

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

_____)
In re:) Chapter 11
)
KIMBALL HILL, INC., *et al.*,¹) Case No. 08-10095
) (Jointly Administered)
)
Debtors.) Hon. Susan Pierson Sonderby
)

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER CONFIRMING
JOINT PLAN OF KIMBALL HILL, INC. AND ITS DEBTOR SUBSIDIARIES
PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE**

The above-captioned debtors (collectively, the "Debtors") having:²

- on April 23, 2008 (the "Petition Date"), commenced these chapter 11 cases (collectively, the "Chapter 11 Cases") by filing voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code");
- continued to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code;
- filed, on December 2, 2008, the *Joint Plan of Kimball Hill, Inc. and its Debtor Subsidiaries Pursuant to Chapter 11 of the United States Bankruptcy Code*

¹ The Debtors in these cases include: Kimball Hill, Inc.; 18th and Peoria, LLC; KII Financial Holding Company; KII Ingham Park South, LLC; KIII Texas Trading Company L.P.; Kimball Hill Far East Detroit, LLC; Kimball Hill Homes Austin, L.P.; Kimball Hill Homes California, Inc.; Kimball Hill Homes Dallas, L.P.; Kimball Hill Homes Florida, Inc.; Kimball Hill Homes Houston, L.P.; Kimball Hill Homes Illinois, LLC; Kimball Hill Homes Nevada, Inc.; Kimball Hill Homes Ohio, Inc.; Kimball Hill Homes Oregon, Inc.; Kimball Hill Homes Realty Florida, Inc.; Kimball Hill Homes San Antonio, L.P.; Kimball Hill Homes Texas Investments, L.L.C.; Kimball Hill Homes Texas Operations, L.L.C.; Kimball Hill Homes Texas, Inc.; Kimball Hill Homes Washington, Inc.; Kimball Hill Homes Wisconsin, Inc.; Kimball Hill Stateway, Inc.; Kimball Hill Texas Investment Company, L.L.C.; Kimball Hill Urban Centers Chicago One, L.L.C.; Kimball Hill Urban Centers Chicago Two, L.L.C.; Kimball Hill Urban Centers Special Purposes, LLC; Kimball Hill Urban Centers, L.L.C.; National Credit and Guaranty Corporation; and The Hamilton Place Partnership.

² Unless otherwise noted, capitalized terms used but not defined herein shall have the meanings ascribed to them in Article I.A of the Plan. The rules of interpretation set forth in Article I.B of the Plan shall apply to this order (the "Confirmation Order").

[Docket No. 814] and the *Disclosure Statement for the Debtors' Joint Plan Pursuant to Chapter 11 of the United States Bankruptcy Code* [Docket No. 815], which plan and related documents were subsequently amended multiple times;

- filed, on December 2, 2008, the *Motion of the Debtors for an Order Approving Disclosure Statement and Related Relief* [Docket No. 813] (the "Disclosure Statement Motion");
- filed, on January 21, 2009, the amended *Disclosure Statement for the Debtors' Joint Plan Pursuant to Chapter 11 of the United States Bankruptcy Code* [Docket No. 926] (as amended, the "Disclosure Statement") with the amended *Joint Plan of Kimball Hill, Inc. and its Debtor Subsidiaries Pursuant to Chapter 11 of the United States Bankruptcy Code* [Docket No. 899] (as amended, the "Plan") attached thereto, as evidenced by the *Affidavit of Service of Kenneth C. Chow Regarding the Disclosure Statement for the Debtors' Joint Plan of Kimball Hill, Inc. and its Debtor Subsidiaries Pursuant to Chapter 11 of the United States Bankruptcy Code* [Docket No. 929];
- obtained approval of the Disclosure Statement by that certain *Order Approving the Debtors' Disclosure Statement and Granting Related Relief*, dated January 21, 2009 [Docket No. 925] (the "Solicitation Procedures Order"), which Solicitation Procedures Order also approved, among other things, solicitation procedures (the "Solicitation Procedures") and certain solicitation materials including notices, Ballots and Master Ballots (collectively, the "Solicitation Package") for soliciting votes with respect to the Plan;
- distributed, on or before January 30, 2009, Solicitation Packages to the parties entitled to receive Solicitation Packages pursuant to the Solicitation Procedures Order, and such distribution appearing to be consistent with the Bankruptcy Code, the Bankruptcy Rules, and the Solicitation Procedures Order, as evidenced by the *Affidavit of Service of Romelia A. Edwards Regarding Solicitation Packages Served on January 30, 2009*, filed on February 10, 2009 [Docket No. 981] (the "KCC Affidavit") and the *Affidavit of Service of Jane Sullivan on Behalf of Financial Balloting Group Regarding Solicitation Packages Served on January 29, 2009*, filed on February 10, 2009 [Docket No. 982] (the "FBG Affidavit");
- distributed, on or before January 30, 2009, certain other solicitation-related materials to parties on the Master Service List and the 2002 List, as defined in the *Amended Order Establishing Certain Notice, Case Management, and Administrative Procedures* filed on May 13, 2008 [Docket No. 174] (the "Case Management Order") in accordance with the Solicitation Procedures, as evidenced by the KCC Affidavit;
- published, on or before February 12, 2009, notice of the Confirmation Hearing (the "Confirmation Hearing Notice") in the national editions of *USA Today*, *The Wall Street Journal*, and *The Chicago Tribune* as evidenced by the *Affidavit of Publication of Antoinette Chase in the USA Today* [Docket No. 1065], filed on March 3, 2009, the

