debtor's opinion, is material, important and necessary to an evaluation of the Plan, and the material herein contained is intended solely for this purpose and the use of known creditors and equity interest holders of the Debtor. This Disclosure Statement may not be relied upon for any purpose other than a determination of how to vote on the Plan. Furthermore, the matters addressed and the discussions contained in this Disclosure Statement are not necessarily sufficient for the formulation of a judgment by any creditor or equity interest holder of whether the Plan is preferable to any alternative thereto. However, the Debtor as the proponent of the Plan supports the Plan for the reasons explained herein and encourages each creditor, equity interest holder, or other party in interest to accept the Plan by timely returning a ballot in favor of the Plan.

The Disclosure Statement is submitted in accordance with section 1125 of the Code for the purpose of soliciting acceptance of the Plan from holders of certain claims against and equity interests in the Debtor. The persons whose acceptance is sought are those whose claims or interests are "impaired" by the Plan; *i.e.*--those whose claims or interests are altered by the Plan or who will not receive under the Plan the allowed amounts of their respective claims or interests in cash. Holders of those claims and interests which are not "impaired" are automatically deemed to have accepted the Plan.

If the Plan is rejected by one or more impaired classes of claims or equity interests, the Plan or a modification thereof may still be confirmed by the Court if the Court determines, among other things, that the Plan does not discriminate unfairly and is fair and equitable with respect to the rejecting class or classes of claims or interests impaired by the Plan. The Debtor will request such a determination (commonly referred to as a “cram down”) if the Plan or modification thereof is not accepted by one or more of the impaired classes of claims or interests.

If the Plan or any modification thereof is not accepted by one or more of the impaired classes of claims or interests and is not confirmed by the Court pursuant to the cram down provisions of the Bankruptcy Code, the Debtor may seek to modify the Plan or may convert the case to a proceeding under Chapter 7, in which event the Chapter 7 trustee would review and object to claims, pursue all necessary litigation and make final distributions to creditors and equity interest holders. By separate order served on all parties in interest, the Court will set a hearing to consider confirmation of the Plan.

A creditor or equity interest holder, in order to vote, must file a Proof of Claim or Interest on or before the date set as the “bar date” for filing all claims. The bar date for filing claims against the Debtor is set forth in the Plan. However, any creditor or equity interest holder whose claim or interest is listed in the schedules filed by the Debtor and not identified as disputed, unliquidated or contingent is deemed (to the extent so scheduled) to have filed a claim, and absent objection such claim is deemed allowed and entitled to vote.

A creditor or equity interest holder may vote to accept or reject the Plan by filling out and mailing (as instructed thereon) the ballot which has been provided with this Disclosure Statement. The Court will set the time by which ballots must actually be filed; and, any ballots received after such time may not be counted. Regardless of whether a creditor or equity interest holder votes against the Plan, or whether the creditor or equity interest holder votes at all, such persons will be bound by the terms and treatment set forth in the Plan if the Plan is confirmed by the Court.

Allowance of a claim or equity interest for voting purposes does not necessarily mean that all or a portion of the claim will be allowed or disallowed for distribution purposes. The Debtor or any party in interest may file an objection to a claim, which will then be allowed or disallowed by the Court after notice and an opportunity for hearing. Tax consequences of any of the transactions proposed by the Plan will depend upon the individual circumstances applicable

to each creditor, equity interest holder, or other party in interest, and include factors beyond the Debtor's knowledge. A general discussion of potential tax consequences is contained in the Disclosure Statement.

The various claims of creditors and interests of equity interest holders are all treated under the proposed Plan. There are additional significant provisions contained throughout the Plan that impact the treatment of creditors and equity interest holders -- please read the Plan carefully to fully understand its terms. The Plan proposes segregation of the creditors into separate classes, with additional classes comprising the equity interests.

The Debtor or others may solicit your vote for or against the Plan. The cost of any solicitation by the Debtor will be borne by the Estate. No other additional compensation shall be received by any party for any solicitation other than as disclosed to the Court.

**Consummation Of The Plan Is Subject To Numerous Conditions And Variables, And There Can Be No Assurance That The Plan, As Contemplated, Will Be Effectuated. No Representations Or Assurances Concerning The Plan Are Authorized By The Debtor Other Than As Set Forth In This Disclosure Statement. Any Representations Or Inducements Made By Any Person To Secure Your Vote Which Are Other Than Herein Contained Should Not Be Relied Upon By You In Arriving At Your Decision, And Such Additional Representations Or Inducements Should Be Reported To Counsel For The Debtor, Who In Turn Shall Convey Such Information To The Court For Such Action As May Be Deemed Appropriate.**

Certain materials contained in this Disclosure Statement may have been taken directly from other, readily accessible instruments or digests of other instruments. In addition, other information may be made available, upon reasonable written request, to creditors or other parties in interest having standing to request such information. While the Debtor made every effort to retain the meaning of any such instruments or documents or the portions thereof reiterated herein, you are advised that any reliance on the contents of such other instruments or documents should be predicated on a thorough review of the instruments or documents themselves, including the Plan.

### **III. VOTING**

If you are in one of the classes of creditors or other parties in interest whose interests are affected by the Plan, it is important that you vote. To vote to accept or reject the Plan, creditors and other persons or entities having claims against the Debtor falling within any of the impaired classes should indicate their acceptance or rejection on the appropriate ballot. Any persons

holding claims in more than one impaired class must file one ballot for each such class. Additional ballots may be obtained by written request to Counsel for the Debtor.

A class of claims will have accepted the Plan if it is accepted by class members holding at least two-thirds (2/3) in amount and more than one-half (1/2) in number of the allowed claims of such class voting on the Plan. A class of equity interests will have accepted the Plan if it is accepted by class members holding at least two-thirds (2/3) in amount of the allowed interests in such class voting on the Plan. You are, therefore, urged to fill in, date, sign, and promptly mail the enclosed ballot furnished to you.

**Please Be Sure To Properly Complete The Form And Legibly Identify The Name Of The Claimant Or Equity Interest Holder. Executed Ballots Must Be Received On Or Before The Return Date Set Forth In The Ballot. Completed Ballots Should Be Returned To The Address Specified On The Ballot. Since Mail Delays May Occur, It Is Important That The Ballot Or Ballots Be Mailed Or Delivered Well In Advance Of The Date Specified. Any Acceptances Or Rejections Of The Plan Received After The Date May Not Be Included In Any Calculation To Determine Whether The Creditors And Equity Interest Holders Have Voted To Accept Or Reject The Plan.**

**This Is A Solicitation By The Debtor Only And Is Not A Solicitation By The Attorneys, Accountants, Or Other Professionals Who May Be Employed By The Debtor, And The Representations Made Herein Are Solely And Exclusively Those Of The Debtor And Not Of Such Attorneys, Accountants, Or Other Professionals.**

#### **IV. BACKGROUND AND HISTORY OF THE DEBTOR**

WM Six Forks, LLC is a North Carolina limited liability company formed on March 13, 2006 for the purpose of developing the Project known as Manor Six Forks. The Project is a five-story building located off of Six Forks Road, in Raleigh, North Carolina and consists of 298 residential apartments and approximately 14,000 square feet of retail/office space on the ground floor of the building.

In 2008, the original manager of the Debtor, Boylan Investment Company, LLC ("Boylan Investment"), sought financing for the construction of the Project through an insured loan program offered by the United States Department of Housing and Urban Development ("HUD"). Capmark Finance, Inc. ("Capmark") had agreed make a loan to the Debtor for the construction of the Project under the HUD-insured program.

One of the many requirements of the HUD-insured loan program was that the Debtor provide Capmark with a commitment from a qualified institution or private surety assuring the completion of the Project. After discussions with Boylan Investment, Walter Williams, an

individual who also held a membership interest in the Debtor, agreed to become a private surety for completion assurance purposes of the proposed HUD-insured loan. As private surety, Mr. Williams agreed to procure a \$4,005,048 unconditional irrevocable letter of credit from Wells Fargo Bank, NA in favor of Capmark (the “Assurance Funds”).

On or about July 22, 2008, the Debtor executed the following documents in favor of Capmark: (1) a Building Loan Agreement, (2) a Deed of Trust Note in the principal amount of \$36,587,800 (the “Note”), (3) a Deed of Trust and Assignment of Rents, Profits, and Income (the “Deed of Trust”), (4) a Security Agreement, and (5) a Completion Assurance Agreement which acknowledged the procurement of the Assurance Funds (collectively, the “Loan Documents”).<sup>2</sup> The Note was insured by HUD, and the Project was subject to a Regulatory Agreement for Multifamily Housing Projects between the Debtor and HUD (“Regulatory Agreement”). The Debtor also entered into a Construction Contract with Boylan Development Company (“Boylan Development”) for the construction of the Project. Boylan Development was an affiliate of the manager of the Debtor, Boylan Investment.

