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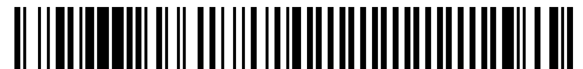
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11 Case No.**
EXTENDED STAY INC., <u>et</u> <u>al.</u>,	:	**09-13764 (JMP)**
Debtors.	:	**(Jointly Administered)**

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE DEBTORS' FIFTH AMENDED PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, AS AMENDED



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TO THE HONORABLE JAMES M. PECK,
UNITED STATES BANKRUPTCY JUDGE:

ESA Properties L.L.C. and seventy-three of its debtor affiliates, as debtors and debtors in possession (collectively, the "Debtors")[1] submit this memorandum of law in support of confirmation, pursuant to section 1129 of title 11 of the United States Code (the "Bankruptcy Code"), of the Debtors' Fifth Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, As Amended (the "Plan")[2] and respectfully represents as follows:

PRELIMINARY STATEMENT

Each of the Debtors commenced with this Court a voluntary case under chapter 11 of title 11 of the Bankruptcy Code on either June 15, 2009 or February 18, 2010 (as applicable, the "Commencement Date"). The Plan is the result of a long and exhaustive process to find an investor to sponsor and to propose a consensual chapter 11 plan. After extensive negotiations with their creditors, other parties in interest and potential plan sponsors, and after an open and transparent auction to select an investor to fund their chapter 11 plan, the Debtors proposed the Plan, which is premised upon CP ESH Investor LLC (the "Investor"), an entity wholly owned by Centerbridge Partners, L.P. and Paulson & Co. Inc, each on behalf of various investment funds and accounts managed by them, and Blackstone Real Estate Partners VI L.P. on behalf of itself and its parallel funds and related alternative vehicles (collectively, the "Sponsors"), purchasing the Debtors for $3.925 billion. The Plan is the culmination of efforts

[1] A list of the Debtors that are proposing the Plan in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, is attached hereto as "Exhibit A."

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Plan or the Disclosure Statement for the Debtors' Fifth Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (the "Disclosure Statement"), as may be applicable.

among many parties, all of whom have acted in good faith, negotiated at arms-length and worked tirelessly to bring these chapter 11 cases to a successful conclusion.

The sale of the Debtors to a new company formed by the Investors ("NewCo") enables the Debtors to raise approximately $3.925 billion, which will be distributed to the Debtors' creditors, primarily the holder of the Mortgage Facility Claim, but which will also be used to fund, among other things: (i) a litigation trust (the "Litigation Trust"), that will be empowered to pursue causes of action for the benefit of unsecured creditors, (ii) the wind-down of the estate of Extended Stay Inc. ("ESI"), (iii) a reserve to pay Administrative Claims and Priority Claims (the "Administrative/Priority Claims Reserve") to the extent that the Debtors' cash on hand is insufficient to do so, and (iv) substantial distributions to holders of General Unsecured Claims, as well as to the Indenture Trustee for the holders of Extended Stay Inc. 9-7/8% Senior Subordinated Notes due 2011. The Plan also provides for the satisfaction of the ESA UD Claim through issuance of a $6.25 million dollar note to the holder of the ESA UD Claim, which will be an obligation of the Reorganized Debtors. As described in more detail below, the Plan satisfies the requirements of section 1129 of the Bankruptcy Code, and enables the continuation of the Debtors' businesses, while also generating substantial funds for the repayment of creditors, and the possibility of additional recoveries through the Litigation Trust. Accordingly, the Debtors submit that the Plan is in the best interests of the Debtors' estates, is beneficial to all creditors and parties in interest and should be approved.

Virtually all of the objections to confirmation of the Plan have been resolved, as described in the Debtors' Omnibus Response to Objections to Confirmation of Debtors' Fifth Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code [Docket No. 1161], many of them through modifications set forth in the Debtors Fifth Amended Plan of

Reorganization Under Chapter 11 of the Bankruptcy Code, As Amended, filed on July 18, 2010. [Docket No. 1157]. The primary outstanding objection is the objection of the United States Trustee to the scope of the releases provisions of the Plan. The Debtors submit that, in the extraordinary circumstances of these cases, the releases, as provided in the Plan, should be approved.

FACTS

The pertinent facts relating to the Debtors' chapter 11 cases and the Plan are set forth in the Disclosure Statement, the Plan, the Declaration of Gil Hopenstand Pursuant to Local Bankruptcy Rule 3018-1(A) Certifying the Methodology for the Tabulation of Votes and Results of Voting on the Debtors' Fifth Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, dated July 13, 2010 [Docket No. 1136] (describing the methodology for the tabulation and results of voting with respect to the Plan and evidencing that the Debtors have received the requisite acceptances of the Plan in both number and amount as required by section 1126 of the Bankruptcy Code) (the "KCC Declaration"), the Supplemental Declaration of Gil Hopenstand Pursuant to Local Bankruptcy Rule 3018-1(A) Certifying the Methodology for the Tabulation of Votes and Results of Voting on the Debtors' Fifth Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, dated July 16, 2010 [Docket No. 1152] (the "Supplemental KCC Declaration"), and the Declaration of Ari Lefkovits in Support of Confirmation of the Fifth Amended Joint Plan Under Chapter 11 of the Bankruptcy Code, which is to be filed prior to the Confirmation Hearing (as hereinafter defined) (the "Lefkovits Declaration," and together with the KCC Declaration and the Supplemental KCC Declaration, the "Declarations"). Such facts are incorporated herein as though set forth fully and at length. As necessary, salient facts will be referred to in connection with the discussion of applicable legal principles.

ARGUMENT

To obtain confirmation of the Plan, the Debtors must demonstrate that the Plan satisfies the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. *Heartland Federal Savings & Loan Ass'n v. Briscoe Enter., Ltd. II (In re Briscoe Enter., Ltd. II)*, 994 F.2d 1160, 1165 (5th Cir. 1993); *see also In re Lionel L.L.C.,* No. 04-17324 (BRL), 2008 WL 905928, at *4 (Bankr. S.D.N.Y. Mar. 31, 2008) ("The Debtors. . . have the burden of proving the elements of sections 1129(a) and 1129(b) by a preponderance of the evidence…."). Through filings with the Court and additional testimonial evidence which may be proffered or adduced at the hearing to be held before the Court on July 20, 2010, or at such later date as the Bankruptcy Court may determine (the "Confirmation Hearing"), the Debtors will demonstrate, by a preponderance of the evidence, that all applicable subsections of section 1129 of the Bankruptcy Code have been satisfied with respect to the Plan.

I.
SECTION 1129(a)(1): THE PLAN COMPLIES WITH THE APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE

Section 1129(a)(1) of the Bankruptcy Code requires that a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history of section 1129(a)(1) indicates that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code governing classification of claims and contents of a plan, respectively. H.R. Rep. No. 95-595, at 412 (1977); *see also In re Johns-Manville Corp.*, 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986), aff'd in part, rev'd in part on other grounds, 78 B.R. 407 (S.D.N.Y. 1987), aff'd, *In re Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

As demonstrated below, the Plan fully complies with the requirements of sections 1122, 1123, and all other applicable provisions of the Bankruptcy Code.

A. <u>The Plan Complies with Section 1122 of the Bankruptcy Code</u>

Section 1122(a) of the Bankruptcy Code provides in pertinent part as follows:

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

For a classification structure to satisfy section 1122 of the Bankruptcy Code, not all substantially similar claims or interests need to be designated in the same class, but claims or interests designated in a particular class must be substantially similar to each other. *In re Chateaugay Corp.*, 89 F.3d 942, 949 (2d Cir. 1996).

The Plan provides for the separate classification of Claims against and Equity Interests in the Debtors based upon differences in the legal nature and/or priority of such Claims and Equity Interests. The Plan designates the following six classes of Claims and ten classes of Equity Interests: Class 1 (Priority Claims), Class 2 (Mortgage Facility Claim), Class 3 (ESA UD Mortgage Claim), Class 4A (Mortgage Facility Deficiency Claim), Class 4B (Mezzanine Facilities Claims), Class 5 (General Unsecured Claims), Class 6 (Existing Equity), Class 7 (ESA MD Properties Trust Certificate), Class 8 (ESA MD Borrower Interests), Class 9 (ESA P Portfolio MD Trust Certificate), Class 10 (ESA P Portfolio MD Borrower Interests), Class 11 (ESA Canada Properties Interests), Class 12 (ESA Canada Properties Borrower Interests), Class 13 (ESH/TN Properties L.L.C. Membership Interests), Class 14 (ESH/ESA General Partnership Interests), Class 15 (Other Existing Equity Interests), and Class 16 (Other Secured Claims). Classes 1 through 5 and 16 constitute classes of Claims, and Classes 6 through 15 constitute classes of Equity Interests.

Based on the foregoing, the Debtors submit the classification of Claims and Equity Interests does not prejudice the rights of holders of such Claims or Equity Interests, is

consistent with the requirements of the Bankruptcy Code and, thus, is appropriate. *See Olympia & York Florida Equity Corp. v. Bank of New York (In re Holywell Corp.)*, 913 F.2d 873, 880 (11th Cir. 1990) (plan proponent allowed considerable discretion to classify claims and interests according to facts and circumstances of case so long as classification scheme does not violate basic priority rights or manipulate voting).

Each of the Claims in each particular Class of Claims is substantially similar to the other Claims in such Class. Specifically, all claims entitled to priority treatment under section 507(a) of the Bankruptcy Code are classified in Class 1. Secured claims are classified in Classes 2, 3 or 16 based upon the separate nature of the claims and security interests giving rise to these claims, including the fact that the claims in these Classes are against separate Debtors, arise from separate agreements, and are secured by separate property. All unsecured claims held by holders of Mortgage Facility Claims as a result of the collateral securing the Mortgage Facility being worth less than the Mortgage Facility Claims are separately classified in Class 4A. The Mezzanine Facility Claims are unsecured claims against certain of the Debtors and are structurally subordinate in right of payment to the Mortgage Facility Deficiency Claim, and, accordingly, are separately classified in Class 4B. Any Claims other than Administrative Expense Claims, Priority Tax Claims, Priority Claims, the Mortgage Facility Claim, the Mortgage Facility Deficiency Claim, the Mezzanine Facilities Claims or other Secured Claims are classified in Class 5. Secured Claims other than the Mortgage Facility Claim or the ESA UD Mortgage Claim are classified together in Class 16.

In addition, each of the Equity Interests in each particular Class of Equity Interests is substantially similar to the other Equity Interests in its Class. All Equity Interests in each of the Debtors, other than the Tier 2 Debtors, are classified in Class 6 and Classes 13

through 15. The Equity Interests in Class 15 represent 99% of the Equity Interests in the following five Debtors: ESH/TN Properties L.L.C., ESH/MTX Property L.P., ESH/TX Properties L.P., ESA/TX Properties L.P. and ESA P Portfolio TXNC Properties L.P. These Debtors are referred to here as the "Class 15 Debtors"). The remaining 1% of the Equity Interests in the Class 15 Debtors are receiving treatment in Class 13 in the case of ESH/TN Properties L.L.C. (the "ESH/TN Properties Membership Interest"), and in Class 14 in the case of the remaining Class 15 Debtors (collectively, the "ESH/ESA General Partnership Interests"). Each of the Equity Interests in Classes 7 through 12 are Equity Interests in a single Tier 2 Debtor. The remaining Equity Interests are included in Class 6 (Existing Equity). Accordingly, no Class of Equity Interests contains dissimilar Equity Interests.

Section 1122(b) of the Bankruptcy Code is an elective, not mandatory, provision allowing the designation of a class of *de minimis* claims for administrative convenience. The Plan does not include a *de minimis* convenience class of claims. Therefore, section 1122(b) of the Bankruptcy Code is inapplicable.

B. The Plan Complies with Section 1123(a) of the Bankruptcy Code

Section 1123(a) of the Bankruptcy Code sets forth eight requirements with which every chapter 11 plan must comply. As demonstrated herein, the Plan fully complies with each enumerated requirement.

1. Section 1123(a)(1): Designation of Classes of Claims and Interests

Section 1123(a)(1) requires that a plan must designate classes of claims and classes of equity interests subject to section 1122 of the Bankruptcy Code. As discussed above, the Plan designates six classes of Claims and ten classes of Equity Interests subject to section 1122. *See* Plan at Art. IV. Accordingly, the Plan satisfies the requirements of section 1123(a)(1) of the Bankruptcy Code.