Affidavit of Publication of Erin Ostenson in The Wall Street Journal [Docket No. 1064], filed on March 3, 2009, and the *Affidavit of Publication of Linda Lundberg in the Chicago Tribune* [Docket No. 1066], filed on March 3, 2009, (collectively, the "Publication Affidavits");

- filed, on February 15, 2009, the *Plan Supplement to the Debtors' Joint Plan of Kimball Hill, Inc. and its Debtor Subsidiaries* [Docket No. 996] (as amended, the "Plan Supplement");³
- filed, on February 26, 2009 and March 4, 2009, certain amendments to the Plan Supplement [Docket Nos. 1021-1028] and [Docket Nos. 1080 and 1082], respectively;
- filed, on March 4, 2009, the *Affidavit of Romelia A. Edwards with Respect to the Tabulation of Votes on the Joint Plan of Kimball Hill, Inc. and its Debtor Subsidiaries Pursuant to Chapter 11 of the United States Bankruptcy Code* [Docket No. 1074], detailing the Plan voting results with respect to all classes of claims other than Class C-3 Claims (as amended, the "KCC Voting Report") and the *Affidavit of Jane Sullivan with Respect to the Tabulation of Votes on the Joint Plan of Kimball Hill, Inc. and its Debtor Subsidiaries Pursuant to Chapter 11 of the United States Bankruptcy Code* [Docket No. 1073], detailing the Plan voting results with respect to Class C-3 Claims (the "FBG Voting Report," and together with the KCC Voting Report, collectively, the "Voting Reports");
- filed, on March 4, 2009, the *Joint Plan of Kimball Hill, Inc. and its Debtor Subsidiaries Pursuant to Chapter 11 of the United States Bankruptcy Code with Technical Modifications* [Docket No. 1076];
- filed, on March 4, 2009, the *Debtors' Memorandum of Law in Support of Confirmation of the Joint Plan of Kimball Hill, Inc. and its Debtor Subsidiaries Pursuant to Chapter 11 of the United States Bankruptcy Code* [Docket No. 1078] (the "Plan Confirmation Brief"), together with the *Declaration of Andrew D. J. Hede in Support of Confirmation of Joint Plan of Kimball Hill, Inc. and Its Debtor*

³ The Solicitation Procedures Order established February 13, 2009, as the deadline to file the Debtors' Plan Supplement (i.e., twenty-four (24) days before the Confirmation Hearing). On February 13, 2009 the Debtors attempted to electronically file the Plan Supplement via the Court's CM/ECF document filing system, but the CM/ECF system shut down for maintenance prior to the end of the business day. Accordingly, on February 13, 2009, the Debtors posted the Plan Supplement on the case website, served it on the Master Service List and 2002 List, and commenced service of all other notices, all as if the Plan Supplement had been formally filed with the Court on February 13, 2009. The Debtors filed the Plan Supplement via the CM/ECF system on Sunday, February 15, 2009, as soon as the system was available for use.

Subsidiaries Under Chapter 11 of the United States Bankruptcy Code [Docket No. 1079] (the "Hede Declaration"); and

- filed, on March 6, 2009, the *Supplemental Affidavit of Romelia A. Edwards with Respect to the Tabulation of Votes on the Joint Plan of Kimball Hill, Inc. and its Debtor Subsidiaries Pursuant to Chapter 11 of the United States Bankruptcy Code* [Docket No. 1091].