In October of 2009 before the completion of the Project, Capmark filed for Chapter 11 bankruptcy protection in Delaware. Shortly thereafter, the Loan Documents were assigned by Capmark to Berkadia Commercial Mortgage, LLC (“Berkadia”). In late 2009, Boylan Development also defaulted under the Construction Contract by failing to complete the Project and pay various subcontractors and suppliers to the Project. Many of the subcontractors filed and perfected liens against the Project pursuant to N.C.G.S. §§ 44A-1 *et seq.*

In response to the default by Boylan Development, on March 19, 2010, Mr. Williams organized WM6F Completion & Performance Associates, LLC (“WM6F”) to administer the Assurance Funds and to assist with the completion of the Project. WM6F also loaned additional funds to the Debtor for the purpose of completing the Project. In March of 2010, the Project was completed, and on August 27, 2010, WM6F became the sole manager of the Debtor.

By December of 2010, WM6F had settled or otherwise resolved most of the claims filed against the Debtor by contractors, subcontractors and suppliers to the Project and expended 100% of the Assurance Funds eligible for payment to these creditors (collectively, the “Private”).

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<sup>2</sup> A UCC Financing Statement was also filed by Capmark in the office of the North Carolina Secretary of State on July 22, 2008.

Surety Settlements”).<sup>3</sup> Creditors whose claims were settled assigned their claims to WM6F as reflected in the schedules to the Petition. As of the Petition Date, the creditors whose claims were not settled included Horizon, Inc., Hughes Metal Works, LLC, Shelco, Inc., Southeastern Electrical Distributors, Inc., and Tindall Corporation.<sup>4</sup> The Debtor believes that these creditors are owed an aggregate amount in excess of \$1,876,631 as of the Petition Date.<sup>5</sup>

In or about September of 2011, after the Debtor failed to pay the amounts owed under the Loan Documents, Berkadia initiated a claim with HUD under the mortgage insurance policy. After the payment of the claim by HUD, Berkadia assigned the Loan Documents to HUD. On July 6, 2012, HUD assigned the Loan Documents to Lenox, without recourse. The Regulatory Agreement was terminated and released by HUD in conjunction with the assignment of the Loan Documents to Lenox.

On July 24, 2012, Lenox filed an action against the Debtor in the Superior Court, Wake County, North Carolina for a preliminary and permanent injunction and appointment of a receiver. After failing to reach an agreement resolving the pending claims, on August 12, 2012, the Debtor filed for Chapter 11 bankruptcy protection. As of the Petition Date, the assets of the Debtor included the Project and approximately \$800,000 in cash, accounts receivable, equipment, furnishings and other intangibles. Pursuant to existing leases for the residential apartments, the Debtor also generated approximately \$285,000 per month in rental revenue.

As of the Petition Date, Lenox was owed the sum of \$39,027,860 pursuant to the Loan Documents. Lenox contends that the outstanding indebtedness is secured by a first mortgage lien on the Project, including any rents, profits and income generated by the Project, pursuant to the Deed of Trust and Security Agreement. The Debtor disputes the extent, validity and priority of the lien or security interest held by Lenox in the Project. However, the parties have reached an agreement resolving this dispute which is explained in more detail in Article VIII of the Disclosure Statement (the “Lenox Settlement”).

As of the Petition Date, there were other liens filed against the Project by contractors and subcontractors for improvements made to the Project (the “Construction Lien Claims”). The holders of Construction Lien Claims include Horizon, Inc., Hughes Metal Works, LLC, Shelco,

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<sup>3</sup> Assurance Funds in the amount of \$667,508 were expended to pay for defective work as required by HUD.

<sup>4</sup> The claim of Hendrix-Barhnill Company was settled by HUD prior to the Petition Date. Hendrix-Barnhill does not have a claim against the Debtor as of the Petition Date.

<sup>5</sup> The Claim of Tindall Corporation is also included within the claim of Shelco, Inc.



Inc., Southeastern Electrical Distributors, Inc., Tindall Corporation, and WM6F, as assignee pursuant to the Private Surety Settlements. The Debtor estimates that these claims total in the aggregate approximately \$6,000,000. As of the Petition Date, various subcontractors, suppliers, and vendors also held unsecured claims in the aggregate amount of approximately \$5,000,000. Some of these claims also are held by WM6F, as assignee pursuant to the Private Surety Settlements.

## **V. PLAN SUMMARY**

**The Following Is A Brief Summary Of Certain Provisions Of The Plan And Should Not Be Relied On For Voting Purposes In Lieu Of A Thorough And Comprehensive Review Of The Actual Plan Itself. The Summary Does Not Purport To Be Complete. Creditors And Equity Interest Holders Are Urged To Read The Plan To Ascertain The Effect Of The Plan On Their Claims And Interests And The Other Provisions Of The Plan. Creditors And Equity Interest Holders Are Further Urged To Consult With Their Attorneys, Tax Advisors, Financial Consultants, Or Other Professionals In Order To Understand More Fully The Plan Or The Effect Of The Plan As To Their Particular Situation.**

The Plan of orderly liquidation contemplates the sale of the Project (the “Project Sale”) after the entry of the Confirmation Order and in accordance with the Bidding Procedures, a copy of which will be filed with the Court and provided to creditors and equity interest holders with this Disclosure Statement. Pursuant to the Bidding Procedures and a Purchase and Sale Agreement to be executed by the Debtor and Lenox (the “Lenox Purchase Agreement”)<sup>6</sup>, Lenox will submit a Stalking Horse Bid in the amount of 39,027,860, less estimated net cash collateral on the Closing Date, payable by Lenox by Credit Bid or a combination of Credit Bid and cash on the Effective Date. The Project will be sold to Lenox or to any other party who submits the highest and best offer pursuant to the Bidding Procedures (the “Prevailing Bidder”). In the event the Prevailing Bidder fails to timely consummate the sale pursuant to the Bidding Procedures, the Project will be sold to the party who submits the next highest and best offer for the Project (the “Back-Up Bidder”).

The Project will be sold subject to the lien securing the Class 1 Allowed Secured Claim of the Wake County Department of Revenue (“Allowed Wake County Secured Claim”), but otherwise free and clear of all liens junior to the Class 2 Allowed Secured Claim of Lenox (“Allowed Lenox Secured Claim”). In conjunction with the Project Sale, the Debtor will assume

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<sup>6</sup> A copy of the Lenox Purchase Agreement is attached as Exhibit A to the Bidding Procedures.



and assign to the Prevailing Bidder or the Back-Up Bidder, as the case may be, certain executory contracts and unexpired leases which such bidder and/or the Debtor designate in accordance with the procedures set forth in the Confirmation Order. The sale and the assumption and assignment of contracts and leases to the Prevailing Bidder or the Back-Up Bidder will be subject to approval by the Court after notice and hearing.

If the Project Sale results in net sale proceeds in excess of the Allowed Lenox Secured Claim, then the holders of Allowed Class 3 Secured Construction Lien Claims and the Class 4 Secured Claim of Water Systems will be distributed, in the order of priority among the holders of such Allowed Claims, an amount equal to the excess net sale proceeds remaining after paying in full the Allowed Lenox Secured Claim. If the Project Sale does not result in net sale proceeds in excess of the Allowed Lenox Secured Claim, then the Allowed Class 3 Construction Lien Claims and the Allowed Class 4 Secured Claim of Water Systems shall be deemed Secured Claims in the amount of \$0.00 and the liens voided pursuant to section 506(d) of the Code.

Irrespective of the proceeds received from the Project Sale, the Debtor will use funds received from the Lenox Settlement, and any other funds which are not otherwise subject to the liens of Lenox or any holders of Class 3 Secured Construction Lien Claims or the Class 4 Secured Claim of Water Systems, to pay all Allowed Administrative Expense Claims, Allowed Priority Claims and Allowed Priority Tax Claims in full as required pursuant to section 1129(a) of the Code. Any remaining funds will be distributed Pro Rata to the holders of Class 5 general unsecured claims, which would include any unsecured deficiency claims in Classes 3 and 4. As of the date of the filing of the Plan and Disclosure Statement, the Debtor does not anticipate that there will be sufficient funds to pay in full all Allowed Unsecured Claims.

The Debtor desires that this Plan be a consensual plan, with all classes of creditors voting to accept the Plan by the requisite majorities required under section 1126 of the Code. In the event any class does not accept the Plan, however, the Debtor requests that the Plan be confirmed by the cram down provisions of section 1129(b) of the Code with respect to such dissenting class or classes. The Debtor reserves the right to modify the Plan pursuant to section 1127 of the Code, consistent with the requirement that the Plan, as modified, meets the requirements of sections 1122 and 1123 of the Code.