2. Section 1123(a)(2): Classes that Are Not Impaired by the Plan

Section 1123(a)(2) requires a plan to specify which classes of claims or interests are unimpaired by the Plan. The Plan specifies that Class 1 (Priority Claims), Class 7 (ESA MD Properties Trust Certificate), Class 8 (ESA MD Borrower Interests), Class 9 (ESA P Portfolio MD Trust Certificate), Class 10 (ESA P Portfolio MD Borrower Interests), Class 11 (ESA Canada Properties Interests), Class 12 (ESA Canada Properties Borrower Interests), Class 13 (ESH/TN Properties L.L.C. Membership Interests), Class 14 (ESH/ESA General Partnership Interests), and Class 16 (Other Secured Claims) are unimpaired by the Plan. *See* Plan at Art. IV. Accordingly, the Plan satisfies the requirements of section 1123(a)(2) of the Bankruptcy Code.

3. Section 1123(a)(3): Treatment of Classes that Are Impaired By the Plan

Section 1123(a)(3) requires a plan to specify how it will treat impaired classes of claims or interests. The Plan sets forth the treatment of (i) Claims in Class 2 (Mortgage Facility Claim), Class 3 (ESA UD Mortgage Claim), Class 4A (Mortgage Facility Deficiency Claim); Class 4B (Mezzanine Facilities Claims); Class 5 (General Unsecured Claims), and (ii) interests in Class 6 (Existing Equity) and Class 15 (Other Existing Equity Interests), each of which constitutes an impaired class. *See* Plan at Art. III and IV. Accordingly, the Plan satisfies the requirements of section 1123(a)(3) of the Bankruptcy Code.

4. Section 1123(a)(4): Equal Treatment Within Each Class

Section 1123(a)(4) requires that a plan provide the same treatment for each claim or interest within a particular class unless any claim or interest holder agrees to receive less favorable treatment than other class members. Pursuant to the Plan, the treatment of each Claim against or Equity Interest in the Debtors, in each respective class, is the same as the treatment of each other Claim or Equity Interest in such class. *See* Plan at Art. IV. Pursuant to the Investment Agreement, as part of the consideration for the NewCo Common Interests that will

be issued pursuant to the Investment Agreement, CP ESH Investors, LLC (the "Investor") will contribute Mortgage Certificates beneficially owned by the Investor, its members, and its affiliates in an aggregate principal amount of approximately $309 million (subject to adjustment as described in the Plan and the Investment Agreement), and the Class 2 and Class 4A Claims arising from these Mortgage Certificates will be waived. The Debtors do not believe that the voluntary surrender and cancellation of Claims by claimholders constitutes disparate treatment but, to the extent such treatment is considered to be disparate, the Special Servicer, as the holder of the affected Claims has agreed to the treatment, and it is therefore permissible under section 1123(a)(4). Accordingly, the Plan satisfies the requirements of section 1123(a)(4) of the Bankruptcy Code.

5. Section 1123(a)(5): Adequate Means for Implementation

Section 1123(a)(5) requires that a plan provide "adequate means for the plan's implementation." Article VI of the Plan provides a detailed description of the transactions that will occur under the Plan and the structure of the Reorganized Debtors after the Effective Date. It provides for (i) the creation of NewCo, and the transfer of the equity in the Tier 1 Debtors to be issued to NewCo or one of its subsidiaries, (ii) the preservation of the Equity Interests of the Tier 2 Debtors and the ESH/TN Properties Membership Interests, (iii) the cancellation of the Equity Interests in the Tier 3 Debtors, each of which will be deemed liquidated and dissolved by the Debtors, and (iv) the implementation of the Restructuring Transactions, as set forth in the Plan Supplement. The Plan provides that the Debtors will execute the Investment Agreement, which provides for an investment of over $3.9 billion in NewCo as consideration for the issuance of the equity in NewCo to the Investors under the Investment Agreement. The Investment Agreement requires NewCo to establish a working capital reserve to ensure the ability of NewCo and its subsidiaries to operate in the future. The Plan also provides for all of the intellectual

property related to the Debtors' businesses to be transferred to NewCo or its designee, through the vesting of such assets in NewCo and entry into the BHAC IP Transfer Agreement by BHAC and the Debtors. The Plan provides for the appointment of a Plan Administrator, who will be responsible for making the Distributions required on the Effective Date. The Plan also provides for the appointment of a Litigation Trustee with the authority to prosecute, abandon, settle and compromise causes of action that comprise Litigation Trust Assets on behalf of unsecured creditors. Article VI also specifies the means for implementing other elements of the Plan, including the creation of a Mortgage Parties Indemnification Fund, a Litigation Trust and a settlement between ESI and the Debtors. Thus, the Plan, together with the documents and agreements contemplated therein, provides the means for implementation of the Plan as required by section 1123(a)(5) of the Bankruptcy Code.

6. Section 1123(a)(6): Prohibitions on the Issuance of Non-Voting Securities

Section 1123(a)(6) of the Bankruptcy Code requires a plan to provide for the inclusion in the charter of (i) the debtor, (ii) certain entities to which property of the estate is transferred, and (iii) certain entities with which the debtor is merged or consolidated, a provision prohibiting the issuance of non-voting equity securities and providing an appropriate distribution of voting power among voting classes of equity securities. Pursuant to section 6.4 of the Plan, (i) the NewCo Certificate of Formation will include, and (ii) the certificates of incorporation, limited liability company operating agreements or certificates of trust (as applicable) for the surviving Tier 1 Debtors and Tier 2 Debtors shall be amended to include, a provision prohibiting the issuance of non-voting equity securities in accordance with section 1123(a)(6) of the Bankruptcy Code. As such, the Plan does not provide for the issuance of non-voting equity securities, and the Plan satisfies section 1123(a)(6).

7. Section 1123(a)(7): Provisions Regarding Directors and Officers

Section 1123(a)(7) requires that the Plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." The Plan does not contain any provisions directing the manner of selection of any officer or director; however, inasmuch as holders of claims and interests will not receive debt (with the exception of the holder of the ESA UD Claim) or equity of the Reorganized Debtors under the Plan, the method of selection of the officers and directors is not relevant to creditors and equity security holders. The Plan requires that the Plan Administrator be selected by the Special Servicer (with the consent of the Operating Advisor, which consent shall not be unreasonably withheld), and that the Litigation Trustee be selected by mutual agreement of the Special Servicer (with the consent of the Operating Advisor, such consent not to be unreasonably withheld) and the Creditors' Committee, or, after the Effective Date, such other Person appointed by the mutual agreement of the Special Servicer and the Creditor Representative, or as otherwise determined by the Bankruptcy Court. *See* Plan §§ 1.93, 1.121. Such provisions enable the representatives of creditors to approve of the people responsible for collecting and distributing estate assets and are thus consistent with the interests of creditors and with public policy. Accordingly, the Plan contains no provisions on the selection of directors, officers or trustees that are contrary to the interests of holders of Claims or Equity Interests or to public policy.

8. Section 1123(a)(8): Provisions Regarding Treatment of Earnings and Future Income

Section 1123(a)(8) applies to cases where the Debtor is an individual, and, accordingly, is inapplicable to the Debtors and the Plan.

C. <u>The Plan Complies with Section 1123(b) of the Bankruptcy Code</u>

Section 1123(b) sets forth certain permissive provisions that may be incorporated into a chapter 11 plan. Each provision of the Plan is consistent with section 1123(b) of the Bankruptcy Code.

1. Section 1123 (b)(1): Impairment/ Unimpairment of Claims and Interests

Section 1123(b)(1) provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests." As discussed above, Claims and Equity Interests in Classes 2 through 6 and Class 15 are impaired. Claims in Classes 1 and 16, and Equity Interests in Classes 7 through 14 are unimpaired. *See* Plan at Art. IV. Accordingly, the Plan is consistent with section 1123(b)(1) of the Bankruptcy Code.

2. Section 1123(b)(2): Assumption/ Rejection of Executory Contracts and Leases

Section 1123(b)(2) allows a Plan to provide for the assumption, assumption and assignment, or rejection of executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code. Section 11.1 of the Plan provides that certain executory contracts and unexpired leases designated in the Plan Supplement, as well as any other executory contracts and unexpired leases that were not previously rejected and are not the subject of pending motions to reject on the Confirmation Date, will be deemed assumed by the applicable Debtor and assigned to NewCo or its designee. Section 11.2 provides that executory contracts and unexpired leases listed on a rejection schedule in the Plan Supplement will be deemed rejected as of the Effective Date. Section 11.4 of the Plan provides for the assumption of insurance policies and agreements as of the Effective Date, unless they are specifically rejected by order of the Bankruptcy Court. Section 11.5 of the Plan provides for the assumption, or assumption and assignment of certain management agreements between the Debtors and HVM, as of the Effective Date, as amended

with terms acceptable to the Investor, each Sponsor, and HVM. Accordingly, the treatment of executory contracts in the Plan is authorized by, and its consistent with, section 1123(b)(2) of the Bankruptcy Code.

3. Section 1123(b)(3): Settlement of Claims and Causes of Action: Debtor Release, ESI Settlement, Retention of Causes of Action

Section 1123(b)(3)(A) allows a Plan to provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."

(a) *Debtor Release*

In accordance with section 1123(b)(3)(A) of the Bankruptcy Code, section 10.10 of the Plan contains a release of claims of the Debtors and the Reorganized Debtors against certain parties (collectively, the "Released Parties") relating to the Debtors or their Affiliates, existing as of the Effective Date or thereafter arising from occurrences prior to the Effective Date (the "Debtors' Release").

Claims held by the debtor against third parties are property of the estate and may be released in exchange for settlement. *In re Johns-Manville (Manville I)*, 837 F.2d 89, 91-92 (2d Cir. 1988). *See also* 11 U.S.C. 541(a)(1). When reviewing releases in a debtor's plan, courts consider whether such releases are in the best interest of the estate. *In re Charter Commc'ns*, 419 B.R. 221, 257 (Bankr. S.D.N.Y. 2009); *In re DBSD N. Am., Inc.,* 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009) (finding, pursuant to section 1123(b)(3) of the Bankruptcy Code, releases by debtors of claims that belong to the estates appropriate where granting releases represented a valid exercise of the debtors' business judgment and were in the best interests of the estate); *In re Bally Total Fitness of Greater New York, Inc.,* No. 07-12395, 2007 WL 2779438, at *12 (Bankr. S.D.N.Y. Sept. 17, 2007) (same). In the *Calpine* decision, the Court recognized that releases could be deemed in the best interests of the estate where "the costs involved likely would

outweigh any potential benefit from pursuing such claims." *In re Calpine Corp.*, No. 05-60200, 2007 WL 4565223, at *9-*10 (Bankr. S.D.N.Y. Dec. 19, 2007). In addition, "if the claims had been investigated by a disinterested party, like a judge, examiner or creditors' committee and if it were determined that there weren't any viable claim or any whose prosecution would be cost-effective. . . it would be at the least, quite reasonable to find that the give-up of such rights is in the best interests of the estate." *In re Bearing Point, Inc.*, Confirmation Hearing Transcript, Case No. 09-10691 (REG), at 75 (Bankr. S.D.N.Y., December 17, 2009).

As set forth in section 10.10 of the Plan, the Debtors' Release provides that "Debtors [and the] the Reorganized Debtors. . . shall release unconditionally and forever each Released Party from any and all Claims, demands, causes of action and the like, relating to the Debtors or their Affiliates existing as of the Effective Date or thereafter arising from any act, omission, event or other occurrence that occurred on or prior to the Effective Date . . . ." Pursuant to section 1123(b)(3), the Debtors may include a settlement of any claims they own as a discretionary provision in their Plan. Here, the Debtors' Release is "an integral part of a comprehensive Plan that provides substantial value to the estates." *In re Charter Commc'ns*, 419 B.R. at 257. The Released Parties, and especially the Investor and the Sponsors sought the inclusion of the Debtors' Release in the Plan, and the Debtors' Release was a significant inducement to key parties who support the Plan. Furthermore, in light of the extensive investigation of the Debtors conducted by the Examiner, and the exclusion of any claims identified in the Examiner's Report from the Debtors' Release, the Debtors do not believe that they are foregoing any valuable claims or causes of action against the Released Parties.

Granting the Debtors' Release, therefore, represents a valid exercise of the Debtors' business judgment and is in the best interest of the estates. Courts in this district have

approved releases similar to the Debtors' Release provided in the Plan. *See e.g., In re Charter Commc'ns*, 419 B.R. at 257; *In re DBSD North Am., Inc.*, 419 B.R. at 217; *In re Calpine Corp.*, 2007 WL 4565223, at *9.

(b) *The ESI Settlement*

The Plan also incorporates a settlement (the "ESI Settlement") among ESI, the Debtors, the Special Servicer, the Indenture Trustee and the Creditors' Committee. Pursuant to the Debtors' Plan, the Sponsors will acquire certain affiliates and subsidiaries of the Debtors, but will not acquire ESI. However, the Special Servicer, the Operating Advisor, and the Controlling Holder requested a release of any potential claims by ESI. Similarly, ESI has requested a release from any liabilities of ESI arising from the ESI Guaranty. In addition, the Indenture Trustee has asserted that ESI has an interest in some of the assets being transferred to the Investor under the Investment Agreement, including the Windows Litigation, as well as in the Litigation Trust Assets being transferred to the Litigation Trust. To resolve these controversies, the Debtors' Plan incorporates the ESI Settlement.