This Court having:

- entered the Solicitation Procedures Order on January 21, 2009 [Docket No. 925];
- set March 9, 2009 at 2:00 p.m. prevailing Central Time, as the date and time for the commencement of the Confirmation Hearing pursuant to Bankruptcy Rules 3017 and 3018 and sections 1126, 1128, and 1129 of the Bankruptcy Code;
- reviewed the Plan, Disclosure Statement, the Plan Supplement, the Plan Confirmation Brief, the Hede Declaration, and the Voting Reports regarding Confirmation, including all objections, statements, and reservation of rights;
- heard the statements, arguments, and objections made by counsel with respect to Confirmation;
- considered all oral representations, testimony, documents, filings, and other evidence regarding Confirmation;
- overruled any and all objections to the Plan and Confirmation thereof and all statements and reservations of rights not consensually resolved or withdrawn unless otherwise indicated; and
- taken judicial notice of the papers and pleadings filed in the Chapter 11 Cases.

NOW, THEREFORE, it appearing to the Court that notice of the Confirmation Hearing and the opportunity for any party in interest to object to Confirmation have been adequate and appropriate as to all Entities affected or to be affected by the Plan and the transactions contemplated thereby, and the legal and factual bases set forth in the documents filed in support of Confirmation and presented at the Confirmation Hearing establish just cause for the relief

granted herein; and after due deliberation thereon and good cause appearing therefore, the Court hereby makes and issues the following findings of fact, conclusions of law, and orders:⁴

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE COURT HEREBY FINDS AND DETERMINES THAT:

I. Jurisdiction and Venue

A. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and has exclusive jurisdiction to determine whether the Plan complies with the applicable provisions of the Bankruptcy Code and should be confirmed.

II. Commencement and Joint Administration of the Chapter 11 Cases

B. On the Petition Date, the Debtors commenced the Chapter 11 Cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. By prior order of the Court, the Chapter 11 Cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Bankruptcy Rule 1015 [Docket No. 47]. The Debtors have operated their businesses and managed their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed

⁴ The findings of fact and the conclusions of law set forth herein shall constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

in the Chapter 11 Cases. The Debtors were and are qualified to be debtors under section 109 of the Bankruptcy Code.

III. Modifications to the Plan

C. Any modifications to the Plan described or set forth herein constitute technical changes or changes with respect to particular Claims by agreement with Holders of such Claims, and do not materially or adversely affect or change the treatment of any Claims or Interests. Pursuant to Bankruptcy Rule 3019, these modifications do not require additional disclosure under section 1125 of the Bankruptcy Code or the resolicitation of votes under section 1126 of the Bankruptcy Code, nor do they require that the Holders of Claims or Interests be afforded an opportunity to change previously cast acceptances or rejections of the Plan.

IV. Judicial Notice

D. The Court takes judicial notice of (and deems admitted into evidence for Confirmation of the Plan) the docket of the Chapter 11 Cases, including all pleadings and other documents on file, all orders entered, and all evidence and arguments made, proffered, or adduced at the hearings held before the applicable Court during the pendency of the Chapter 11 Cases. Any resolutions of objections to Confirmation explained on the record at the Confirmation Hearing are hereby incorporated by reference. All unresolved objections, statements, and reservations of rights are overruled on the merits.

V. Solicitation Procedures Order

E. On January 21, 2009, the Court entered the Solicitation Procedures Order, which, among other things: (a) approved the Disclosure Statement as containing adequate information within the meaning of section 1125 of the Bankruptcy Code; (b) fixed January 13, 2009 as the Record Date; (c) fixed February 27, 2009 at 5:00 p.m. prevailing Pacific Time as the

Voting Deadline; (d) fixed February 27, 2009 at 5:00 p.m. prevailing Central Time as the Plan Objection Deadline; (e) fixed March 9, 2009 at 2:00 p.m. prevailing Central Time as the date and time for the commencement of the Confirmation Hearing; and (f) approved the Solicitation Procedures and the Solicitation Package.

VI. Transmittal and Mailing of Materials; Notice

F. As evidenced by the KCC Affidavit and the FBG Affidavit, due, adequate, and sufficient notice of the Disclosure Statement, the Plan, and the Confirmation Hearing, together with all deadlines for voting on or objecting to the Plan, was provided to: (a) all known Holders of Claims and Interests and (b) Entities that properly requested notice (and did not withdraw such request) in accordance with Bankruptcy Rule 2002. Such notice was in compliance with the Solicitation Procedures Order and Bankruptcy Rules 2002(b), 3017, and 3020(b), and no other or further notice is or shall be necessary or required. Additionally, notice to all parties subject to retained Causes of Action and all counterparties to Executory Contracts and Unexpired Leases was provided in compliance with the Solicitation Procedures Order.