## **VI. CLASSIFICATION AND TREATMENT OF CLAIMS AND EQUITY INTERESTS**

For purposes of the Plan, Claims and Equity Interests are divided into the following Classes and will receive the treatment summarized below and set forth in detail in the Plan. **A schedule of estimated claims is attached hereto as Exhibit 2.** Please note that the schedule was prepared prior to completion of the claims reconciliation process, and thus the amounts shown are subject to change depending on the final amount of the Allowed Claims.

### **A. Administrative Expense Claims**

Administrative Expense Claims are Claims against the Debtor or its Estate arising on or after the Petition Date (except for 503(b)(9) Claims which arose within 20 days prior to the Petition Date) for a cost or expense of administration in the Chapter 11 Case that is entitled to priority or superpriority under sections 364(c)(1), 503(b), 503(c), 507(b) or 1114(e)(2) of the Code, including: (a) the actual and necessary costs and expenses incurred after the Petition Date for operating the business of the Debtor, including wages, salaries, commissions, and payments for services, utilities, inventories, leased equipment, etc. for premises care and maintenance (“Operating Expense Claims”); (b) compensation for legal, financial, advisory, accounting and other professional services, and reimbursement of expenses awarded or allowed under sections 330(a) or 331 of the Bankruptcy Code (“Professional Services Claims”); (c) Property Manager Consulting Claims awarded or allowed under sections 330(a) or 331 of the Bankruptcy Code; (d) any Allowed Claim asserted pursuant to section 503(b)(9) of the Bankruptcy Code (“503(b)(9) Claims”) and (e) all fees and charges assessed against the Estate under chapter 123 of title 28, United States Code, 28 U.S.C. §§ 1911-1930 (“Court Fees and Charges”).

Property Manager Consulting Claims include all hourly consulting fees and consulting expenses of Wellington Advisors, LLC (“Wellington”) and Abacus Management Group, LLC (“Abacus”) arising on or after the Petition Date pursuant to (a) the Financial Services Agreement between the Debtor and Wellington (the “Wellington Agreement”), and (b) the Property Management Agreement between the Debtor and Abacus dated September 1, 2010, as amended on August 6, 2012 (the “Abacus Agreement”). The Wellington Agreement and the Abacus Agreement are attached to the Motion for Authority to Continue Employment of Property Managers for Debtor filed in the Chapter 11 Case on August 12, 2012 [Docket No. 6].

Administrative Expense Claims shall be allowed upon due request or application and in such amounts as may be determined by the Court after notice and hearing. Professional Services Claims by attorneys, accountants and other professionals retained by the Debtor and Property Manager Consulting Claims shall be compensated for services rendered in such capacity and reasonably necessary to the administration of this estate, upon an hourly basis and at their customary hourly rates or in such amounts as may be determined by the Court, but not to exceed reasonable compensation for such services. Prior to the closing on the Project Sale, Professional Services Claims approved by the Court shall be paid from the retainer held by Debtor's counsel (the "Retainer Funds") and not from the cash collateral of Lenox. After the closing on the Project Sale, Professional Services Claims and Property Manager Consulting Claims shall be paid from the Retainer Funds or from any other funds available to the Debtor for the payment of Allowed Claims, including the Lenox Settlement Fund as described in Section VIII below.

Except for Professional Services Claims and Property Manager Consulting Claims, requests for allowance of Administrative Expense Claims shall be filed with the Court within 30 days after the Closing Date, or such other date as may be established by the Court. Requests for allowance of Professional Services Claims and Property Manager Consulting Claims shall be filed with the Court on a quarterly basis after the Effective Date.

Except to the extent that any entity entitled to payment of any Allowed Administrative Expense Claim agrees to less favorable treatment, the Debtor or its designee (the "Disbursing Agent") shall pay to each holder of an Allowed Administrative Expense Claim in full satisfaction, settlement, and release of and in exchange for such Allowed Administrative Expense Claim an amount in cash equal to the allowed amount of such Claim (i) within 90 days after the Closing Date or (ii) as soon thereafter as the allowed amount of such Claim can be determined and, if necessary, allowed by the Court pursuant to a Final Order. The schedule of estimated claims attached hereto as Exhibit 2 provides the Administrative Expense Claims known to the Debtor as of the date of the filing of the Plan and Disclosure Statement.

#### **B. Priority Claims**

A Priority Claim includes a claim that is unsecured and is entitled to priority under sections 507 or 364 of the Code, excluding Priority Tax Claims. Except to the extent that any Entity entitled to payment of any Allowed Priority Claim agrees to less favorable treatment, the Disbursing Agent shall pay to each holder of an Allowed Priority Claim in full satisfaction,

settlement, and release of and in exchange for such Allowed Priority Claim, an amount in cash equal to the allowed amount of such Claim (i) within 90 days after the Closing Date or (ii) as soon thereafter as the allowed amount of such Claim can be determined and, if necessary, allowed by the Court pursuant to a Final Order. The Debtor is not aware of the existence of any Priority Claims as of the date of the filing of the Plan and Disclosure Statement.

**C. Priority Tax Claims**

Priority tax claims are those claims entitled to priority as set forth in section 507(a)(8) of the Code. Except to the extent that a holder of an Allowed Priority Tax Claim agrees to a less favorable treatment, the Disbursing Agent shall pay to each holder of an Allowed Priority Tax Claim in full satisfaction, settlement, and release of and in exchange for such Allowed Priority Tax Claim, an amount equal to the allowed amount of such Claim, plus interest at the statutory rate, (i) within 90 days after the Closing Date or (ii) as soon thereafter as the allowed amount of such Claim can be determined and, if necessary, allowed by the Court pursuant to a Final Order. Other than the Allowed Wake County Secured Claim, the Debtor is not aware of the existence of any Priority Tax Claims as of the date of the filing of the Plan and Disclosure Statement.

**D. Classes Of Claims**

**Class 1** consists of the Allowed Secured Claim of the Wake County Department of Revenue (“Wake County”) representing 2012 ad valorem property taxes owed by the Debtor as of the Petition Date on the Project. Wake County shall have an Allowed Secured Claim in the aggregate amount of \$305,304.72, plus any post-petition penalties and interest accruing under applicable non-bankruptcy law. Wake County will retain its Liens on the Project and when such collateral is sold at the Project Sale, the Project will be transferred subject to the applicable Liens of Wake County. The Class 1 Secured Claim of Wake County is unimpaired by the Plan. Wake County is deemed to have accepted the Plan.

**Class 2** consists of the Allowed Secured Claim of Lenox secured by a first priority lien and security interest in the Project and any cash collateral derived therefrom (the “Lenox Collateral”), subject only to the Allowed Wake County Secured Claim. Lenox shall have an Allowed Secured Claim in an amount to be determined by the Project Sale but in no event shall such Allowed Secured Claim be less than \$39,027,860 plus, in the event the Project is sold for an amount in excess of the \$39,027,860, applicable post-petition interest at the contract rate and reasonable attorneys’ fees and costs as may be agreed between the Debtor and Lenox or allowed

by the Court after notice and hearing pursuant to section 506 of the Code. The Lenox Secured Claim shall be deemed secured by a valid, enforceable and perfected Lien on the Lenox Collateral, junior only to the Allowed Wake County Secured Claim.

The Debtor shall sell, transfer and convey the Project at the Project Sale and pursuant to the Bidding Procedures, subject to the Liens of Wake County, but otherwise free and clear of all other Liens, Claims, encumbrances and other interests of any kind pursuant to sections 363(f) and 1123(a)(5)(D) of the Code, with all other Liens, Claims, encumbrances and other interests of any kind to attach to the proceeds of the Project Sale in the same order of priority as they attached to the Project as of the Petition Date. Lenox, as holder of the Allowed Lenox Secured Claim, shall be entitled to assert the Lenox Credit Bid Right<sup>7</sup> at the Project Sale in accordance with the terms set forth in the Plan and in the Bidding Procedures.