Pursuant to section 6.18 of the Plan, ESI is required to enter into the ESI Settlement, by which it will, among other things, consent to and grant the releases set forth in Section 10.10 of the Plan. The ESI Settlement will also release ESI from its guaranty of the Mortgage Facility Claim, provide funding for the wind-down of the ESI estate, waive any claims ESI may have to ownership of the assets being transferred to NewCo, transfer any causes of action held by ESI to the Litigation Trust, provide for the assumption of certain key contracts to which ESI is a party, and the assignment of these contracts to the Debtors, and provide for a substantial distribution to the Indenture Trustee, which is ESI's only significant creditor. *See* Debtors' Motion Pursuant to Bankruptcy Rule 9019 for Approval of a Settlement Agreement Between Extended Stay Inc. and Remaining Debtors. [Docket No. 1114]. Approval of the ESI

Settlement by the Bankruptcy Court on or before the Confirmation Date is a condition to the Effective Date. *See* Plan section 9.1(h). The ESI Settlement settles claims by and against ESI and the other Debtors and is included in the Plan pursuant to section 1123(b)(3)(A) and Bankruptcy Rule 9019.

(c) *Retention of Causes of Action*

Section 1123(b)(3)(B) provides that a plan may "provide for the retention and enforcement by the debtor . . . or by a representative of the estate appointed for such purpose, of any . . . claim or interest [belonging to the debtor or the estate]." Section 10.14 of the Plan provides that, except as provided in section 6.17 of the Plan (with regard to the Litigation Trust), and section 10.10 (with regard to the release of claims by the Debtors), nothing in the Plan or the Confirmation Order shall be deemed a waiver or relinquishment of any claims, causes of action, or other rights or defenses of the Debtors. Section 6.17 provides for the appointment of a "Litigation Trustee" who will serve as the representative of the Debtors' Estates from an after the Effective Date and will have the sole authority to pursue certain claims designated as "Litigation Trust Assets." Sections 10.10, 10.14 and 6.17 are included in the Plan and are supported by section 1123(b)(3) of the Bankruptcy Code.

4. Section 1123(b)(4): Sale of All or Substantially All Assets

Section 1123(b)(4) provides that a plan may "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." As discussed above, the Plan provides for the sale of the membership interests in NewCo (the "NewCo Common Interests") to the Investor, in exchange for cash paid to NewCo and the contribution of certain Mortgage Certificates owned by the Sponsors. NewCo will make transfers to or at the direction of the Plan Administrator to fund the disbursements contemplated by the Plan. Those Debtors not being transferred (directly in the

case of the Tier 1 Debtors, and indirectly through the transfer of a direct or indirect parent in the case of the Tier 2 Debtors) to NewCo will be liquidated or dissolved. Accordingly, the Plan essentially provides for a sale of substantially all of the Debtors' assets through these transactions, and the distribution to creditors of the proceeds generated therefrom. Moreover, although title to the Mortgage Properties will vest in the Reorganized Debtors, section 6.2 of the Plan provides that the transfer of the New Debtor Equity of the Tier 1 Debtors to NewCo, and the distribution of the Cash Distribution by the Reorganized Debtors to the holder of the Allowed Mortgage Facility Claim will be deemed the equivalent of a sale of the Mortgage Properties to NewCo, after foreclosure and acceptance of a deed in lieu of foreclosure by the Trustee or the Special Servicer, free and clear of all liens, claims, encumbrances and obligations. These transactions are consistent with section 1123(b)(4) of the Bankruptcy Code.

5. Section 1123(b)(5): Modification of Creditor Rights

Section 1123(b)(5) provides that a Plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims." As set forth in Article IV of the Plan, the Plan modifies the rights of holders of Claims and Equity Interests in Classes 2 through 6 and Class 15. The Plan also leaves unaffected the rights of holders of Claims and Equity Interests in Classes 1 and 16 and Classes 7 through 14. Accordingly, the Plan is consistent with section 1123(b)(5) of the Bankruptcy Code.

6. Section 1123(b)(6): Retention of Jurisdiction, Third Party Release, Exculpation

Section 1123(b)(6) of the Bankruptcy Code is a "catchall" provision, which permits inclusion in the Plan of any appropriate provision as long as such provision is consistent with applicable sections of the Bankruptcy Code.

(a) *Retention of Jurisdiction*

The Plan provides that, among other things, the Bankruptcy Court will retain jurisdiction as to, among other things, (i) matters involving the Plan, the claims allowance and distribution process, (ii) questions and disputes relating to or arising under the Investment Agreement, the BHAC IP Transfer Agreement, or the Debt Financing Arrangements, and (iii) disputes arising under the Trust and Servicing Agreement or relating to the implementation of this Plan by the Trustee, the Special Servicer, the Operating Advisor and the Controlling Holder. *See* Plan at Art. XII. These provisions are appropriate because the Bankruptcy Court would have otherwise had jurisdiction over all of these matters during the pendency of the Debtors' chapter 11 cases. Moreover, case law establishes that a bankruptcy court may retain jurisdiction over the debtor or the property of the estate following confirmation. *See Universal Oil Ltd. v. Allfirst Bank (In re Millennium Seacarriers, Inc.*), 419 F.3d 83, 96 (2d Cir. 2005) ("[A] bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders, particularly when disputes arise over a bankruptcy plan of reorganization.") (quoting *In re Petrie Retail*, 304 F.3d 223, 228 (2d Cir. 2002)). Accordingly, the continuing jurisdiction of the Bankruptcy Court is consistent with applicable law and therefore permissible under section 1123(b)(6) of the Bankruptcy Code.

(b) *Release of Non-debtors by Third Parties*

Certain of the releases provided for in section 10.10 of the Plan release claims against non-debtors that are held by three categories of third parties, against certain non-debtors (the "Non-Debtor Releases"). Such Non-Debtor Releases are consistent with the requirements of case law in this circuit and are an integral part of the Plan and, as to many of such third parties, the funding for the Plan would not exist absent such releases. Courts typically allow releases of third party claims against non-debtors where (i) there is the express or inferred consent of the party giving the release, or (ii) other circumstances in the case justify giving the release. *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005). The Court of Appeals for the Second Circuit has stated that "'a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan.'" *In re Charter Commc'ns*, 419 B.R. at 258 (quoting *SEC v. Drexel Burnham*, 960 F.2d 285, 293 (2d Cir. 1992); *Metromedia*, 416 F.3d at 141; *In re Adelphia Commc'ns*, 368 B.R. 140, 266 (Bankr. S.D.N.Y. 2007) (same); *In re Oneida Ltd.*, 351 B.R. 79, 94 (Bankr. S.D.N.Y. 2006) (same). The Non-Debtor Releases are largely consensual and are an integral part of the bargain struck among numerous parties to achieve a nearly consensual restructuring.

Express or Inferred Consent

The Non-Debtor Releases are narrowly tailored to release parties whose efforts, money, or support was essential to these chapter 11 cases, the auction process that resulted in the Sponsors funding $3.925 billion for distributions to Creditors, and the development and acceptance of the Plan, from claims which may be asserted by parties who were involved in these cases and which relate to the Debtors. The parties giving the Non-Debtor Releases fall into three categories: (i) NewCo, (ii) holders of Claims that vote to accept the Plan, abstain from voting on the Plan, or are deemed to accept the Plan, and (iii) holders of Mortgage Certificates.

The Non-Debtor Releases pertain to causes of action relating to the Debtors and their Affiliates existing as of the Effective Date, or arising after the Effective Date from acts and omissions occurring before the Effective Date. The Non-Debtor Releases expressly carve out and do not apply to (i) Guaranty Claims (other than a Guaranty Claim against a Debtor) related to the Mortgage Facility or the Mezzanine Facility, (ii) potential causes of action identified by the Examiner appointed in these cases, and (iii) any claims against any Released Party resulting from acts or omissions determined by a court to have constituted willful misconduct or gross negligence.

The Non-Debtor Releases are consensual with respect to (i) the release granted by NewCo (which consents to and supports the Non-Debtor Releases), and (ii) the holders of Claims who voted to accept the Plan or abstained from voting to accept the Plan. Courts in this District have held that "[r]eleases can be granted by consent and that consent can be established by a vote in favor of the plan, at least where the consequences are plainly and unambiguously expressed to the voting creditor. . ." *In re Bearing Point*, at 62; *see also In re Metromedia*, 416 F.3d at 142 ("Nondebtor releases may also be tolerated if the affected creditors consent"); *In re Calpine*, 2007 WL 4565223, at *9-*10 (consent inferred with respect holders of claims "abstaining from voting *and* choosing not to opt out of the releases" where such parties "were given due and adequate notice that they would be granting the releases by acting in such a manner."); *In re Oneida*, 351 B.R. at 94 (holding that "third party releases in the Plan fall directly into [*Metromedia's*] final category" where the affected creditors consented to the release by checking a box on their ballot). In assessing requisite consent, the Bankruptcy Court in *Bearing Point*, described the requirement of "explicitness" on voting ballots, which must "prominently set forth. . . in a fashion one couldn't miss" that "by voting to accept the plan, the

signer agreed to release those who would be released under this category of the release." *Bearing Point*, at 63. The court in *Bearing Point* noted that it would be sufficient to disclose explicitly the inference of a release with a disclosure "prominently set forth in a separate paragraph and in a fashion one couldn't miss under the check box for acceptance or rejecting."

Here, the Ballots for the Plan clearly and explicitly stated in bold, underlined and uppercase font that the release in the Plan "binds those Holders of Claims or Equity that VOTE TO ACCEPT the Plan, that are DEEMED TO ACCEPT the Plan, [and] that ABSTAIN FROM VOTING ON THE Plan . . . ." *See* sample ballot attached as "Exhibit B." The Ballots therefore made the consent inferred from a positive Plan vote, and from an abstention, explicit, and it can be inferred that holders of claims and interests that either voted for the Plan or abstained from voting, consented to the releases included in the Plan. Accordingly, the Debtors submit that the Non-Debtor Releases should be approved as it pertains to these parties.

Unique Circumstances

In *Metromedia*, the Second Circuit elaborated on certain factors that courts have found to justify granting nonconsensual third party releases of non-debtors, and has found that such releases are appropriate only in unique circumstances. *In re Metromedia*, 416 F.3d at 142-43. *See also In re Charter Commc'ns*, 419 B.R. at 258 (holding third party releases of non-debtors will be approved where the debtor makes a showing of specific facts sufficient to warrant the court's determination that "truly unusual circumstances render the release terms important to [the] success of the plan."). The factors identified in *Metromedia* include the following: "(i) the estate received substantial consideration; (ii) the enjoined claims were 'channeled' to a settlement fund rather than extinguished; (iii) the enjoined claims would indirectly impact the debtor's reorganization 'by way of indemnity or contribution; and (iv) the plan otherwise

provided for the full payment of the enjoined claims." *Metromedia*, 419 B.R. at 142 & 142-43. Despite the Court's enumeration of indicative factors, the Second Circuit noted that no single factor was necessarily determinative, but that courts should consider the totality of the circumstances to determine whether the releases are important to the success of the plan. *Id.*

The Released Parties fall into four categories based on their role in the restructuring of the Debtors, and the circumstances supporting their release under Section 10.10 of the Plan vary. The first category is comprised of parties (1) whose release is essential to the achievement of the sale transactions that underpin the Plan, and/or (2) who are making a substantial contribution in the form of the cash that will be used to fund all the distributions provided under the Plan. This category includes (i) NewCo, (ii) the Investor, (iii) each Sponsor, (iv) the Debt Financing Lenders, and (v) HVM and HVM Manager. The Investor and the Sponsors, through their substantial cash contribution, and the Debt Financing Lenders, through the financing they have committed to provide to the Investor and NewCo, are contributing approximately $3.925 billion of cash to the Debtors' reorganization effort. This is a significant cash infusion without which the Debtors would not be able to emerge from chapter 11, and which will be used to provide creditors with substantial recoveries. Significantly, it was the Sponsors, who prevailed at a nineteen hour auction, and agreed to provide the Debtors with $3.925 billion in cash. The Debt Financing Lenders also played a crucial role in these chapter 11 cases by providing the Sponsors with fully committed financing before the auction, which helped fuel a robust auction process. In addition, the Sponsors and the Debt Financing Lenders also worked after the auction to negotiate documents and work toward an expeditious confirmation. Without these contributions, the Plan — and the recoveries it provides to, among others, the holder of the Mortgage Facility Claim — would not be viable or feasible.