G. The Debtors published the Confirmation Hearing Notice in the *USA Today*, the National Edition of *The Wall Street Journal*, and *The Chicago Tribune*, in compliance with the Solicitation Procedures and Bankruptcy Rule 2002(1), as evidenced by the Publication Affidavits.

VII. Adequacy of Solicitation

H. Votes for acceptance or rejection of the Plan were solicited in good faith and in compliance with sections 1125 and 1126 of the Bankruptcy Code, Bankruptcy Rules 3017 and 3018, the Disclosure Statement, the Solicitation Procedures Order, all other applicable provisions of the Bankruptcy Code, and all other applicable rules, laws, and regulations. Specifically, the Solicitation Package approved by the Court in the Solicitation Procedures Order (including the

Disclosure Statement, the Plan, the appropriate Ballots, the Master Ballots, and the related notices) were transmitted to and served on all Holders of Claims in Classes that were entitled to vote on the Plan and relevant portions of the Solicitation Package were transmitted to and served on other parties in interest in the Chapter 11 Cases. Transmittal and service was adequate and sufficient, and no further notice is necessary or required or shall be required. Additionally, Holders of Claims and Interests and other potential parties in interest that were not entitled to vote on the Plan were provided with non-voting materials approved by the Court (including the Confirmation Hearing Notice) in accordance with the Solicitation Procedures Order. Pursuant to the Solicitation Procedures Order, the Debtors were excused from mailing a Solicitation Package to those Entities to whom the Debtors attempted to mail a notice of commencement or a notice of the Claims Bar Date if either of such notices was returned and marked "undeliverable" by the United States Postal Service or other mail carrier unless such Entity informed the Debtors in writing of their new address. All procedures used to distribute the Solicitation Package to Holders of Claims were fair and conducted in accordance with the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules.

VIII. Plan Supplement

I. On February 15, 2009, the Debtors filed the Plan Supplement and served notice of such filing on the Master List, the 2002 List, each of the counterparties to the Debtors' Executory Contracts and Unexpired Leases, and all parties to retained Causes of Action. On February 26, 2009 and March 4, 2009 the Debtors filed certain amendments to the Plan Supplement. The Plan Supplement complies with the terms of the Plan, and the filing and notice of such documents was conducted in accordance with the Bankruptcy Code, the Bankruptcy Rules, and the Solicitation Procedures Order, and no other or further notice is or shall be required. The

Debtors are authorized to modify the Plan Supplement following entry of this Confirmation Order in accordance with the terms of the Plan and to the extent consistent with the Bankruptcy Code.

IX. Voting Report

J. On March 4, 2009, the Debtors' Voting and Solicitation Agent filed the KCC Voting Report with the Court. On the same day, the Debtors' Securities Voting Agent filed the FBG Voting Report with the Court. All procedures used to tabulate the Ballots and Master Ballots were fair and conducted in accordance with the Solicitation Procedures Order, the Solicitation Procedures, the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules.

K. As set forth in the Plan and Disclosure Statement, only Holders of Claims in Class A-1, Class C-1, Class C-2, and Class C-3 are eligible to vote on the Plan pursuant to the Solicitation Procedures. Holders of Claims in Class A-2, Class A-3, and Class B are Unimpaired and, thus, conclusively deemed to accept the Plan (the "Unimpaired Accepting Classes"). Holders of Claims in Class D and Holders of Interests in Class E are Impaired, but are not entitled to receive a distribution under the Plan. Therefore, Holders of Claims in Class D and Holders of Interests in Class E are presumed to reject the Plan pursuant to the Solicitation Procedures and are not entitled to vote on the Plan (the "Impaired Rejecting Classes"). As evidenced by the Voting Reports, creditors in each of the Classes eligible to vote on the Plan voted to accept the Plan (collectively, the "Impaired Accepting Classes");

| Class | Claim/Interest | Status | Voting Right | % of Creditors Accepting | % of Claim Amount Accepting |
|-------|---|----------|------------------|--------------------------|-----------------------------|
| A-1 | Senior Credit Agreement Claims | Impaired | Entitled to Vote | 100.00% | 100.00% |
| C-1 | Senior Unsecured Claims | Impaired | Entitled to Vote | 90.00% | 99.99% |
| C-2 | General Unsecured Claims | Impaired | Entitled to Vote | 94.44% | 97.78% |
| C-3 | Unsecured Senior Subordinated Note Claims | Impaired | Entitled to Vote | 98.89% | 99.90% |

L. Based on the foregoing, at least one Impaired Class of Claims (excluding the acceptance by any insiders of any of the Debtors) has voted to accept the Plan in accordance with the requirements of sections 1124 and 1126 of the Bankruptcy Code.