If Lenox is the successful purchaser of the Project at the Project Sale, Lenox shall acquire the Project in satisfaction of the Allowed Lenox Secured Claim and free and clear of all Liens, Claims, encumbrances and other interests of any kind that are junior in priority to the Lien of Lenox ("Junior Liens and Claims") pursuant to sections 363(f) and 1123(a)(5)(D) of the Code, but expressly subject to the Liens of Wake County. If Lenox is not the successful purchaser of the Project at the Project Sale, (i) Lenox will retain its Lien on the proceeds of the Project Sale and Lenox will be paid the Allowed amount of the Lenox Secured Claim as determined in accordance with the Plan in immediately available funds at the closing of the Project Sale, (ii) the Purchaser shall acquire the Project free and clear of all Junior Liens and Claims, and (iii) the remaining proceeds of sale, if any, shall be distributed to the holders of Junior Liens and Claims (i.e., Allowed Class 3 Secured Construction Lien Claims and the Allowed Class 4 Secured Claim of Water Systems) in the same order of priority to which such Secured Claims attached to the Project under applicable non-bankruptcy law.

Upon Lenox funding the Settlement Fund, Lenox shall be deemed to have waived any deficiency claim. The Class 2 Lenox Secured Claim is impaired by the Plan. Lenox is entitled to vote to accept or reject the Plan.

**Class 3** consists of all Construction Lien Claims of parties asserting a contractor's, subcontractor's or materialmen's lien upon the Project pursuant to N.C.G.S. §§ 44A-1 *et seq.*

which are determined to be Secured Claims. To the extent the Project Sale does not result in net sale proceeds in excess of the Allowed Lenox Secured Claim, Allowed Class 3 Secured Construction Lien Claims shall be deemed Secured Claims in the amount of \$0.00, the Liens securing such Claims voided pursuant to section 506(d) and the Project sold free and clear of any such Secured Claims. The remainder of such Secured Claims shall constitute unsecured deficiency claims pursuant to section 506(a) of the Code and entitled to the treatment provided for Class 5 Unsecured Claims under the Plan, subject to allowance under the Plan.

Solely to the extent the Project Sale results in net sale proceeds in excess of the Allowed Lenox Secured Claim, the holders of Allowed Class 3 Secured Construction Lien Claims will receive, in full satisfaction of their Allowed Secured Claims, the excess net sale proceeds in the order of priority among the respective holders of Allowed Class 3 Secured Construction Lien Claims and any Allowed Class 4 Secured Claim of Water Systems pursuant to applicable law as may be determined by the Debtor and holders of such Secured Claims or as otherwise ordered by the Court until such claims are paid in full or all such excess net sale proceeds have been fully disbursed.

After the disbursement of all net sale proceeds, all or any part of an Allowed Class 3 Construction Lien Claim which has not been paid in full shall be deemed a Secured Claim in the amount of \$0.00, the Lien securing such Claim voided pursuant to section 506(d) of the Bankruptcy Code, and the remainder of such Claim shall constitute an unsecured deficiency claim pursuant to section 506(a) of the Bankruptcy Code and entitled to the treatment provided for Class 5 Unsecured Claims under the Plan. Class 3 Secured Construction Lien Claims are impaired. Holders of Allowed Claims in Class 3 are entitled to vote to accept or reject the Plan.

**Class 4** consists of the Secured Claim of Water Systems, Inc. ("Water Systems") secured by a lien in certain equipment related to water meters for each unit in the Project granted pursuant to Security Agreement dated February 15, 2010 and perfected by UCC Financing Statement filed with the North Carolina Secretary of State on May 14, 2012.

The Secured Claim of Water Systems is junior in priority to the Allowed Lenox Secured Claim and to many of the Class 3 Secured Construction Lien Claims. Further, the Water

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<sup>7</sup> The right of Lenox to credit bid pursuant to section 363(k) of the Bankruptcy Code, in its discretion, up to the entire amount of the Allowed Lenox Secured Claim (determined in accordance with Section 5.2.1) at any time before or during the Project Sale.

Systems Lien may be avoidable as a preference under section 547 of the Bankruptcy Code because the UCC Financing Statement perfecting it was filed ninety (90) days before the Petition Date and its filing otherwise satisfies all elements of an avoidable preference. To the extent the Project Sale does not result in net sale proceeds in excess of the Allowed Lenox Secured Claim, the Class 4 Secured Claim of Water Systems shall be deemed a Secured Claim in the amount of \$0.00, the Lien securing such Claim voided pursuant to section 506(d) and the Project sold free and clear of any such Secured Claim. The remainder of such Secured Claim of Water Systems shall constitute an unsecured deficiency claim pursuant to section 506(a) of the Bankruptcy Code and entitled to the treatment provided for Class 5 Unsecured Claims under the Plan, subject to Allowance thereunder.

Solely to the extent the Project Sale results in net sale proceeds in excess of the Allowed Lenox Secured Claim, the holder of the Allowed Class 4 Secured Claim of Water Systems will receive, in full satisfaction of its Allowed Secured Claim, the excess net sale proceeds in the order of priority among the respective holders of Allowed Class 3 Secured Construction Lien Claims and any Allowed Class 4 Secured Claim of Water Systems pursuant to applicable law as may be determined by the Debtor and holders of such Secured Claims or as otherwise ordered by the Court until such claims are paid in full or all such excess net sale proceeds have been fully disbursed. After the disbursement of all net sale proceeds, all or any part of an Allowed Class 4 Secured Claim of Water Systems which has not been paid shall be deemed a Secured Claim in the amount of \$0.00, the Lien securing such Claim voided pursuant to section 506(d) of the Bankruptcy Code, and the remainder of such Claim shall constitute an unsecured deficiency claim pursuant to section 506(a) of the Bankruptcy Code and entitled to the treatment provided for Class 5 Unsecured Claims under the Plan.

The Class 4 Secured Claim of Water Systems is impaired. Water Systems is entitled to vote to accept or reject the Plan.

**Class 5** consists of the Unsecured Claims scheduled or filed in the Debtor's proceeding, including the unsecured portion of the Class 3 Construction Lien Claims and Class 4 Water Systems Claim which are determined to be unsecured by the terms of the Plan, by order of the Court or under applicable law after (a) valuation or liquidation of property serving as Collateral to said claimant at the Project Sale, or (b) avoidance of any Lien securing such Claim to the extent such Claim is not otherwise deemed an Allowed Secured Claim herein. Each holder of an



Allowed Claim in Class 5 will receive, in full satisfaction of its Allowed Claim, as part of the settlement and compromise embodied in the Plan, its Pro Rata share of the Available Cash in full and complete satisfaction, settlement, and release of and in exchange for such holder's Unsecured Claim. No post-petition interest shall be paid on any Allowed Claim in Class 5 unless and until all such Allowed Claims have been paid in full.

The term "Available Cash" includes all cash of the Debtor's estate to be distributed to the holders of Allowed Claims less (i) the amount of cash estimated by the Debtor, from time to time, to be necessary to fund adequately the administration of the Plan and the Chapter 11 Case on and after the Effective Date, and (ii) the amount of cash to be retained for the payment of Disputed Claims, from time to time. Available Cash shall also include the Settlement Fund (hereafter defined). Available Cash shall not include cash collateral of Lenox in excess of cash collateral used to fund the Settlement Fund pursuant to Section 8.2.2 of the Plan or any cash collateral securing any Allowed Secured Claim other than the Lenox Secured Claim.

The aggregate amount of the Class 5 Unsecured Claims filed and/or scheduled in the Debtor's proceeding is approximately \$5,000,000 and the aggregate amount of the Class 3 Construction Lien Claims and Class 4 Secured Claim of Water Systems is approximately \$6,000,000. If all of the Allowed Claims in Class 3 and Class 4 are determined to be unsecured pursuant to the Plan, then the Debtor estimates that the eventual distribution on Allowed Claims in Class 5 will be approximately 13%. If all of the Allowed Claims in Class 3 and Class 4 are determined to be secured pursuant to the Plan, then the Debtor estimates that the eventual distribution on Allowed Claims in Class 5 will be approximately 29%. The Class 5 Unsecured Claims are impaired, and holders of Allowed Claims in Class 5 are entitled to vote to accept or reject the Plan.

#### **E. Classes of Equity Interests**

**Class 6** consists of the holders of Equity Interests; that is, parties who hold an ownership interest in the Debtor. Equity Interests shall be extinguished and shall receive or retain no property under the Plan unless all Allowed Claims are paid in full, with interest at the rate of 4.25% per annum from the Petition Date until paid. The Debtors do not anticipate any distributions to the holders of Equity Interests under the Plan. The Class 5 Equity Interests are impaired. Holders of Class 5 Equity Interests are deemed to reject the Plan.

## **VII. MEANS FOR EXECUTION OF THE PLAN**

The Plan contemplates that upon entry of the Confirmation Order, all of the Debtor's Assets shall remain property of the Estate and shall not vest in any subsequent entity but, rather, will be liquidated and sold in accordance with the terms of the Plan and the Bidding Procedures.