Each of these parties has bargained for the Non-Debtor Releases, as part of the consideration received for its substantial financial contribution. These parties also bargained for the release to apply to NewCo, which will be owned by the Investor and the Sponsors, and to HVM and HVM Manager. NewCo is purchasing HVM Manager directly or indirectly, and the Investor and the Sponsors will not assume unknown liabilities as part of their acquisition of the Debtors' assets and businesses. As to HVM, the Investor and the Sponsors do not want the manager of their newly acquired businesses to be burdened by the prospect of litigation. Without the provision of a release, it is unlikely the Sponsors, the Investors or the Debt Financing Lenders would have participated in these chapter 11 cases or would proceed to consummate the transactions contemplated by the Plan.

The second category of Released Parties, the Mortgage Debt Parties,[3] confronted novel challenges and faced unique risks, as they worked through the myriad issues regarding a restructuring of Commercial Mortgage Back Securities ("CMBS"). The Non-Debtor Releases to be granted by the holders of Mortgage Certificates, who were not eligible to vote on the Plan, are permissible because such releases were required in order to enable the Debtors to propose a confirmable chapter 11 plan despite the unique challenges that arise in restructuring the CMBS. Voluminous and complex documentation provided little, if any, guidance to the Mortgage Debt Parties. Without meaningful legal precedent as to their rights, role and obligations in a chapter 11 case, the Special Servicer, working with the other Mortgage Debt Parties, agreed to permit the auction, negotiated a chapter 11 plan, agreed to enter into a Plan Support Agreement, and determined to vote the Mortgage Facility Claim in favor of the Plan. Without the active

[3] These parties include (i) the Special Servicer, (ii) the Mortgage Facility Trust, (iii) the Master Servicer, (iv) the Trustee, (v) the Successor Trustee, (vi) the Operating Advisor, and (vii) the Controlling Holder.

participation and support of the Mortgage Debt Parties, it is likely that the Debtors would not have been able to confirm a chapter 11 plan. The unique contribution made by the Mortgage Debt Parties in a largely undeveloped area merits the issuance of the release.

The third category of Released Parties are contributing assets or value to the Debtors' reorganization and consists of various insiders of the Debtors, namely, (i) Lightstone Holdings LLC, (ii) BHAC, (iii) HVM Manager Owner (David Lichtenstein), and (iv) ESI (including its affiliates, directors and officers). Lightstone Holdings LLC, an indirect equity owner of the Debtors, has, without compensation, and fully aware that its Equity Interests would not survive the Chapter 11 Cases, provided the Debtors' estates with certain necessary services throughout the Chapter 11 Cases and without any compensation therefor. In particular, Joseph Teichman, the General Counsel of Lightstone, served as an officer of the Debtors and has devoted a substantial portion of his time since October 2008 to working on the restructuring of the Debtors' businesses, and facilitating negotiations and decisions on behalf of the Debtors. Mr. Teichman, on behalf of the Debtors, took responsibility for and signed agreements and pleadings, including the Debtors' schedules and monthly operating reports. Such services were necessary for the Debtors to conduct their Chapter 11 Cases, engage in restructuring negotiations, and enter into an Investment Agreement. By providing these services, Lightstone Holdings LLC and Joseph Teichman made a substantial contribution to the Debtors and their creditors. BHAC entered into the BHAC IP Transfer Agreement by which it agreed to transfer valuable intellectual property to NewCo that was required by NewCo as a condition of the Investment Agreement, and the release is part of the consideration it received. David Lichtenstein participated in the management of HVM Manager during these cases and agreed to the sale of this non-debtor entity, making it possible for the Debtors to sell their businesses as ongoing

operations and without disruption. Although it also falls into category one, the release to be provided to HVM is also justified by the unique circumstances of these cases. At a time when the prospects for the Debtors' survival were unclear, and liquidity was scarce, HVM continued to manage the Debtors' properties, providing vital and crucial services without which the Debtors may not have survived. In addition, HVM was required to manage the Debtors' business while simultaneously providing information and diligence to prospective bidders. During this period HVM managed the Debtors' performance so that they beat their business plan and out-performed their competitors. By providing these services, HVM provided a substantial contribution to the Debtors' estates and their creditors. Finally, ESI is contributing valuable contracts related to the management and operation of the Debtors' hotel properties, which it will assume and assign to NewCo, and other consideration. Accordingly, ESI is contributing assets important to the Investor and the Sponsors as they reconstitute the Debtors' businesses in a new structure, and is waiving certain rights to ensure that the process is free of disputes.

The final category of Released Parties includes (i) the Debtors, (ii) each member of the Creditors' Committee, and (iii) certain parties related to the Released Parties, including, without limitation, officers and directors of such parties.[4]

As set forth above, the Non-Debtor Releases in section 10.10 are given by a limited universe of parties: creditors who accept the release (either by positive vote or abstention), creditors who are deemed to accept the Plan because they are receiving a full recovery, and holders of Mortgage Certificates, who are the beneficiaries of substantial recoveries under the Plan, which was accepted by the Special Servicer on their behalf. In

[4] Such parties include the present or former director, manager, officer, member, equity holder (and their respective Affiliates), employee, agent, financial advisor, partner, Affiliate, attorney, other professional advisor or representative (and their respective Affiliates) of the Released Parties other than ESI.

response to objections, the Debtors have revised the release so that parties who rejected the Plan do not give the release. Moreover, the Examiner appointed in these cases conducted an exhaustive investigation of potential claims and has identified potential causes of action which are carved out of the releases in Section 10.10 and which will constitute Litigation Trust Assets. In light of the substantial contributions made by the Released Parties to the achievement of a complex and novel restructuring, and the limited nature of the release, the Debtors submit that approving the release provided in section 10.10 is appropriate. Moreover, the Debtors submit that, in light of the integral nature of the Non-Debtor Releases to the Debtors' Plan and the bearing it has had on the Debtors' ability to achieve the compromise among numerous parties that is embodied in the Plan, the Court has jurisdiction to approve the release in section 10.10 of the Plan, including as it pertains to non-debtors that have not consented.

(c) *Exculpation*

The exculpation provisions in Section 10.9 and 10.12 of the Plan should be approved under the standard established by several courts in this district as well as by the Third Circuit. Courts in this district have approved exculpation provisions where they were deemed "appropriately tailored to protect the Exculpated Parties from inappropriate litigation and do not relieve any party of liability for gross negligence or willful misconduct." *In re Calpine*, 2007 WL 4565223, at *10. Similarly, the Third Circuit has held that exculpation provisions are appropriate where they limit liability arising out of the reorganization, and contain an express carve-out for fraud, willful misconduct and *ultra vires* acts. *See In re PWS Holding Corp.*, 228 F.3d. 224, 246-47 (3d Cir. 2000).

Inasmuch at the exculpation provision is limited to acts relating to the Chapter 11 Cases and includes a carve-out for claims arising from gross negligence or willful misconduct, the provision complies with applicable law.

7. Section 1123(c) of the Bankruptcy Code

Section 1123(c) only applies in a case concerning an individual and therefore does not apply to these Chapter 11 Cases.

8. Section 1123(d): Cure of Defaults

Section 1123(d) provides that "if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable non-bankruptcy law." Section 11.1 of the Plan provides that cure amounts for assumed executory contracts and unexpired leases will be set forth in the Plan Supplement. The Plan Supplement does not list any cure amounts because the Debtors have determined, in accordance with the law underlying the assumed agreements and applicable nonbankruptcy law, that there are no defaults under the executory contracts and unexpired leases that the Debtors will assume pursuant to the Plan. Sections 11.4 and 11.5 of the Plan provide for the assumption of certain Insurance Policies and Agreements and Management Agreements respectively. No defaults exist under these agreements either. Accordingly, the Plan complies with section 1123(d) of the Bankruptcy Code.

Based upon all of the foregoing, the Plan fully complies with the requirements of sections 1122 and 1123, as well as with all other provisions of the Bankruptcy Code, and thus satisfies section 1129(a)(1) of the Bankruptcy Code.

II.
SECTION 1129(a)(2): THE DEBTORS HAVE COMPLIED WITH THE BANKRUPTCY CODE

Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history of section 1129(a)(2) reflects that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 of the Bankruptcy Code. *See* H.R. REP. NO. 95-

595, at 412 (1977); *see also In re Johns-Manville Corp.*, 68 B.R. at 630 ("Objections to confirmation raised under § 1129(a)(2) generally involve the alleged failure of the plan proponent to comply with § 1125 and § 1126 of the Code.").

As set forth more fully below, the Debtors have complied with the applicable provisions of the Bankruptcy Code, including the provisions of sections 1125 and 1126, as well as the Order (I) Pursuant to Sections 105 and 363(b) of the Bankruptcy Code Approving Investment Agreement with Successful Bidder, (II) Approving Disclosure Statement Reflecting the Successful Bid, (III) Establishing Solicitation and Voting Procedures, (IV) Scheduling a Confirmation Hearing, and (V) Establishing Notice and Objection Procedures for Confirmation of the Debtors' Proposed Plan of Reorganization (the "Disclosure Statement Order") [Docket No. 1098] regarding disclosure and Plan solicitation.

A. Compliance with Section 1125: Postpetition Disclosure and Solicitation

Section 1125(b) of the Bankruptcy Code provides, in pertinent part:

> An acceptance or rejection of a plan may not be solicited after the commencement of the case under [the Bankruptcy Code] 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. . . .

By entry of the Disclosure Statement Order, the Bankruptcy Court approved the Disclosure Statement as containing "adequate information" pursuant to section 1125(b) of the Bankruptcy Code.

On June 24, 2010, the Debtors commenced their solicitation of votes to accept the Plan. On July 7, 2010, the Debtors' voting and tabulation agent, Kurtzman Carson Consultants LLC ("KCC"), filed the KCC Declaration, which states that KCC solicited and tabulated votes in accordance with the Disclosure Statement Order. *See* KCC Declaration ¶ 4. The Debtors did not

solicit acceptances of the Plan from any holder of Claims or Equity Interests prior to the transmission of the Disclosure Statement. *See id*. (stating that KCC served solicitation packages on June 24, 2010 and June 29, 2010 in accordance with the Disclosure Statement Order). In addition, the KCC Declaration describes the methodology for the tabulation and results of voting with respect to the Plan. *See* KCC Declaration ¶¶ 5-14. The deadline for voting to accept or reject the Plan was July 7, 2010.

B. <u>Compliance with Section 1126: Acceptance of Plan</u>

Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan of reorganization. Pursuant to section 1126, only holders of allowed claims in impaired classes of claims or equity interests may vote to accept or reject such plan. Section 1126 provides, in pertinent part, as follows:

> (a) The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan.
>
> * * *
>
> (f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.
>
> (g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

As set forth in the Disclosure Statement and the KCC Declaration, the Debtors solicited acceptances of the Plan from the holders of all Claims against the Debtors in each class of impaired Claims entitled to receive distributions under the Plan in accordance with section

1126. The impaired classes entitled to vote under the Plan are Class 2 (Mortgage Facility Claim), Class 3 (ESA UD Mortgage Claim), Class 4A (Mortgage Facility Deficiency Claim), Class 4B (Mezzanine Facilities Claims), and Class 5 (General Unsecured Claims). The Plan reflects that Class 1 (Priority Claims), Class 7 (ESA MD Properties Trust Certificate), Class 8 (ESA MD Borrower Interests), Class 9 (ESA P Portfolio MD Trust Certificate), Class 10 (ESA P Portfolio MD Borrower Interests), Class 11 (ESA Canada Properties Interests), Class 12 (ESA Canada Properties Borrower Interests), Class 13 (ESH/TN Properties L.L.C. Membership Interests), Class 14 (ESH/ESA General Partnership Interests) and Class 16 (Other Secured Claims) are unimpaired, and thus, are conclusively presumed to have accepted the Plan. The Plan also reflects that Class 6 (Existing Equity) and Class 15 (Other Existing Equity Interests) are impaired and that the holders of Equity Interests in these Classes will not receive or retain any interest or property pursuant to the Plan and, therefore, are deemed to have rejected the Plan, and are not entitled to vote on the Plan.

Section 1126(c) of the Bankruptcy Code specifies the requirements for acceptance of a plan by impaired Classes entitled to vote to accept or reject a plan of reorganization:

> A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

As evidenced in the KCC Declaration, the Plan has been *accepted* by creditors in all impaired Classes holding in excess of two-thirds in amount and one-half in number of the Allowed Claims voted in each class. Specifically, as set forth in the KCC Declaration, 100% of the creditors in Class 2, in number and in dollar amount, voted to accept the Plan. Creditors in Class 4A holding 100% in number and dollar amount voted to accept the Plan. As to Class 4B,

if the vote of the Special Servicer is dispositive, creditors holding 100% in number and in dollar amount voted to accept the Plan. If the Ballots cast by the holders of the Mezzanine Facilities Claims are dispositive, creditors holding 60.7% in number and 84.87% in dollar amount voted to accept the Plan. Creditors in Class 5 holding 100% in number and dollar amount voted to accept the Plan. *See* KCC Declaration ¶ 10. Creditors in Class 3 holding 100% in number and dollar amount voted to accept the Plan. *See* Supplemental KCC Declaration ¶ 4. As set forth above, the Debtors did not solicit acceptances from the Existing Equity in Class 6 and Other Existing Equity Interests in Class 15. Nevertheless, as set forth below, and, to the extent applicable, pursuant to section 1129(b) of the Bankruptcy Code, the Plan may be confirmed over the "deemed" rejection of Classes 6 and 15 because the Plan does not discriminate unfairly and is fair and equitable with respect to each such Class. Based upon the foregoing, the Debtors submit that the requirements of section 1129(a)(2) of the Bankruptcy Code have been satisfied.