X. Bankruptcy Rule 3016

M. The Plan is dated and identifies the Entities submitting and filing it, thereby satisfying Bankruptcy Rule 3016(a). The filing of the Disclosure Statement satisfies Bankruptcy Rule 3016(b).

XI. Burden of Proof

N. The Debtors, as proponents of the Plan, (a) have met their burden of proving the requisite elements of section 1129(a) and 1129(b) of the Bankruptcy Code by the applicable evidentiary standard for Confirmation and (b) have proven the elements of section 1129(a) and 1129(b) of the Bankruptcy Code by clear and convincing evidence.

XII. Compliance with the Requirements of Section 1129 of the Bankruptcy Code

O. The Plan complies with all applicable provisions of section 1129 of the Bankruptcy Code as follows:

(a) Section 1129(a)(1) – Compliance of the Plan with Applicable Provisions of the Bankruptcy Code

P. The Plan complies with all applicable provisions of the Bankruptcy Code as required by section 1129(a)(1) of the Bankruptcy Code, including sections 1122 and 1123 of the Bankruptcy Code.

(i) Section 1122 and 1123(a)(1) – Proper Classification

Q. The classification of Claims and Interests under the Plan is proper under the Bankruptcy Code. Pursuant to sections 1122(a) and 1123(a)(1) of the Bankruptcy Code, Article III of the Plan provides for the separate classification of Claims and Interests into nine (9) Classes, based on differences in the legal nature or priority of such Claims and Interests.⁵ Valid business, factual, and legal reasons exist for the separate classification of the various Classes of Claims and Interests created under the Plan. Further, the classifications were not done for any improper purpose and the creation of such Classes does not discriminate unfairly between or among Holders of Claims or Interests.

R. In accordance with section 1122(a) of the Bankruptcy Code, each Class of Claims and Interests contains only Claims or Interests that are substantially similar to the other Claims or Interests within that Class. Accordingly, the requirements of sections 1122(a), 1122(b), and 1123(a)(1) of the Bankruptcy Code are satisfied.

⁵ Article II of the Plan discusses the treatment of Administrative Claims, DIP Facility Claims, and Priority Tax Claims. Section 1123(a)(1) of the Bankruptcy Code excepts such claims from the classification requirement.

(ii) Section 1123(a)(2) – Specification of Unimpaired Classes

S. Article III of the Plan specifies that Claims in Class A-2, Class A-3, and Class B are Unimpaired under the Plan. Additionally, Article II of the Plan specifies that Allowed Administrative Claims, DIP Credit Agreement Claims, and Priority Tax Claims are Unimpaired, however, these Claims are not classified under the Plan (collectively, the “Unclassified Claims”) pursuant to section 1123(a)(1) of the Bankruptcy Code. Accordingly, the requirements of section 1123(a)(2) of the Bankruptcy Code are satisfied.

(iii) Section 1123(a)(3) – Specification of Treatment of Impaired Classes

T. Article III of the Plan specifies the treatment of each Impaired Class under the Plan, including Class A-1, Class C-1, Class C-2, Class C-3, Class D, and Class E. Accordingly, the requirements of section 1123(a)(3) of the Bankruptcy Code are satisfied.

(iv) Section 1123(a)(4) – No Discrimination

U. In accordance with section 1123(a)(4) of the Bankruptcy Code, Article III of the Plan provides for the same treatment of each Claim or Interest in a particular Class, as the case may be, unless the Holder of a particular Claim or Interest has agreed to a less favorable treatment with respect to such Claim or Interest. Accordingly, the requirements of section 1123(a)(4) of the Bankruptcy Code are satisfied.