### **A. Project Sale**

The Plan provides for the liquidation and sale of the Project after the entry of the Confirmation Order pursuant to sections 363(b) and 1123(a) (5) (D) of the Code. In accordance with the Plan and Bidding Procedures, the Debtor shall offer the Project for sale, subject to the Liens securing the Allowed Wake County Secured Claim and subject to the Lenox Credit Bid Right, but otherwise free and clear of all Junior Liens and Claims.

Lenox has submitted a Stalking Horse Bid in the amount of 39,027,860, less estimated net cash collateral on the Closing Date, payable by Lenox by Credit Bid or a combination of Credit Bid and cash on the Effective Date. The Project will be sold to the Prevailing Bidder or the Back-Up Bidder, as the case may be, in accordance with the Bidding Procedures. At the Project Sale, Lenox will be entitled to exercise the Lenox Credit Bid Right in incremental amounts determined by Lenox, which amounts shall not exceed the Allowed Lenox Secured Claim. Lenox also will be entitled to include a cash component in any amount along with or in lieu of the Lenox Credit Bid. Other qualified bidders, as determined in accordance with the Bidding Procedures, also shall be entitled to submit higher and better cash bids for the Project.

If Lenox is the Successful Bidder (i.e., if Lenox is the Prevailing Bidder, or is the Back-Up Bidder and the Prevailing Bidder fails to consummate the sale) at the Project Sale, Lenox shall acquire the Project in satisfaction of the Allowed Lenox Secured Claim and shall be deemed to have waived any deficiency claim. If Lenox is not the Successful Bidder at the Project Sale, the Lien of Lenox shall attach to the proceeds of the sale of the Project and Lenox shall be paid in full in immediately available funds at the closing of the Project Sale. If the cash proceeds of the Project Sale exceed the Allowed Lenox Secured Claim, the Liens asserted by holders of Allowed Class 3 Secured Construction Lien Claims and the Allowed Class 4 Secured Claim of Water Systems shall attach to any such excess proceeds of the Project Sale in the same order of priority to which such Secured Claims attached to the Project under applicable non-bankruptcy law.

The Court shall enter an Order in form and substance acceptable to the Debtor and the Prevailing Bidder approving the sale of the Project (the “Sale Approval Order”), subject to the liens for ad valorem taxes of Wake County, including the Allowed Wake County Secured Claim and subject to Permitted Exceptions (as defined in the relevant Purchase and Sale Agreement) but otherwise free and clear of all Junior Liens and Claims and finding, among other things, that the Prevailing Bidder is a good faith purchaser entitled to all protections granted to such persons under section 363(m) of the Code and other applicable Bankruptcy and non-bankruptcy law. The Sale Approval Order shall constitute a final determination as to the value of the Project for purposes of determining the extent to which the Class 2 and any of the Class 3 Construction Lien Claims and the Class 4 Secured Claim of Water Systems are “secured,” “unsecured,” or otherwise constitute Allowed Claims within the meaning of section 506 of the Code.

**B. Funding on and after the Effective Date**

Until the closing of the Project Sale, the Debtor shall operate the Project and shall use the revenues derived from leases of the Project to pay all operating costs, fees and expenses that have accrued as of the Closing Date and that the Debtor has been authorized to pay pursuant to Cash Collateral Orders entered in the Debtor’s proceeding. On or before the Closing Date, the Debtor shall provide Lenox with a list of all accrued but unpaid costs, fees and expenses to be paid from such revenues (“Accrued Operating Expenses”). The Debtor also shall inform Lenox of the projected “book balance” remaining in the debtor-in-possession accounts as of the Closing Date, after reducing such balance by the amount of the Accrued Operating Expenses (the “Net Operating Funds”).

The Debtor believes that the only funds that will be available to pay Allowed Claims in this proceeding include (i) the proceeds from the sale of the Project, (ii) the Lenox Settlement Fund as described in Section VIII below, and (iii) the Retainer Funds available as of the Closing Date.<sup>8</sup> THE PROJECTIONS REGARDING THE ALLOCATION AND DISTRIBUTION OF THESE FUNDS ARE ATTACHED TO THIS DISCLOSURE STATEMENT AS EXHIBIT 3. PLEASE NOTE THAT THE PROJECTIONS WERE PREPARED PRIOR TO (I) COMPLETION OF THE PROJECT SALE, (II) COMPLETION OF THE CLAIMS OBJECTION AND RECONCILIATION PROCESS, AND (III) THE DEADLINE TO FILE

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<sup>8</sup> In the event the Net Operating Funds are not subject to the lien of Lenox as of the Closing Date, the Net Operating Funds also would be available to pay Allowed Claims.

ADMINISTRATIVE EXPENSE CLAIMS. ACCORDINGLY, THE PROJECTIONS ARE NOT FINAL AND ANY OF THE FOREGOING EVENTS COULD RESULT IN AN INCREASE OR DECREASE IN THE FUNDS AVAILABLE FOR DISTRIBUTION TO CREDITORS.

**C. Timing of Distributions and Disbursing Agent**

Any distributions to holders of Allowed Claims in Classes 1, 2, 3 and 4 shall be made contemporaneously with or as soon as practicable after the closing on the Project Sale.

Distributions to holders of Allowed Claims in Class 5 shall be made within sixty (60) days after the later of (i) the resolution of all Disputed Claims asserted against the Debtor or the Estate, (ii) the resolution of all causes of action asserted by or on behalf of the Debtor, and (iii) the sale, liquidation or abandonment of all remaining property of the Estate. All distributions under the Plan shall be made by the Disbursing Agent.

**D. Continuing Existence**

After the Effective Date, the Debtor shall continue in existence for the purpose of (i) winding-down its affairs, (ii) conducting and consummating the Project Sale pursuant to the Bidding Procedures and in accordance with the Plan (iii) liquidating, by conversion to cash or other methods, any remaining assets of its Estate, as expeditiously as reasonably possible, (iv) enforcing and prosecuting claims, interests, rights and privileges of the Debtor and the Estate, (v) resolving Disputed Claims, (vi) administering the Plan and taking such actions as are necessary to effectuate the Plan, and (vii) filing appropriate tax returns.

After the Effective Date, WM6F shall remain as the manager of the Debtor. WM6F and the members of the Debtor shall serve in such capacity through the earlier of the date the Debtor is dissolved and the date such member or manager resigns, is terminated or otherwise unable to serve. In the event that any member or manager of the Debtor resigns, is terminated or is unable to serve, the Court will have the right to select a successor who shall be appointed a member or manager of the Debtor. After the Effective Date, any member or manager of the Debtor may be terminated for cause by the Debtor or by the Court. Upon the Final Consummation of the Plan, the Debtor shall be deemed dissolved for all purposes and the Debtor shall file with the Office of the Secretary of State for the State of North Carolina a certificate of dissolution which may be executed by a member or manager of the Debtor.

#### **E. Litigation**

As of the date of the filing of the Plan and Disclosure Statement, other than the Enforceability Dispute (as defined below) and potential avoidance actions with respect to Liens purportedly securing certain Class 3 and Class 4 Secured Claims, the Debtor is not aware of any causes of action or claims which the Debtor could assert against a third party pursuant to sections 541, 542, 544, 545, 546, 547, 548, 549, 550 or 553 of the Code (the “Bankruptcy Causes of Action”) or otherwise, and does not expect any recoveries pursuant to Bankruptcy Causes of Action or other litigation. However, the Debtor may institute such legal actions as the Debtor deems necessary unless expressly waived. All Bankruptcy Causes of Action shall be brought in the Court, and any compromise or other settlement of a controversy by the Debtor shall be approved by the Court after notice and hearing.

Payments made by the Debtor to creditors within 90 days prepetition, payments to creditors who are Insiders or Affiliates within 1 year prepetition, and payments to parties made within four (4) years prepetition for less than reasonably equivalent value are all subject to potential actions to recover such payments for the benefit of unsecured creditors. However, there are many defenses to such actions which reduce any potential recovery, as the Bankruptcy Code protects certain payments (such as those made in the ordinary course of business) from such avoidance actions.

#### **F. Executory Contracts and Leases**

The Debtor shall assume and assign to the Prevailing Bidder for the Project at the Project Sale (or the Back-up Bidder in the event the Prevailing Bidder fails to consummate the sale) only those executory contracts and unexpired leases of the Debtor as may be directed by such bidder in accordance with the Bidding Procedures. The Prevailing Bidder or Back-up Bidder, as the case may be, shall be responsible for the payment of any cure costs related to the assumption by the Debtor and assignment to such bidder of such contracts and/or leases as set forth in the Bidding Procedures.