III.
SECTION 1129(a)(3): THE PLAN HAS BEEN PROPOSED IN GOOD FAITH AND NOT BY ANY MEANS FORBIDDEN BY LAW

Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." The Second Circuit has defined the good-faith standard as requiring a showing that "the plan was proposed with 'honesty and good intentions' and with 'a basis for expecting that a reorganization can be effected.'" *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988) (quoting *Koelbl v. Glessing* (*In re Koelbl*), 751 F.2d 137, 139 (2d Cir. 1984) (quoting *Manati Sugar Co. v. Mock*, 75 F.2d 284, 285 (2d Cir.1935)). Courts have held that "a plan is proposed in good faith 'if there is a likelihood that the plan will achieve a result consistent with the standards prescribed under the Code.'" *In re Leslie Fay Cos.*, 207 B.R. 764, 781 (Bankr. S.D.N.Y. 1997) (quoting *In re Texaco Inc.*, 84 B.R. 893, 907 (Bankr. S.D.N.Y. 1988)). Moreover, "[w]here the plan is proposed with the

legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied." *Brite v. Sun Country Dev., Inc. (In re Sun Country Dev., Inc.)*, 764 F.2d 406, 408 (5th Cir. 1985). The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the establishment of a chapter 11 plan. *Id.*

The Debtors, as the plan proponent, have met their good faith obligation under the Bankruptcy Code. The Plan (including all documents necessary to effectuate the Plan) is the result of extensive arms-length negotiations among the Debtors, the Investor, the Sponsors, the Special Servicer, the Debt Financing Lenders, and the Creditors' Committee and their respective advisors. Each of these parties has acted in good faith. The Plan contemplates and is premised upon the sale of the Tier 1 Debtors to NewCo, which will in turn contribute proceeds of the sale to fund the distributions contemplated by the Plan. The Plan also provides for a recovery to the ESA UD Mortgage Claim in the form of the ESA UD Mortgage Note, and the potential for additional recoveries for unsecured creditors through the creation of a Litigation Trust. In addition, as a result of incorporation of the Litigation Trust Agreement, the Plan provides for significant distributions to holders of General Unsecured Claims and the Indenture Trustee. The Plan therefore, achieves one of the primary objectives underlying a chapter 11 bankruptcy: the equitable distribution of value to creditors for amounts owing. At the same time, the Plan provides for the rehabilitation and continuation of the Debtors' businesses, albeit under different ownership. *See In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989) ("the paramount policy and goal of Chapter 11, to which all other bankruptcy policies are subordinated, is the rehabilitation of the debtor). Inasmuch as the Plan promotes the rehabilitative objectives and purposes of the Bankruptcy Code, while also providing for a

recovery to creditors, the Plan and the related documents have been filed in good faith, and the Debtors have satisfied their obligations under section 1129(a)(3).

IV.
SECTION 1129(a)(4): THE PLAN PROVIDES THAT PROFESSIONAL FEES AND EXPENSES ARE SUBJECT TO COURT APPROVAL

Section 1129(a)(4) of the Bankruptcy Code requires that certain professional fees and expenses paid by the plan proponent, the debtor, or a person receiving distributions of property under the plan, be subject to approval by the Bankruptcy Court.

Pursuant to the interim compensation procedures established in these Chapter 11 Cases, the Bankruptcy Court has authorized and approved the payment of certain fees and expenses of retained professionals, subject to final review for reasonableness by the Bankruptcy Court under section 330.[5] The Plan provides, at Section 2.2, that the Allowed Amount of all Administrative Expense Claims arising under section 330, 331, 503(b)(2), 503(b)(3), 503(b)(4), 503(b)(5), or 503(b)(6), of the Bankruptcy Code shall be paid in full, in cash, from an Administrative/Priority Claims Reserve established pursuant to the Plan. Moreover, the Plan provides that the Bankruptcy Court shall retain jurisdiction "to hear and determine all applications for allowances of compensation and reimbursement of expenses of professionals under sections 330, 331 and 503(b) of the Bankruptcy Code . . . ." *See* Plan, section 12.7. All fees and expenses accrued through the Effective Date thus remain subject to final review by the Bankruptcy Court for reasonableness pursuant to sections 330, 331, and 503(b).

The foregoing procedures for the Bankruptcy Court's review and ultimate determination of the fees and expenses to be paid by the Debtor satisfy the objectives of

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[5] Second Amended Order Pursuant to Sections 105(a) and 331 of the Bankruptcy Code and Bankruptcy Rule 2016(a) Establishing Procedures for Interim Monthly Compensation and Reimbursement of Expenses of Professionals. [Docket No. 486]

section 1129(a)(4). *See In re Elsinore Shore Assos.*, 91 B.R. 238, 268 (Bankr. D.N.J. 1988) (requirements of section 1129(a)(4) satisfied where plan provided for payment of only "allowed" administrative expenses); *In re Future Energy Corp.,* 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988) ("Court approval of payments for services and expenses is governed by various Code provisions – e.g., §§ 328, 329, 330, 331, and 503(b) – and need not be explicitly provided for in a Chapter 11 plan."). Based upon the foregoing, the Plan complies with the requirements of section 1129(a)(4).

V.
SECTION 1129(a)(5): THE DEBTORS HAVE DISCLOSED ALL NECESSARY INFORMATION REGARDING DIRECTORS, OFFICERS, AND INSIDERS

Section 1129(a)(5) of the Bankruptcy Code requires that the plan proponent disclose the identity and affiliations of "any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan." Further, section 1129(a)(5) requires that the appointment of such individual be "consistent with the interests of creditors and equity security holders and with public policy" and that the plan proponent disclose the identity of any insider that will be employed or retained by the reorganized debtor and the nature of any compensation for such insider.

Prior to confirmation hearing, the Sponsors will disclose, in the Plan Supplement, the identity and affiliations of any individuals who will serve as members of the NewCo Board of Managers. There will be no officers of NewCo or the Reorganized Debtors because these companies will be run by HVM after the Effective Date. In addition, inasmuch as holders of claims and interests will not receive debt (except the holder of the ESA UD Claim) or equity of the Reorganized Debtors under the Plan, the method of selection of the officers and directors is

not relevant to creditors and equity security holders. With the exception of management and employees of HVM, none of the Debtors' insiders will be employed or retained by the Reorganized Debtors.

VI.
BANKRUPTCY CODE SECTION 1129(a)(6) IS NOT APPLICABLE

Bankruptcy Code section 1129(a)(6) provides that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." This provision of the Bankruptcy Code is not applicable to the Chapter 11 Cases, as the Debtors are not subject to any regulation over the rates they charge, nor will be they be subject to such regulation after confirmation of the Plan.

VII.
THE PLAN SATISFIES THE REQUIREMENTS OF SECTION 1129(a)(7) OF THE BANKRUPTCY CODE

Section 1129(a)(7) of the Bankruptcy Code provides, in relevant part:

With respect to each impaired class of claims or interests –

(A) each holder of a claim or interest of such class –

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date . . . ."[6]

Section 1129(a)(7) of the Bankruptcy Code is often referred to as the "best interests test" or the "liquidation test." The best interests test focuses on individual dissenting creditors rather than classes of claims. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N.*

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[6] With respect to the Plan, the Special Servicer has waived the right to make an election under section 1111(b)(2) of the Bankruptcy Code.

LaSalle St. P'ship, 526 U.S. 434, 440 n. 13 (1999). The test requires that "if the holder of a claim impaired under a plan of reorganization has not accepted the plan, then such holder must 'receive ... on account of such claim ... property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive ... if the debtor were liquidated under chapter 7 ... on such date.'" *Id*. at 440 (quoting 11 U.S.C. § 1129(a)(7).

The best interests test is satisfied as to each holder of a Claim in an unimpaired Class of Claims, which includes Classes 1 and 16 and 7 through 14, as they are unimpaired and, therefore, are deemed to have accepted the Plan. The best interests test is also satisfied as to each holder of a Claim in Classes 2, 3, 4A, 4B and 5 because each holder in such Class has either, voted to accept the Plan, or will receive at least as much as it would receive in a liquidation under chapter 7. The test is satisfied with regard to Classes 6 and 15 because there is no recovery available to these classes in liquidation.

Exhibit D to the Disclosure Statement sets forth the Debtors' liquidation analysis (the "***Liquidation Analysis***"), which is supported by the Lefkovits Declaration. The Liquidation Analysis and the Lefkovits Declaration demonstrate that the creditors in the only impaired Class where there was dissenting votes — Class 4B (Mezzanine Facilities Claim)[7] — will receive more value under the Plan than they would receive in a hypothetical chapter 7 liquidation. Specifically, the estimated recovery under the Plan, listed in Article II of the Disclosure Statement, titled Summary of the Plan, is contingent upon the successful prosecution of actions by the Litigation Trust. This contingent recovery is of greater value than the recovery these creditors would receive in a liquidation, which is estimated to be zero. Therefore, the claimants

[7] 100% of the Mezzanine Facilities Claims that were voted by the Special Servicer accepted the Plan, but there were dissenting votes among holders of Mezzanine Facilities Claims who also cast votes on the Plan.

in Class 4B will receive a greater distribution under the Plan than they would in a chapter 7 liquidation. Based upon the foregoing, the Debtors submit that the best interests test is satisfied.

VIII.
SECTION 1129(a)(8): THE PLAN HAS BEEN ACCEPTED BY IMPAIRED CLASSES, AND, AS TO SUCH CLASSES, THE REQUIREMENTS OF SECTION 1129(a)(8) HAVE BEEN SATISFIED

Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests either accept the plan or not be impaired by the plan. As set forth above, holders of claims in Classes 1 and 16 and 7 through 14 are unimpaired under the Plan and are, therefore, conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. Classes 2, 3, 4A, 4B and 5, each of which is an impaired Class of Claims eligible to vote, have affirmatively voted to accept the Plan. As such, section 1129(a)(8) is satisfied with respect to these Classes of Claims.

Holders of Existing Equity (Class 6) and Other Existing Equity Interests (Class 15) will not receive or retain any property on account of their Equity Interests in the Debtors, which Equity Interests will be cancelled, and, as such, these Classes are deemed to reject the Plan. Nonetheless, as set forth in Section XIV below, the Plan may be confirmed under the "cram down" provisions of section 1129(b) of the Bankruptcy Code.

IX.
SECTION 1129(a)(9): THE PLAN PROVIDES FOR PAYMENT IN FULL OF ALL ALLOWED PRIORITY CLAIMS

Section 1129(a)(9) of the Bankruptcy Code requires that persons holding claims entitled to priority under section 507(a) receive specified cash payments under the Plan. Unless the holder of a particular claim agrees to a different treatment with respect to such claim, section 1129(a)(9) requires a plan to provide as follows:

> (A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of [the Bankruptcy Code], on the effective date of the plan, the holder of such claim will

receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6) or 507(a)(7) of [the Bankruptcy Code], each holder of a claim of such class will receive –

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of [the Bankruptcy Code], the holder of such claim will receive on account of such claim regular installment payments in cash –

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

A. Section 1129(a)(9)(A): Administrative Expense Claims

With respect to Administrative Expense Claims, in accordance with section 1129(a)(9)(A) of the Bankruptcy Code, the Plan provides that administrative expenses shall be (i) assumed and paid by the Reorganized Debtors or NewCo in accordance with the terms and conditions of the particular transactions and any agreements relating thereto, (ii) paid

on the Effective Date, or (iii) paid from the Administrative/Priority Claims Reserve as soon as practicable after such Administrative Expense Claim becomes Allowed. *See* Plan at § 2.1.

B. Section 1129(a)(9)(B): Priority Non-Tax Claims

With respect to the payment of Allowed Priority Non-Tax Claims, in accordance with section 1129(a)(9)(B) of the Bankruptcy Code, Section 4.1 of the Plan provides that each holder of an Allowed Priority Claim shall be paid the Allowed Amount of its Allowed Priority Claim from the Administrative/Priority Claims Reserve, in full, in Cash, on the later of the Effective Date and as soon as practicable after the date such Priority Claim becomes Allowed. Thus, the Plan more than satisfies section 1129(a)(9)(B) of the Bankruptcy Code, as such section only requires that an accepting class of such priority non-tax claims receive deferred cash payments of a value, as of the effective date, equal to the amount of such priority non-tax claims.