All executory contracts and unexpired leases not otherwise assumed and assigned to the Prevailing Bidder or Back-up Bidder shall be deemed rejected and entry of the order approving the sale of the Project shall constitute the approval, pursuant to section 365(a) of the Code, of the rejection of such executory contracts and unexpired leases effective as of the closing on the sale of the Project. A Claim for damages arising from the rejection of an executory contract or

unexpired lease shall be forever barred and shall not be enforceable against the Estate and no holder of any such Claim shall participate in any distribution under the Plan with respect to that Claim unless a Proof of Claim is served on the Debtor and filed with the Court within sixty (60) days from the closing on the sale of the Project, or such other deadline as may be set by the Court generally or with respect to any lease or contract rejected, and said Proof of Claim is determined to be an Allowed Claim, either because no timely objection is filed or because the Court allows the Claim after a timely filed objection.

### **VIII. EFFECT OF PLAN CONFIRMATION**

#### **A. Comprehensive Settlement of Claims and Controversies**

The provisions of the Plan shall constitute a good faith compromise and settlement of all claims or controversies relating to the rights that a holder of a Claim may have with respect to any Allowed Claim or any distribution to be made pursuant to the Plan on account of any Allowed Claim, including, without limitation, all subordination rights, whether arising under general principles of equitable subordination, contract, section 510(c) of the Code or otherwise. The provisions of the Plan also shall constitute a good faith compromise and settlement of all claims or controversies that a holder of a Claim or Equity Interest may have against other Claim or Equity Interest holders with respect to any distribution made pursuant to the Plan. The entry of the Confirmation Order shall constitute the Court's approval, as of the Confirmation Date, of the compromise or settlement of all such claims or controversies and the Court's finding that all such compromises or settlements are in the best interests of the Debtor, its Estate, its assets and Claim holders and are fair, equitable and reasonable. All subordination rights that a holder of a Claim may have with respect to any distribution to be made pursuant to the Plan shall be released and terminated, and all actions related to the enforcement of such subordination rights shall be permanently enjoined. Accordingly, distributions pursuant to the Plan to holders of Allowed Claims shall not be subject to payment to a beneficiary of such terminated subordination rights or to levy, garnishment, attachment or other legal process by a beneficiary of such terminated subordination rights.

#### **B. Settlement of Claims by and between the Debtor and Lenox**

As of the Petition Date, Lenox was owed the sum of \$39,027,860 pursuant to the Loan Documents. Lenox contends that the outstanding indebtedness is secured by a first mortgage lien on the Project, including any rents, profits and income generated by the Project, pursuant to

the Deed of Trust and Security Agreement. The Debtor disputes the extent, validity and priority of the lien or security interest held by Lenox in the Project (the “Enforceability Dispute”).

In compromise and settlement of the Enforceability Dispute, upon the Effective Date Lenox shall be deemed to have an Allowed Secured Claim in an amount determined by the Project Sale but in no event less than \$39,027,860. Furthermore, the Liens of Lenox securing its Allowed Secured Claim (i) shall be conclusively deemed to be senior, valid, perfected, enforceable and unavoidable, (ii) shall not be subject to offsets, defenses, claims or counterclaims by the Estate or other parties in interest who received notice of confirmation of the Plan and were provided with an opportunity to be heard, and (iii) shall not be subordinate to any other Lien except the Lien asserted by Wake County. In consideration for the above treatment of the claim of Lenox, Lenox will release any lien or security interest it may have in or to the Retainer Funds as of the Effective Date, and will fund the Settlement Fund on the Funding Date as set forth below.

The Enforceability Dispute arises from the fact that the Note evidencing the Lenox loan is dated July 22, 2008, and provides that it is secured by a deed of trust of “even date.” The Deed of Trust is dated June 22, 2008 and provides that it secures a note of “even date” (collectively, the “Date Discrepancy”). The Debtor has raised the possibility that because of the Date Discrepancy, the Deed of Trust may not adequately identify the Note under applicable North Carolina law, and that therefore the Deed of Trust may be avoidable under section 544 of the Code. Lenox contends that although the Deed of Trust is dated June 22, 2008, it was filed of record July 22, 2008, that the reference to “June” in the Deed of Trust is a patent scrivener’s error, and that otherwise the description of the Note in the Deed of Trust is sufficient under applicable North Carolina law to identify the Note as the debt secured thereby. Litigation of the Enforceability Dispute would be lengthy and costly for both parties, and the outcome is uncertain. Accordingly, Lenox and the Debtor have agreed to compromise and settle the Enforceability Dispute as set forth herein and in the Plan. As additional consideration for Lenox’s funding of the Settlement Fund, any holder of a Claim voting in favor of the Plan and any holder of an Allowed Claim accepting a distribution under the Plan shall be conclusively deemed to have agreed to the release set forth in Section D below and in the Plan.

The Settlement Fund shall total not less than \$1.45 million and shall be funded by Lenox upon the first to occur of the following (the “Funding Date”): (i) Lenox obtains title to the



Project at the Project Sale; (ii) Lenox is paid in full in cash on account of its Allowed Lenox Secured Claim (in an amount determined by the Project Sale but in no event less than the Lenox Petition Date Claim) on the date the Project Sale closed to a Person other than Lenox; and (iii) the ninetieth day after the Effective Date of the Plan or the date the Confirmation Order becomes a Final Order, whichever occurs last. Lenox's obligation to fund the Settlement Fund also is subject to certain conditions precedent set forth in Section 8.2.4 of the Plan. However, if the Settlement Fund is not funded within one hundred and twenty (120) days after the Effective Date or the date the Confirmation Order becomes a Final Order, whichever occurs last, then the Debtor or any other party in interest other than Lenox may move to revoke the Confirmation Order.

On the Funding Date, Lenox shall remit immediately available funds to the Estate in the amount of \$1.45 million (the "Cash Payment"). Lenox will receive a credit against the Cash Payment for the amount of the Net Operating Funds released by Lenox to the Debtor, but only to the extent such Net Operating Funds remain subject to the Lien of Lenox as of the Funding Date. Lenox also shall receive a credit against the Cash Payment for any liquidated damages the Debtor is entitled to retain as of the Funding Date from a Deposit (as defined in the Bidding Procedures) as a result of the Prevailing Bidder or the Back-Up Bidder (each as defined in the Bidding Procedures) failing to consummate the Project Sale in accordance with the Bidding Procedures.

**C. Injunction**

PURSUANT TO SECTION 8.3 OF THE PLAN, THE CONFIRMATION ORDER WILL PERMANENTLY ENJOIN THE COMMENCEMENT, CONTINUATION OR PROSECUTION BY ANY ENTITY SUBSEQUENT TO THE EFFECTIVE DATE, WHETHER DIRECTLY, DERIVATIVELY OR OTHERWISE, OF ANY CLAIMS, OBLIGATIONS, SUITS, JUDGMENTS, DAMAGES, DEMANDS, DEBTS, RIGHTS, CAUSES OF ACTION OR LIABILITIES RELEASED PURSUANT TO THE PLAN, INCLUDING THE CLAIMS, OBLIGATIONS, SUITS, JUDGMENTS, DAMAGES, DEMANDS, RIGHTS, CAUSES OF ACTION OR LIABILITIES RELEASED IN SECTION 8.4 OF THE PLAN. EACH HOLDER OF AN ALLOWED CLAIM VOTING IN FAVOR OF THE PLAN WHO ACCEPTS DISTRIBUTIONS PURSUANT TO THE PLAN, SHALL BE DEEMED TO HAVE SPECIFICALLY CONSENTED TO SUCH INJUNCTIONS.

**D. Releases and Exculpation**

SECTION 8.4 OF THE PLAN PROVIDES FOR CERTAIN RELEASES BY THE DEBTOR AND THE HOLDERS OF CLAIMS OR EQUITY INTERESTS UPON THE EFFECTIVE DATE OF THE PLAN. THE DEBTOR, THE ESTATE AND ITS RESPECTIVE DEBTOR AND NON-DEBTOR SUCCESSORS, ASSIGNS AND ANY AND ALL ENTITIES WHO MAY PURPORT TO CLAIM BY, THROUGH, FOR OR BECAUSE OF THEM, FOREVER RELEASE, WAIVE AND DISCHARGE ALL LIABILITIES AND CLAIMS THAT THEY HAVE, HAD OR MAY HAVE AGAINST ANY LENOX RELEASED PARTY. HOWEVER, THIS RELEASE SHALL NOT AFFECT (A) ANY RIGHTS TO ENFORCE THE PLAN OR THE OTHER CONTRACTS, INSTRUMENTS, RELEASES, AGREEMENTS OR DOCUMENTS TO BE, OR PREVIOUSLY, ENTERED INTO OR DELIVERED IN CONNECTION WITH THE PLAN; (B) ANY OBJECTIONS BY THE DEBTOR TO CLAIMS OR EQUITY INTERESTS FILED BY ANY PERSON OR ENTITY AGAINST THE DEBTOR AND/OR ITS ESTATE, INCLUDING RIGHTS OF SETOFF, REFUND OR OTHER ADJUSTMENTS; PROVIDED, HOWEVER, THAT THE DEBTOR SHALL HAVE NO FURTHER RIGHT TO OBJECT TO OR CHALLENGE THE LENOX SECURED CLAIM OR THE LIENS SECURING SUCH CLAIM.