C. Section 1129(a)(9)(C): Priority Tax Claims

With respect to the payment of Priority Tax Claims, in accordance with section 1129(a)(9)(C) of the Bankruptcy Code, Section 2.3 of the Plan provides for payment of each Allowed Priority Tax Claim from the Administrative/Priority Claims Reserve either (a) in full, in Cash, on the latest of (i) the Effective Date, (ii) the date such Allowed Priority Tax Claim becomes Allowed, and (iii) the date such Allowed Priority Tax Claim is payable under applicable non-bankruptcy law or (b) upon such other terms as may be mutually agreed upon between each holder of a Priority Tax Claim and the Plan Administrator. Section 1129(a)(9)(C) of the Bankruptcy Code requires that a debtor make deferred cash payments over a period of five years or less, but the Plan offers better treatment to holders of Allowed Priority Tax Claims by providing for payment in full, without deferral, once the Priority Tax Claim is both Allowed and due.

D. <u>Section 1129(a)(9)(D): Secured Tax Claims</u>

Section 1129(a)(9)(D) requires that a Plan provide for the payment of certain secured tax claims by governmental units through installment payments. Secured tax claims fall in Class 16 (Other Secured Claims) and are unimpaired. Class 16 provides for several alternative types of treatment, including any manner of distribution required pursuant to the Bankruptcy Code. Accordingly, the treatment described in Class 16 protects the rights of secured taxing authorities under section 1129(a)(9)(D) of the Bankruptcy Code.

Based upon the foregoing, the Plan satisfies all the requirements of section 1129(a)(9) of the Bankruptcy Code.

X.
SECTION 1129(a)(10): AT LEAST ONE CLASS OF IMPAIRED CLAIMS HAS ACCEPTED THE PLAN

Section 1129(a)(10) of the Bankruptcy Code requires the affirmative acceptance of the Plan by at least one class of impaired claims, "determined without including any acceptance of the plan by any insider" if a class of claims is impaired by the Plan. The Debtors satisfy this requirement in that impaired Classes 2, 3, 4A, 4B and 5 have affirmatively accepted the Plan, without including the acceptance of the Plan by insiders in such Classes. *See* KCC Declaration ¶ 10.

XI.
SECTION 1129(a)(11): THE PLAN IS NOT LIKELY TO BE FOLLOWED BY LIQUIDATION OR THE NEED FOR FURTHER REORGANIZATION

Section 1129(a)(11) of the Bankruptcy Code requires that, as a condition to confirmation, the Bankruptcy Court determine that a plan is feasible. Specifically, the Bankruptcy Court must determine that:

> Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the

> debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

The feasibility test set forth in section 1129(a)(11) requires the Bankruptcy Court to determine whether a plan is workable and has a reasonable likelihood of success. *See In re Armstrong World Indus., Inc.*, 348 B.R. 136, 167 (D. Del. 2006); *In re The Leslie Fay Cos*., 207 B.R. at 788. "The feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed." *Johns-Manville Corp.*, 843 F.2d at 649; *see also In re U.S. Truck Co., Inc.*, 47 B.R. 932, 944 (E.D. Mich. 1985) ("'Feasibility' does not, nor can it, require the certainty that a reorganized company will succeed."), *aff'd*, 800 F.2d 581 (6th Cir. 1986); *In re One Times Square Assocs. Ltd. P'ship*, 159 B.R. 695, 709 (Bankr. S.D.N.Y. 1993) ("'It is not necessary that the success be guaranteed, but only that the plan present a workable scheme of reorganization and operation from which there may be a reasonable expectation of success.'") (*quoting 5* COLLIER ON BANKRUPTCY 1129.02[11], at 1129-54 (15th ed. 1992)), *aff'd*, 165 B.R. 773 (S.D.N.Y. 1994) . The key element of feasibility is whether there exists a reasonable probability that the provisions of the plan can be performed. The purpose of the feasibility test is to protect against visionary or speculative plans. *See Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985) (*quoting* 5 COLLIER ON BANKRUPTCY ¶ 1129.02, at 1129-36.11 (15th ed. 1984)). However, "[j]ust as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility" and "[t]he mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds . . . ." *In re Drexel Burnham Lambert Group Inc.*, 138 B.R. 723, 762 (Bankr. S.D.N.Y. 1992) (*citing In re U.S. Truck*, 47 B.R. at 944).

Applying the foregoing standards of feasibility, courts have identified the following factors, as probative:

(a) the adequacy of the capital structure;

(b) the earning power of the business;

(c) economic conditions;

(d) the ability of management;

(e) the probability of the continuation of the same management;

(f) the availability of prospective credit, both capital and trade;

(g) the adequacy of funds for equipment replacements;

(h) the provisions for adequate working capital; and

(i) any other related matters which will determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

Leslie Fay, 207 B.R. at 789 (citing 7 COLLIER ON BANKRUPTCY ¶ 1129 LH[2], at 1129-82 (15th ed. rev. 1996)); *see also In re Texaco Inc.*, 84 B.R. 893, 910 (Bankr. S.D.N.Y. 1988). The foregoing list is neither exhaustive nor exclusive. *In re Drexel Burnham*, 138 B.R. at 763.

Applying the foregoing legal standards, the Plan satisfies the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code. For purposes of determining whether the Plan satisfies the feasibility standards, the Debtors have analyzed their ability to fulfill their obligations under the Plan and retain sufficient liquidity and capital resources to conduct their business. *See* Disclosure Statement Art. VIII and Exhibit “C”; Lefkovits Declaration. As part of this analysis, the Debtors have prepared projections of their financial performance for four (4) fiscal years from 2010 through 2014 (the “Projections”), including a projected pro forma balance sheet, statement of operations, and statement of cash flows. *See* Disclosure Statement Exhibit “C”; Lefkovits Declaration. As set forth in the Disclosure Statement, the Projections are premised upon numerous assumptions, including, among other things, the successful implementation of the Debtors’ business plan, assumptions about

economic and lodging industry trends, a timely Effective Date, the total amount of Allowed Claims in each class equaling the estimated amount, and that there are no material cure payments due as a result of the assumption of executory contracts and unexpired leases. *See* Disclosure Statement Exhibit "C"; Lefkovits Declaration. Based upon the Projections, the Debtors believe that the Reorganized Debtors or NewCo, as applicable, will be able to make all payments required to be made pursuant to the Plan. Disclosure Statement at Article X; Lefkovits Declaration. Based upon the foregoing, the Plan is not likely to be followed by the liquidation or the need for further financial restructuring of the Debtors and satisfies the feasibility standard of section 1129(a)(11).

XII.
SECTION 1129(a)(12): ALL STATUTORY FEES HAVE BEEN OR WILL BE PAID

Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 of title 28 [of the United States Code], as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the Plan." In accordance with section 1129(a)(12) of the Bankruptcy Code, Section 13.2 of the Plan provides that all fees payable pursuant to section 1930 of title 28 of the United States Code, as determined by the Bankruptcy Court at the Confirmation Hearing, shall be paid by the Debtors on or before the Effective Date.

XIII.
SECTIONS 1129(a)(13), 1129(a)(14), 1129(a)(15) AND 1129(a)(16) DO NOT APPLY

Section 1129(a)(13) of the Bankruptcy Code requires a plan to provide for retiree benefits at levels established pursuant to section 1114 of the Bankruptcy Code. Inasmuch as Debtors are not liable for any retiree benefits, section 1129(a)(13) is inapplicable to the Plan.

Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations and, therefore, is inapplicable to the Debtors.

Section 1129(a)(15) applies only in cases in which the debtor is an "individual" (as that term is defined in the Bankruptcy Code), therefore, section 1129(a)(15) is inapplicable.

Section 1129(a)(16) applies in cases where the debtor is a non-profit entity and requires that any sales of the debtors' assets be in accordance with applicable non-bankruptcy law. The Debtors are not corporations or trusts that are not moneyed, business, or commercial corporations, and/or partnerships. Accordingly, section 1129(a)(16) does not apply to them.

XIII.
SECTION 1129(b): THE PLAN SATISFIES THE "CRAM DOWN" REQUIREMENTS WITH RESPECT TO CLASSES 6 and 15

Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation of a plan in circumstances where not all impaired classes of claims and equity interests accept a plan. This mechanism is known colloquially as "cram down."

Section 1129(b) provides in pertinent part:

> [I]f all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be accepted by all impaired classes] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

Thus, under section 1129(b), the Bankruptcy Court may "cram down" a plan over the rejection of a plan by impaired classes of claims or equity interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such classes. *See, e.g., Johns-Manville Corp.*, 843 F.2d at 650.

Two impaired Classes – Class 6 (Existing Equity) and Class 15 (Other Existing Equity Interests) – are deemed to have rejected the Plan. As set forth above, all of the impaired Classes entitled to vote have accepted the Plan and, accordingly, the Debtors invoke section 1129(b) only with respect to Class 6 (Existing Equity) and Class 15 (Other Existing Equity Interests).

A. <u>The Plan Does Not Discriminate Unfairly</u>

The unfair discrimination standard of section 1129(b) ensures that a plan does not unfairly discriminate against a dissenting class with respect to the value it will receive under a plan when compared to the value given to all other similarly situated classes. *See In re Barney and Carey Co.*, 170 B.R. 17, 25 (Bankr. D. Mass 1994). Section 1129(b)(1) does not include an outright prohibition on discrimination between classes, but rather prohibits discrimination between classes that is unfair. *In re 11,111, Inc.*, 117 B.R. 471, 478 (Bankr. D. Minn. 1990). Generally a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if similar classes are treated differently without a reasonable basis for the disparate treatment. *See In re Buttonwood Partners, Ltd.*, 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990); *In re Johns-Manville Corp.*, 68 B.R. at 636. Accordingly, as between two classes of claims or two classes of equity interests, there is no unfair discrimination if (i) the classes are comprised of dissimilar claims or interests, *see, e.g.*, *Johns-Manville Corp.*, 68 B.R. at 636, or (ii) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment, *see, e.g., Buttonwood Partners*, 111 B.R. at 63; *In re Rivera Echevarria*, 129 B.R. 11, 12 (Bankr. D.P.R. 1991) (analyzing unfair discrimination in the context of a case under chapter 13 of the Bankruptcy Code).

1. The Plan Does Not Discriminate Unfairly Against Equity Interests in Class 6 (Existing Equity) or Class 15 (Other Existing Equity Interests)

Classes 6 and 15 are comprised of Equity Interests. The Plan provides that holders of Equity Interests in Classes 6 and 15 will receive no property on account of such interests, and that such interests will be cancelled on the Effective Date. Classes 6 and 15 represent the Equity Interests in the Debtors that the purchasers of the Debtors' businesses do not desire to preserve. Although the Plan preserves Equity Interests in Classes 7 through 14, such Equity Interests will be transferred, either through the transfer of the parent company holding the Equity Interest or through the transfer of an indirect parent company, to NewCo. As such, the Equity Interests in Classes 7 through 14 are not preserved for the benefit of holders of prepetition Equity Interests in any of the Debtors, but rather because the preservation of the structure of those Equity Interests is of value to NewCo. Therefore, the preservation of certain Equity Interests in the Plan does not constitute unfair discrimination in favor of the holders of the Equity Interests in Classes 7 through 14, or unfair discrimination against the holders of the Equity Interests in Classes 6 and 15, and no class of Equity Interests having similar legal rights to the Equity Interests in Classes 6 and 15 is receiving different treatment under the Plan.

B. The Plan is Fair and Equitable

To be "fair and equitable" as to holders of Equity Interests, section 1129(b)(2)(C) of the Bankruptcy Code requires a Plan to provide either (i) that each holder of an equity interest will receive or retain under the plan property of a value equal to the greatest of the fixed liquidation preference to which such holder is entitled, the fixed redemption price to which such holder is entitled or the value of the interest or (ii) that a holder of an interest that is junior to the nonaccepting class will not receive or retain any property under the plan.

1. The Plan is Fair and Equitable as to Equity Interests in Class 6 (Existing Equity) and Class 15 (Other Existing Equity Interests)

In the instant case, the "fair and equitable" rule is satisfied as to the holders of Existing Equity in Class 6, and Other Existing Equity Interests in Class 15. Specifically, no interests junior to the interests of Classes 6 and 15 will receive or retain any property under the Plan on account of such junior interests.

XIV. SECTIONS 1129(c)-(e) OF THE BANKRUPTCY CODE

The Plan is the only plan filed in these cases, and accordingly, section 1129(c) of the Bankruptcy Code is inapplicable in these Chapter 11 Cases. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of Section 5 of the Securities Act of 1933, and the Plan therefore satisfies the requirements of section 1129(d) of the Bankruptcy Code. Finally, none of the Chapter 11 Cases are "small business case[s]," as that term is defined in the Bankruptcy Code, and, accordingly, section 1129(e) of the Bankruptcy Code is inapplicable.

XV. THE PLAN SATISFIES THE REQUIREMENTS OF SECTION 1127 OF THE BANKRUPTCY CODE

Pursuant to section 1127 of the Bankruptcy Code, a plan proponent may modify a plan at any time before confirmation so long as the plan, as modified, satisfies the requirements of sections 1122 and 1123 of the Bankruptcy Code. In addition, Bankruptcy Rule 3019 provides, in relevant part:

> after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be

deemed accepted by all creditors and equity security holders who have previously accepted the plan.

As noted above, the Debtors have filed modifications to the Plan in accordance with Section 13.1 of the Plan. The modifications may be summarized, as follows: (i) the Debtors have added Class 16 (Other Secured Claims) and the treatment for such Class, (ii) the Debtors have improved the treatment of Class 3 (ESA UD Claim), (iii) the Debtors have improved the treatment of Class 5 (General Unsecured Claims), and (iv) the Debtors have reduced the scope of the releases contained in Section 10.10 and 10.12 of the Plan.

None of the modifications constitute material modifications or adversely affect any creditor, with the possible exception of the Special Servicer, which has accepted the modifications in writing. The Court in *In re Am. Solar King Corp.*, 90 B.R. 808, 826 (Bankr. W.D. Tex. 1988) found the following description of materiality instructive, "[a] modification is material if it so affects a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance" (*quoting* 8 COLLIER ON BANKRUPTCY ¶ 3019.03 (15th ed. 1987). Re-solicitation is appropriate where the "modification adversely affects the interests of a creditor who has previously accepted the plan," but here no modification adversely affects the interests of creditors. *See In re Frontier Airlines, Inc.*, 93 B.R. 1014, 1023 (Bankr. D. Colo. 1988). Because the Debtors made no material and adverse modifications, re-solicitation is unnecessary and acceptances of the Plan should be deemed acceptances of the Plan as modified.

As set forth above, the Plan complies fully with sections 1122 and 1123 of the Bankruptcy Code. In addition, the Debtors have complied with section 1125 with respect to the Plan. Accordingly, the requirements of section 1127 of the Bankruptcy Code have been satisfied.

CONCLUSION

The Plan complies with and satisfies all of the requirements of section 1129 of the Bankruptcy Code and all objections should, therefore, be overruled. The Debtors, therefore, request that the Court confirm the Plan.

Dated: July 19, 2010
New York, New York

/s/ Jacqueline Marcus
Marcia L. Goldstein
Jacqueline Marcus
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Attorneys for Debtors and
Debtors in Possession

Exhibit A

Debtor	Last Four Digits of Federal Tax I.D. Number
ESA P Portfolio L.L.C. f/k/a BRE/ESA P Portfolio L.L.C.	7190
ESA 2005 Portfolio L.L.C. f/k/a BRE/ESA 2005 Portfolio L.L.C.	8617
ESA 2005-San Jose L.L.C. f/k/a BRE/ESA 2005-San Jose L.L.C.	1317
ESA 2005-Waltham L.L.C. f/k/a BRE/ESA 2005-Waltham L.L.C.	1418
ESA Acquisition Properties L.L.C. f/k/a BRE/ESA Acquisition Properties L.L.C.	8149
ESA Alaska L.L.C. f/k/a BRE/ESA Alaska L.L.C.	8213
ESA Canada Properties Borrower L.L.C. f/k/a BRE/ESA Canada Properties Borrower L.L.C.	7476
ESA FL Properties L.L.C. f/k/a BRE/ESA FL Properties L.L.C.	7687
ESA MD Borrower L.L.C. f/k/a BRE/ESA MD Borrower L.L.C.	8839
ESA MN Properties L.L.C. f/k/a BRE/ESA MN Properties L.L.C.	0648
ESA P Portfolio MD Borrower L.L.C. f/k/a BRE/ESA P Portfolio MD Borrower L.L.C.	7448
ESA P Portfolio PA Properties L.L.C. f/k/a BRE/ESA P Portfolio PA Properties L.L.C.	6306
ESA P Portfolio TXNC Properties L.P. f/k/a BRE/ESA P Portfolio TXNC Properties L.P.	7378
ESA PA Properties L.L.C. f/k/a BRE/ESA PA Properties L.L.C.	7652
ESA Properties L.L.C. f/k/a BRE/ESA Properties L.L.C.	1249
ESA TX Properties L.P. f/k/a BRE/ESA TX Properties L.P.	1295
ESH/Homestead Portfolio L.L.C. f/k/a BRE/Homestead Portfolio L.L.C.	9049
ESH/HV Properties L.L.C. f/k/a BRE/HV Properties L.L.C.	8927
ESH/MSTX Property L.P. f/k/a BRE/MSTX Property L.P.	5862
ESH/TN Properties L.L.C. f/k/a BRE/TN Properties L.L.C.	5781
ESH/TX Properties L.P.	6964

Debtor	Last Four Digits of Federal Tax I.D. Number
f/k/a BRE/TX Properties L.P.	
ESH/Homestead Mezz L.L.C. f/k/a BRE/Homestead Mezz L.L.C.	9883
ESA P Mezz L.L.C. f/k/a BRE/ESA P Mezz L.L.C.	7467
ESA Mezz L.L.C. f/k/a BRE/ESA Mezz L.L.C.	0767
ESH/Homestead Mezz 2 L.L.C. f/k/a BRE/Homestead Mezz 2 L.L.C.	9903
ESA P Mezz 2 L.L.C. f/k/a BRE/ESA P Mezz 2 L.L.C.	7480
ESA Mezz 2 L.L.C. f/k/a BRE/ESA Mezz 2 L.L.C.	0866
ESH/Homestead Mezz 3 L.L.C. f/k/a BRE/Homestead Mezz 3 L.L.C.	9936
ESA P Mezz 3 L.L.C. f/k/a BRE/ESA P Mezz 3 L.L.C.	8977
ESA Mezz 3 L.L.C. f/k/a BRE/ESA Mezz 3 L.L.C.	0929
ESH/Homestead Mezz 4 L.L.C. f/k/a BRE/Homestead Mezz 4 L.L.C.	9953
ESA P Mezz 4 L.L.C. f/k/a BRE/ESA P Mezz 4 L.L.C.	8997
ESA Mezz 4 L.L.C. f/k/a BRE/ESA Mezz 4 L.L.C.	0964
ESH/Homestead Mezz 5 L.L.C. f/k/a BRE/Homestead Mezz 5 L.L.C.	9613
ESA P Mezz 5 L.L.C. f/k/a BRE/ESA P Mezz 5 L.L.C.	9186
ESA Mezz 5 L.L.C. f/k/a BRE/ESA Mezz 5 L.L.C.	1006
ESH/Homestead Mezz 6 L.L.C. f/k/a BRE/Homestead Mezz 6 L.L.C.	9667
ESA P Mezz 6 L.L.C. f/k/a BRE/ESA P Mezz 6 L.L.C.	9247
ESA Mezz 6 L.L.C. f/k/a BRE/ESA Mezz 6 L.L.C.	8995
ESH/Homestead Mezz 7 L.L.C. f/k/a BRE/Homestead Mezz 7 L.L.C.	9722
ESA P Mezz 7 L.L.C. f/k/a BRE/ESA P Mezz 7 L.L.C.	9349
ESA Mezz 7 L.L.C. f/k/a BRE/ESA Mezz 7 L.L.C.	9065
ESH/Homestead Mezz 8 L.L.C. f/k/a BRE/Homestead Mezz 8 L.L.C.	9779
ESA P Mezz 8 L.L.C.	9402
ESA Mezz 8 L.L.C.	9117

Debtor	Last Four Digits of Federal Tax I.D. Number
f/k/a BRE/ESA Mezz 8 L.L.C.	
ESH/Homestead Mezz 9 L.L.C. f/k/a BRE/Homestead Mezz 9 L.L.C.	1011
ESA P Mezz 9 L.L.C.	0281
ESA Mezz 9 L.L.C.	0923
ESH/Homestead Mezz 10 L.L.C. f/k/a BRE/Homestead Mezz 10 L.L.C.	1063
ESA P Mezz 10 L.L.C.	0224
ESA Mezz 10 L.L.C.	0175
Homestead Village L.L.C. f/k/a BRE/Homestead Village L.L.C.	8930
ESA MD Beneficiary L.L.C. f/k/a BRE/ESA MD Beneficiary L.L.C.	7038
ESA P Portfolio MD Trust f/k/a BRE/ESA P Portfolio MD Trust	8258
ESA MD Properties Business Trust f/k/a BRE/ESA MD Properties Business Trust	6992
ESA P Portfolio MD Beneficiary L.L.C. f/k/a BRE/ESA P Portfolio MD Beneficiary L.L.C.	8432
ESA Canada Properties Trust f/k/a BRE/ESA Canada Properties Trust	2314
ESA Canada Trustee Inc. f/k/a BRE/ESA Canada Trustee Inc.	2861
ESA Canada Beneficiary Inc. f/k/a BRE/ESA Canada Beneficiary Inc.	7543
ESA UD Properties L.L.C.	7075
ESA 2007 Operating Lessee Inc. f/k/a BRE/ESA 2007 Operating Lessee Inc.	9408
ESA 2005 Operating Lessee Inc. f/k/a BRE/ESA 2005 Operating Lessee Inc.	8471
ESA Operating Lessee Inc. f/k/a BRE/ESA Operating Lessee Inc.	4369
ESA P Portfolio Operating Lessee Inc. f/k/a BRE/ESA P Portfolio Operating Lessee Inc.	7433
ESA Business Trust f/k/a BRE/ESA Business Trust	8078
ESA Management L.L.C.	9101
ESA P Portfolio Holdings L.L.C. f/k/a BRE/ESA P Portfolio Holdings L.L.C.	8432
ESA Canada Operating Lessee Inc. f/k/a BRE/ESA Canada Operating Lessee Inc.	8838
Extended Stay Hotels L.L.C.	7438
ESH/MSTX GP L.L.C. f/k/a BRE/MSTX GP L.L.C.	5876
ESH/TXGP L.L.C.	6936

Debtor	Last Four Digits of Federal Tax I.D. Number
f/k/a BRE/TXGP L.L.C.	
ESA TXGP L.L.C. f/k/a BRE/ESA TXGP L.L.C.	1199
ESA P Portfolio TXNC GP L.L.C. f/k/a BRE/ESA P Portfolio TXNC GP L.L.C.	7210
ESH/TN Member Inc. f/k/a BRE/TN Member Inc.	8365

Exhibit B

Sample Ballot

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11 Case No.
EXTENDED STAY INC., et al.,	:	09-13764 (JMP)
Debtors.	:	(Jointly Administered)

BALLOT FOR CLASS 3
(ESA UD MORTGAGE CLAIM)

PLEASE READ AND FOLLOW THE ENCLOSED INSTRUCTIONS BEFORE COMPLETING THIS BALLOT

THIS BALLOT MUST BE COMPLETED, EXECUTED AND RETURNED TO THE VOTING AGENT SO IT IS ACTUALLY RECEIVED ON OR BEFORE 4:00 P.M. (PREVAILING EASTERN TIME) ON JULY 7, 2010 (THE "VOTING DEADLINE") BY THE VOTING AGENT

Name of Debtor Entities and Case Numbers

Debtor	Case No.	Debtor	Case No.
ESA Properties L.L.C.	09-13815	ESH/HV Properties L.L.C.	09-13786
ESA P Portfolio L.L.C.	09-13765	ESH/MSTX Property L.P.	09-13790
ESA 2005 Portfolio L.L.C.	09-13767	ESH/TN Properties L.L.C.	09-13793
ESA 2005-San Jose L.L.C.	09-13770	ESH/TX Properties L.P.	09-13802
ESA 2005-Waltham L.L.C.	09-13773	ESA MD Beneficiary L.L.C.	09-13768
ESA Acquisition Properties L.L.C.	09-13775	ESA P Portfolio MD Trust	09-13769
ESA Alaska L.L.C.	09-13780	ESA MD Properties Business Trust	09-13771
ESA Canada Properties Borrower L.L.C.	09-13785	ESA P Portfolio MD Beneficiary L.L.C.	09-13772
ESA FL Properties L.L.C.	09-13791	ESA Canada Properties Trust	09-13774
ESA MD Borrower L.L.C.	09-13794	ESA Canada Trustee Inc.	09-13776
ESA MN Properties L.L.C.	09-13798	ESA Canada Beneficiary Inc.	09-13779
ESA P Portfolio MD Borrower L.L.C.	09-13803	ESA UD Properties L.L.C.	09-13782
ESA P Portfolio PA Properties L.L.C.	09-13807	ESA 2007 Operating Lessee Inc.	09-13783
ESA P Portfolio TXNC Properties L.P.	09-13809	ESA 2005 Operating Lessee Inc.	09-13787