IN CONSIDERATION FOR LENOX'S FUNDING OF THE SETTLEMENT FUND AND IN CONSIDERATION FOR THE OBLIGATIONS OF THE DEBTOR UNDER THE PLAN, EACH HOLDER OF A CLAIM OR EQUITY INTEREST WHO VOTES IN FAVOR OF THE PLAN OR OTHERWISE ACCEPTS A DISTRIBUTION MADE PURSUANT TO THE PLAN SHALL BE DEEMED TO FOREVER RELEASE, WAIVE AND DISCHARGE ALL LIABILITIES IN ANY WAY RELATING TO OR ARISING UNDER SUCH HOLDER'S CLAIM THAT SUCH HOLDER HAS, HAD OR MAY HAVE AGAINST ANY RELEASED PARTY.

A RELEASED PARTY INCLUDES, COLLECTIVELY AND INDIVIDUALLY, THE DEBTOR, LENOX, AFFILIATES OR DESIGNEES OF LENOX AS OF THE CONFIRMATION DATE, AND ANY PREDECESSOR OR SUCCESSOR, ANY ASSIGNOR OR ASSIGNEE, AND ANY CURRENT OR FORMER OFFICER, DIRECTOR, MANAGER, PARTNER, EMPLOYEE, AGENT, ATTORNEY, ADVISOR, INVESTMENT BANKER,

FINANCIAL ADVISOR, ACCOUNTANT OR OTHER PROFESSIONAL OF ANY OF THE FOREGOING.

FROM AND AFTER THE EFFECTIVE DATE, THE RELEASED PARTIES SHALL NEITHER HAVE NOR INCUR ANY LIABILITY TO ANY HOLDER OF A CLAIM FOR ANY ACT TAKEN OR OMITTED TO BE TAKEN IN CONNECTION WITH THE DEBTOR'S CHAPTER 11 CASE, INCLUDING THE FORMULATION, PREPARATION, NEGOTIATION, DISSEMINATION, IMPLEMENTATION, ADMINISTRATION, CONFIRMATION, CONSUMMATION OR APPROVAL OF THE PLAN, THE DISCLOSURE STATEMENT OR ANY CONTRACT, INSTRUMENT, RELEASE OR OTHER AGREEMENT OR DOCUMENT PROVIDED FOR OR CONTEMPLATED IN CONNECTION WITH THE CONSUMMATION OF THE TRANSACTIONS SET FORTH IN THE PLAN. HOWEVER, A PERSON SHALL REMAIN LIABLE FOR ANY SUCH ACT OR OMISSION TO THE EXTENT THAT ACT OR OMISSION IS DETERMINED IN A FINAL ORDER TO HAVE CONSTITUTED FRAUD, GROSS NEGLIGENCE, WILLFUL MISCONDUCT, ULTRA VIRES ACTS, OR CRIMINAL CONDUCT.

**IX. LIQUIDATION ANALYSIS**

In the event the case was converted to Chapter 7, the Court would appoint a Chapter 7 trustee, who would then proceed to administer the Debtor's estate in the same or in a similar manner as set forth in the Plan. The Chapter 7 trustee would also retain professionals, as necessary, to represent the trustee, such as attorneys and accountants, and the fees and expenses of the Chapter 7 trustee and the trustee's professionals would be administrative expenses having priority over any outstanding claims (except secured claims) or other administrative expenses incurred prior to the date of conversion to Chapter 7.

As this Plan is a plan of orderly liquidation, the Projections reflect the expected outcome of this process. However, in a Chapter 7 scenario the Debtor believes there would be additional administrative expenses incurred in some amount, due to the Trustee's commission and the time required for new counsel to become familiar with the Debtor's assets and liabilities, which would result in less funds being available for the payment of Allowed Unsecured Claims in the Debtor's proceeding.

## **X. FINANCIAL INFORMATION**

### **A. Reporting**

A quarterly consummation status report shall be filed within thirty (30) days after the end of the calendar quarter in which the Effective Date occurs and after each calendar quarter thereafter until the filing of the Final Report.

### **B. Financial Information on Record**

At or shortly after the Petition Date, the Debtor filed a Schedule of Assets and Liabilities and a Statement of Financial Affairs. The Debtor also has filed amendments to the Schedules of Assets and Liabilities. The monthly reports, the Schedule of Assets and Liabilities (as amended), and the Statement of Financial Affairs may be inspected by interested parties in order to obtain a broader financial picture of the Debtor and its Estate. These may be examined on-line through the Court's website.

## **XI. TAX CONSEQUENCES OF THE PLAN**

The federal income tax consequences of the Plan are complex and subject to significant uncertainties. The Debtor has not requested a ruling from the Internal Revenue Service ("IRS") or an opinion of counsel with respect to any of the tax aspects of the Plan. Thus, no assurance can be given as to any interpretation that the IRS may adopt. In addition, this summary does not address foreign, state or local tax consequences of the Plan, nor does it purport to address the federal income tax consequences of the Plan to special classes of taxpayers. Furthermore, this discussion assumes that holders of Allowed Claims hold only Claims in a single Class. Holders of Allowed Claims in multiple Classes should consult their own tax advisors as to the effect such ownership may have on the federal income tax consequences described below.

There are certain anticipated U.S. federal income tax consequences of the proposed Plan to the Debtor and holders of Allowed Claims and Equity Interests that are impaired under the Plan. This summary is provided for informational purposes only and is based on the Internal Revenue Code of 1986, as amended (the "Tax Code"), Treasury regulations, judicial authorities and current administrative rulings and practice, all as in effect as of the date hereof and all of which are subject to change or differing interpretations, possibly with retroactive effect. It does not address all aspects of federal income taxation that may be relevant to the Debtor or to a particular holder of a Claim or Equity Interest in light of its particular facts and circumstances or to certain types of holders of Claims subject to special treatment under the Tax Code.

Creditors holding Allowed Claims (whether Priority, Secured or Unsecured) will receive cash payments as provided in the Plan. The timing for recognition of revenues, gains or losses for income tax purposes is dependent upon the particular creditor involved and cannot be addressed by the Debtor due to the multiplicity of factors which may be involved. The amount of the income or gain, and its character as ordinary income or capital gain or loss, as the case may be, will depend upon the nature of the claim of each particular creditor.

The method of accounting utilized by a creditor for federal income tax purposes may also affect the tax consequences of a distribution. In general, the amount of gain (or loss) recognized by any such creditor will be the difference between (i) the creditor's basis for federal income tax purposes, if any, in the Claim; and (ii) the amount of the distribution received. Whether the distribution will generate ordinary income or capital gain will depend upon whether the distribution is in payment of a Claim or an item which would otherwise generate ordinary income on the one hand or in payment of a Claim which would constitute a return of capital.

The Plan provides that the old equity interests in the Debtor will be extinguished, resulting in a long term capital gain or loss in an amount depending upon each member's adjusted basis in his or her respective membership interest.

## **XII. PROVISIONS FOR IMPAIRED CREDITORS NOT ACCEPTING PLAN**

With respect to any Class of creditors impaired by and not accepting this Plan by the requisite majority in number and two-thirds (2/3) in dollar amount of those casting ballots, adequate provisions for the realization by them of the value of their claim shall be set forth in the Order confirming the Plan by such method as will, in the opinion of the Bankruptcy Judge and consistent with the circumstances of these cases, fairly and equitably provide such protection as is required by the applicable provisions of the Bankruptcy Code.

With respect to any Class of Equity Interests impaired by and not accepting this Plan by the holders of at least two-thirds (2/3) in amount of the allowed interests in such Class of those casting ballots, adequate provisions for the realization by them of the value of their interest shall be set forth in the Order confirming the Plan by such method as will, in the opinion of the Bankruptcy Judge and consistent with the circumstances of these cases, fairly and equitably provide such protection as is required by the applicable provisions of the Bankruptcy Code.