ESA PA Properties L.L.C.	09-13811	ESA Operating Lessee Inc.	09-13789
ESA TX Properties L.P.	09-13818	ESA P Portfolio Operating Lessee Inc.	09-13795
ESH/Homestead Portfolio L.L.C.	09-13778	ESA Canada Operating Lessee Inc.	09-13804
ESA Portfolio TXNC GP L.L.C.	10-10805	ESA TXGP L.L.C.	10-10806
ESH/MSTX GP L.L.C.	10-10807	ESH/TXGP L.L.C.	10-10808
ESH/TN Member Inc.	10-10809	Homestead Village L.L.C.	09-13766
Extended Stay Hotels L.L.C.	09-13808	ESA Management L.L.C.	09-13799
ESA Business Trust	09-13797	ESA P Portfolio L.L.C.	09-13765
ESH/Homestead Mezz L.L.C.	09-13805	ESA P Mezz L.L.C.	09-13813
ESA Mezz L.L.C.	09-13816	ESH/Homestead Mezz 2 L.L.C.	09-13819
ESA P Mezz 2 L.L.C.	09-13820	ESA Mezz 2 L.L.C.	09-13823
ESH/Homestead Mezz 3 L.L.C.	09-13826	ESA P Mezz 3 L.L.C.	09-13828
ESA Mezz 3 L.L.C.	09-13830	ESH/Homestead Mezz 4 L.L.C.	09-13831
ESA P Mezz 4 L.L.C.	09-13832	ESA Mezz 4 L.L.C.	09-13833
ESH/Homestead Mezz 5 L.L.C.	09-13777	ESA P Mezz 5 L.L.C.	09-13781
ESA Mezz 5 L.L.C.	09-13784	ESH/Homestead Mezz 6 L.L.C.	09-13788
ESA P Mezz 6 L.L.C.	09-13792	ESA Mezz 6 L.L.C.	09-13796
ESH/Homestead Mezz 7 L.L.C.	09-13801	ESA P Mezz 7 L.L.C.	09-13806
ESA Mezz 7 L.L.C.	09-13810	ESH/Homestead Mezz 8 L.L.C.	09-13812
ESA P Mezz 8 L.L.C.	09-13814	ESA Mezz 8 L.L.C.	09-13817
ESH/Homestead Mezz 9 L.L.C.	09-13821	ESA P Mezz 9 L.L.C.	09-13822
ESA Mezz 9 L.L.C.	09-13824	ESH/Homestead Mezz 10 L.L.C.	09-13825
ESA P Mezz 10 L.L.C.	09-13827	ESA Mezz 10 L.L.C.	09-13829

The debtors and debtors in possession in the above-referenced chapter 11 cases (collectively, the "Debtors") are soliciting votes with respect to the Debtors' Fifth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, dated June 8, 2010 (as it may be amended, the "Plan"), from the holders of certain impaired claims against the Debtors. All capitalized terms used but not defined herein or in the enclosed voting instructions have the meanings ascribed to such terms in the Plan. If you have any questions on how to properly complete this Ballot, please call Kurtzman Carson Consultants, LLC (the "Voting Agent") at (866) 381-9100.

This Ballot is to be used for voting by the holder of the ESA UD Mortgage Claim. In order for your vote to be counted, the Ballot must be properly completed, signed, and returned to the Voting Agent so that it is actually received by the Voting Agent at Extended Stay Ballot Processing Center, c/o Kurtzman Carson Consultants, LLC , 2335 Alaska Avenue, El Segundo, California 90245, by no later than 4:00 p.m. (prevailing Eastern Time) on July 7, 2010 (the "Voting Deadline"), unless such time is extended in writing by the Debtors, with the consent of the Investor.

Please note, that, although the Bankruptcy Court entered an order (the "Disclosure Statement Order") approving, among other things, the Disclosure Statement (as defined below) as containing adequate information pursuant to section 1125 of the Bankruptcy Code, the Bankruptcy Court's approval of the Disclosure Statement does not indicate approval of the Plan. The Plan is attached as "Exhibit A" to the Disclosure Statement relating to the Plan, a copy of which is included on the CD-ROM accompanying this Ballot.

Your rights are described in the Disclosure Statement, so it is important that you review the Disclosure Statement and each exhibit thereto, including the Plan, before you complete, execute and return this Ballot. You also may wish to seek legal advice concerning the Plan and the Plan's classification and treatment of your Claim.

If your ballot is not received by KCC on or before the Voting Deadline, and the Voting Deadline is not extended, your vote will not count as either an acceptance or rejection of the Plan.

If the Plan is confirmed by the Bankruptcy Court it will be binding on you whether or not you vote.

PLEASE COMPLETE THE FOLLOWING:

ITEM 1. **Amount of ESA UD Mortgage Claim.** For purposes of voting to accept or reject the Plan, the undersigned holds an ESA UD Mortgage Claim against the Debtors in the amount set forth below.

Amount: **$8,500,000.00**

ITEM 2. **Vote on the Plan.** The undersigned holder of an ESA UD Mortgage Claim in the amount set forth in Item 1 above hereby votes to:

Check one box: ☐ ACCEPT (vote FOR) the Plan

☐ REJECT (vote AGAINST) the Plan

IMPORTANT INFORMATION REGARDING THE RELEASING PARTY RELEASE

Following Confirmation, subject to Article IX of the Plan, the Plan will be Consummated on the Effective Date. Among other things, effective as of the Confirmation Date but subject to the occurrence of the Effective Date, certain release, injunction, exculpation and discharge provisions set forth in Article X will become effective. It is important to read the provisions contained in Article X of the Plan very carefully so that you understand how Confirmation and Consummation of the Plan – which effectuates such provisions – will affect you and any Claim you may hold against the Debtors so that you cast your vote accordingly.

Specifically, the "Releases" in Article X, section 10.10 of the Plan, which binds those Holders of Claims or Equity Interests that VOTE TO ACCEPT the Plan, that are DEEMED TO ACCEPT the Plan, that ABSTAIN from voting on the Plan, and to the fullest extent permissible under the applicable law (or as such law may be extended or integrated after the Effective Date) each holder of a Claim or Equity Interest that VOTES NOT TO ACCEPT the Plan, provides, among other things, the following:

As of the Effective Date, and in consideration of (a) the services provided by the present and former directors, managers, officers, employees, Affiliates, agents, financial advisors, attorneys, and representatives of the Debtors to the Debtors who acted in such capacities after the Commencement Date; (b) the services of the Creditors' Committee and their Affiliates; (c) the services provided by HVM; (d) the services provided by HVM Manager; (e) the services of, and assets contributed by, HVM Manager Owner; (f) the provision of the Debt Financing Arrangements by the Debt Financing Lenders; (g) the substantial contribution of the Investor, each of the Sponsors and their Affiliates; and (h) the substantial contribution of the Special Servicer, the Trustee, the Operating Advisor and the Controlling Holder: (i) the Debtors, the Reorganized Debtors or NewCo; (ii) each holder of a Claim or Equity Interest that votes to accept the Plan, or is deemed to accept the Plan, or abstains from voting on the Plan; (iii) to the fullest extent permissible under applicable law (as such law may be extended or integrated after the Effective Date), each holder of a Claim or Equity Interest that votes not to accept the Plan; and (iv) each holder of a Mortgage Certificate, shall release unconditionally and forever each Released Party from any and all Claims, demands, causes of action and the like, relating to the Debtors or their Affiliates, advisors, officers, managers, directors and holders of Equity Interests existing as of the Effective Date or thereafter arising from any act, omission, event or other occurrence that occurred on or prior to the Effective Date; provided, that nothing in Section 10.10 of the Plan shall be construed as a release of any Guaranty Claim other than a Guaranty Claim against a Debtor, provided, further, that nothing in Section 10.10 of the Plan shall be construed as a release of any claims constituting Litigation Trust Assets.

ITEM 3. **Acknowledgements and Certification.** By signing this Ballot, the undersigned acknowledges that the undersigned has been provided with a copy of the Disclosure Statement for the Debtors' Fifth Amended Joint Plan of Reorganization, dated June 8, 2010 (as it may be amended, the "Disclosure Statement"), including all exhibits thereto. The undersigned certifies that (i) it is the holder of the ESA UD Mortgage Claim identified in Item 1 above and (ii) it has full power and authority to vote to accept or reject the Plan. The undersigned further acknowledges that the Debtors' solicitation of votes is subject to all terms and conditions set forth in the Disclosure Statement and the order of the Bankruptcy Court approving the Disclosure Statement and the procedures for the solicitation of votes to accept or reject the Plan contained therein.

Print or Type Name of Claimant: Bank of America

Social Security or Federal Tax I.D. No. of Claimant: ________________________________

Signature: ________________________________

Name of Signatory (if different than claimant): ________________________________

If by Authorized Agent, Title of Agent: ________________________________

Street Address:

100 S Charles St
Baltimore, MD 21201

Telephone Number: ________________________________

Date Completed: ________________________________

0913782100623114702000001

VOTING INSTRUCTIONS FOR COMPLETING THE BALLOT
FOR HOLDERS OF CLASS 3 (ESA UD MORTGAGE CLAIM)

1. This Ballot is submitted to you to solicit your vote to accept or reject the Plan. **PLEASE READ THE PLAN AND THE DISCLOSURE STATEMENT CAREFULLY BEFORE COMPLETING THIS BALLOT.**

2. The Plan will be accepted by Class 3 if it is accepted by the holders of two-thirds in amount and more than one-half in number of Claims in Class 3 voting on the Plan. In the event that Class 3 rejects the Plan, the Bankruptcy Court may nevertheless confirm the Plan and thereby make it binding on you if the Bankruptcy Court finds that the Plan does not unfairly discriminate against, and accords fair and equitable treatment to, the holders of Claims in Class 3 and all other Classes of Claims rejecting the Plan, and otherwise satisfies the requirements of section 1129(b) of the Bankruptcy Code. If the Plan is confirmed by the Bankruptcy Court, all holders of Claims against and Equity Interests in the Debtors (including those holders who abstain from voting or reject the Plan, and those holders who are not entitled to vote on the Plan) will be bound by the confirmed Plan and the transactions contemplated thereby.

3. **To have your vote counted, you must complete, sign, and return this Ballot to the Voting Agent so that it is received by the Voting Agent by no later than 4:00 p.m. (prevailing Eastern Time) on July 7, 2010 (the "Voting Deadline"), unless such time is extended in writing by the Debtors, with the consent of the Investor.** Ballots must be delivered either by mail with the enclosed envelope or by hand delivery or overnight courier to the Voting Agent at the following address:

KURTZMAN CARSON CONSULTANTS, LLC
ATTN: EXTENDED STAY BALLOTING PROCESSING CENTER
2335 ALASKA AVENUE
EL SEGUNDO, CALIFORNIA 90245

Ballots will not be accepted by telecopy, facsimile, or other electronic means of transmission.

4. To properly complete the Ballot, you must follow the procedures described below:

   a. **make sure that the information contained in Item 1 is correct;**

   b. **if you have a Claim in Class 3, cast one vote to accept or reject the Plan by checking the appropriate box in Item 2;**

   c. **if you are completing this Ballot on behalf of another person or entity, indicate your relationship with such person or entity and the capacity in which you are signing and submit satisfactory evidence of your authority to so act (e.g., a power of attorney or a certified copy of board resolutions authorizing you to so act);**

   d. **if you also hold Claims in a Class other than Class 3, you may receive more than one Ballot, labeled for a different Class of Claims. Your vote will be counted in determining acceptance or rejection of the Plan by a particular Class of Claims only if you complete, sign, and return the Ballot labeled for that Class of Claims in accordance with the instructions on that Ballot;**

   e. **if you believe that you have received the wrong Ballot, please contact the Voting Agent immediately;**

   f. **provide your name and mailing address;**

   g. **sign and date your Ballot; and**

h. **return your Ballot using the enclosed pre-addressed return envelope.**

IF YOU HAVE ANY QUESTIONS REGARDING THE BALLOT, OR IF YOU DID NOT RECEIVE A RETURN ENVELOPE WITH YOUR BALLOT, OR IF YOU DID NOT RECEIVE A COPY OF THE DISCLOSURE STATEMENT OR PLAN, OR IF YOU NEED ADDITIONAL COPIES OF THE BALLOT OR OTHER ENCLOSED MATERIALS, PLEASE CONTACT THE DEBTORS' VOTING AGENT, KURTZMAN CARSON CONSULTANTS, LLC AT (866) 381-9100. COPIES OF THE PLAN AND DISCLOSURE STATEMENT CAN BE ACCESSED ON KURTZMAN CARSON CONSULTANT LLC'S WEBSITE AT: HTTP://WWW.KCCLLC.NET/EXTENDEDSTAY. PLEASE DO NOT DIRECT ANY INQUIRIES TO THE BANKRUPTCY COURT.