The Bankruptcy Code provides that the Plan may be confirmed even if it is not accepted by all impaired Classes. In order to be confirmed without the requisite number of acceptances of

each impaired Class, the Court must find that at least one impaired Class has accepted the Plan without regard to the acceptance of insiders, and the Plan does not discriminate unfairly against, and is otherwise fair and equitable to, such impaired Class. To the extent confirmation by “cramdown” is necessary or required, the Debtor by the filing of the Plan request confirmation thereof pursuant to section 1129(b) of the Code without further motion or notice, which request shall be considered (if necessary) at the conclusion of the Confirmation Hearing.

### **XIII. DISCHARGE AND RELEASE**

As the Plan provides for the liquidation of all assets of the Estate and the Debtor will not continue business operations, the Plan does not provide for the discharge of any claims or liabilities. However, all proceedings and court actions seeking to establish or enforce pre-petition liabilities and claims of any nature against property of the Estate or priorities received or retained by any creditor with respect to debts and obligations of the Debtor shall be stayed and treated as specifically provided for in the Plan.

### **XIV. DISPUTED CLAIMS AND OBJECTIONS TO CLAIMS**

The Debtor or any party in interest may file an objection to any claim within ninety (90) days after the Closing Date. Objections not filed within such time shall be deemed waived unless the period within which to file objections to claims is extended by Order of this Court as provided in the Plan.

THE ABSENCE OF AN OBJECTION PRIOR TO THE EFFECTIVE DATE, WHETHER AS TO A SCHEDULED OR FILED CLAIM, SHALL NOT BE DEEMED AN ACCEPTANCE OF ANY CLAIM NOR A WAIVER OF THE RIGHT TO OBJECT TO ANY CLAIM, AND THE HOLDER OF ANY SUCH CLAIM SHALL NOT BE ENTITLED TO ASSERT RELIANCE UPON ANY IMPLIED ACCEPTANCE OF SUCH CLAIM WHEN VOTING TO ACCEPT OR REJECT THE PLAN.

Any claim, or portion thereof, which is to be paid in cash under the Plan and which is challenged, shall be protected by requiring the Debtor to segregate and set aside in an escrow account a reserve based on the Court’s estimate of such claim and sufficient to treat said claim in the same fashion as though the objection were denied. The reserve so segregated shall be distributed in accordance with the Plan in the event the objection is overruled or a dispute is resolved in favor of the party asserting the claim. In the event the disputed claim is disallowed, the retained cash so segregated shall be retained by the Debtor and available for distribution in

accordance with the provisions of this Plan, with the disallowed claimant being excluded from the appropriate Class.

## **XV. MATTERS TO CONSIDER BEFORE VOTING ON THE PLAN**

### **A. Who May File a Plan**

The confirmation of the Plan is the ultimate goal of this Chapter 11 proceeding. Consequently, your decision whether to accept or reject the Plan must be made in the context established by the Bankruptcy Code. In a Chapter 11 case, only the Debtor may file a plan of reorganization within the exclusivity period provided by section 1121(b) of the Code.

### **B. Conditions Precedent to Confirmation**

Confirmation of the Plan shall not occur, and the Confirmation Order shall not be entered, unless and until the following conditions have been satisfied or duly waived pursuant to the Plan: (i) the form of Confirmation Order will be reasonably acceptable in form and substance to the Debtor and Lenox and will not have been materially amended, altered or modified from the form of Confirmation Order filed with the Court prior to the Confirmation Hearing; (ii) the Plan will not have been materially amended, altered or modified, unless such material amendment, alteration or modification has been made in accordance with Section 11.2 of the Plan; and (iii) all exhibits to the Plan are in form and substance reasonably satisfactory to the Debtor and Lenox.

### **C. Substantial Consummation of the Plan**

The closing of the Project Sale and the funding by Lenox of the Settlement Fund shall constitute substantial consummation of Plan pursuant to section 1101(2) of the Code.

### **D. What is Necessary for Court Approval of a Plan**

Chapter 11 permits the adjustment of secured debt, unsecured debt and equity interests. A Chapter 11 Plan may provide for less than full satisfaction of senior indebtedness and payment of junior indebtedness, and may even provide some return to equity owners absent full satisfaction of indebtedness, so long as no impaired class votes against the Plan (except as provided below).

Even if an impaired class votes against the Plan, implementation of the Plan is still possible so long as (i) the Plan is fair and equitable and (ii) that class is afforded certain treatment defined by the Bankruptcy Code, broadly defined as giving a claimant the full value of



his claim or interest. Such value is determined by the Court and balanced against the treatment afforded the dissenting class of creditors.

In particular, senior claims must be satisfied in full prior to payment of junior claims or interests, unless the holders of senior claims agree to different treatment. This principle (commonly known as the “absolute priority rule”) applies only in cases when a class of unsecured claims or equity interests is impaired and does not accept the proposed Plan. In that event, the absolute priority rule does not apply to all classes of unsecured claims and equity interests, but only to the dissenting class and classes junior to the dissenting class.

In the event a class is unimpaired, it is automatically deemed to have accepted the Plan. If there is no dissenting class, the test for confirmation (*i.e.*, approval) by the Court of a Chapter 11 Plan is whether the Plan is feasible and in the best interests of the creditors and equity interest holders. In simple terms, this test requires that creditors and equity interest holders receive more under the Plan than they would obtain if the Debtor was liquidated and the proceeds distributed in accordance with bankruptcy liquidation priorities. The Court, in considering this factor, need not consider any other alternatives to the Plan but liquidation.

In considering “feasibility” the Court is only required to determine whether the Plan can be accomplished, which entails determining the projected availability of cash for payments required to be made at and after the Effective Date, and any other factor which might make it impossible for the Debtor to accomplish that which is proposed in the Plan. In addition, in order to confirm a Plan the Court must find that such Plan was proposed in good faith and that the Plan and the Debtor are in compliance with the applicable provisions of Chapter 11. Finally, similar to the requirement that the Court find the Plan to be feasible, the Court must find that liquidation or further reorganization is not likely to occur after implementation of the Plan, except to the extent the Plan provides for such liquidation.

The determination by the Court that the Plan is fair, equitable and feasible occurs at the confirmation hearing. The Court’s adjudication of these matters does not constitute an expression of the Court’s opinion as to whether the Plan is a good one nor does it constitute an opinion by the Court regarding any debt or equity interest or securities issued to creditors under the Plan.

**E. Alternatives to the Plan**

Although this Disclosure Statement is intended to provide information to assist in the formation of a judgment as to whether to vote for or against the Plan, and although creditors are not being offered, through that vote, an opportunity to express an opinion concerning alternatives to the Plan, there are no on-going operations and the only likely alternative to the Plan is the liquidation of the Debtor through conversion of the case to one under Chapter 7 which would result in the appointment of a Chapter 7 trustee, a new notice period for the filing of claims, and additional administrative costs, and any dividend to the holders of Claims and/or Equity Interests would be delayed and likely reduced in amount.

**The Debtor Has Attempted to Set Forth The Likely Alternatives to The Proposed Plan. The Debtor Must Caution Creditors and Other Parties in Interest That a Vote Must Be For or Against The Plan. The Vote on The Plan Does Not Include a Vote on The Likely Alternatives to The Plan. If You Believe The Alternatives Are Preferable to The Plan And You Wish to Urge Them Upon The Court, You Should Consult Counsel As To The Appropriate Response.**

**F. Specific Considerations in Voting**

While the Plan provides for certain payments to creditors, such payments will only be made to the holders of Allowed Claims. Under the Bankruptcy Code, a claim may not be paid until it is “allowed” pursuant to §502. A filed or scheduled claim will be allowed in the absence of an objection. A claim to which an objection has been filed will be heard by the Court at a regular evidentiary hearing and will be allowed in full or in part or disallowed. While the Debtor will bear the principal responsibility for claim objections, any interested party may file claim objections. Accordingly, payment on all claims may be delayed until all pending objections to such claims are ultimately adjudicated or settled.

For Classes of Claims which do not receive payment in full on the Effective Date, there are certain risks inherent in accepting the Plan, including the absence of absolute certainty of ultimate payment, especially with respect to Claims which are to be paid from future revenues.

The materials provided in this Disclosure Statement are intended to assist you in voting on the Plan in an informed fashion. If the Plan is confirmed, you will be bound by its terms; therefore, you are urged to review this material and to make such further inquiries as you may deem appropriate, then cast an informed vote on the Plan. The Debtor solicits your acceptance of the Plan as being in the best interests of creditors in this case.

Respectfully submitted on behalf of the Debtor, this the 10<sup>th</sup> day of December, 2012.

/s/ John A. Northen

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**Exhibits to Disclosure Statement:**

1. Plan Of Liquidation Dated December 10, 2012.
2. Schedule of Scheduled, Filed, And Estimated Claims, By Class.
3. Projections as to Plan Payments