(v) Section 1123(a)(5) – Adequate Means for Plan Implementation

V. Pursuant to section 1123(a)(5) of the Bankruptcy Code, Article IV the Plan and various other provisions of the Plan specifically provide, in sufficient detail, adequate, and proper means for the implementation of the Plan, including: (a) the sale of the Debtors’ assets; (b) the establishment of the Post-Consummation Trust; (c) the transfer of certain assets including the Post-Consummation Trust Assets to the Post-Consummation Trust; (d) the funding of the

expenses of the Post-Consummation Trust; (e) the appointment of the Plan Administrator; (f) the establishment of the Liquidation Trust; (g) the prosecution of Liquidation Trust Claims; (h) the transfer of certain assets including the Liquidation Trust Assets to the Liquidation Trust; (i) the funding of expenses of the Liquidation Trust; (j) the allocation of expenses between the Liquidation Trust and the Post-Consummation Trust; (k) the appointment of the Liquidation Trust Administrator; (l) the cancellation of instruments and equity securities and related obligations; (m) the creation of the Professional Fee Escrow Account; (n) the maintenance of Causes of Actions and the preservation of all Causes of Action not expressly settled or released; (o) the release of all Interests, mortgages, deeds of trust, liens, or other security interests against the property of any Estate; and (p) the general authority for all corporate action necessary to effectuate the Plan. Accordingly, the requirements of section 1123(a)(5) of the Bankruptcy Code are satisfied.

(vi) Section 1123(a)(6) – Voting Power of Equity Securities

W. Section 1123(a)(6) of the Bankruptcy Code is inapplicable to these Chapter 11 Cases because, among other things, the Debtors are not issuing any securities under the Plan. On the Effective Date, all securities pertaining to the Debtors will be cancelled.

(vii) Section 1123(a)(7) – The Appointment of a Successor to the Debtors

X. The Plan complies with section 1123(a)(7) of the Bankruptcy Code, regarding the selection of individuals to administer debts, because the selection of the Plan Administrator and the Liquidation Trust Administrator has been accomplished in a fair and reasonable manner, consistent with public policy. Accordingly, the requirements of section 1123(a)(7) of the Bankruptcy Code have been satisfied.

(b) Section 1123(b) – Discretionary Contents of the Plan

Y. The Plan contains various provisions that may be construed as discretionary but are not required for Confirmation under the Bankruptcy Code. As set forth below, such discretionary provisions comply with section 1123(b) of the Bankruptcy Code and are not inconsistent with the applicable provisions of the Bankruptcy Code. As a result, the requirements of section 1123(b) of the Bankruptcy Code are satisfied.

(i) Section 1123(b)(1) and 1123(b)(2) – Unimpaired Claims and Executory Contracts and Unexpired Leases

Z. Pursuant to section 1123(b)(1) and (b)(2) of the Bankruptcy Code, respectively, Article III of the Plan impairs or leaves unimpaired, as the case may be, each Class of Claims and Interests. Further, Article V of the Plan provides for the assumption, assumption and assignment, or rejection of the Executory Contracts and Unexpired Leases of the Debtors not previously assumed, assumed and assigned, or rejected pursuant to section 365 of the Bankruptcy Code and applicable orders of the Court.

(ii) Section 1123(b)(3) - Settlement, Releases, Exculpation, Injunction, and Preservation of Claims and Causes of Action

AA. Compromise and Settlement. Pursuant to Bankruptcy Rule 9019 and section 363 of the Bankruptcy Code and in consideration for the distributions and other benefits provided under the Plan, the compromise and settlement provisions of the Plan constitute a good faith compromise of all Claims, Interests, or Causes of Action relating to the contractual, legal, and subordination rights that a Holder of a Claim or Interest may have with respect to any Allowed Claim or any distribution to be made on account of such an Allowed Claim. The compromise and settlement of such Claims, Interests, or Causes of Action embodied in the Plan

is in the best interests of the Debtors, their Estates, and all Holders of Claims and Interests, and is fair, equitable, and reasonable.

BB. The global settlement between the Creditors' Committee, the Prepetition Lenders, and the Prepetition Agent upon which the Plan is premised, including the settlements with respect to the allocation of the Post-Consummation and Liquidation Trust Assets as set forth in Article IV of the Plan and the Plan Supplement is fair, equitable, and reasonable, and complies with the applicable legal standard set forth in Bankruptcy Rule 9019.

CC. All settlements and compromises of Claims, Interests, or Causes of Action of non-Debtor entities that are embodied in the Plan are effective and binding on each Holder of a Claim and Interest who may have standing to assert such Claims, Interests, or Causes of Action, and any such Holder of a Claim or Interest is forever barred from asserting such Claims, Interests, or Causes of Action after the Effective Date.

DD. Releases by the Debtors. The release provisions described in Article VIII.C of the Plan (the "Debtor Releases") are essential to the Plan and represent a valid exercise of the Debtors' business judgment. The Debtor Releases are: (a) in exchange for good and valuable consideration provided by the Released Parties; (b) a good faith settlement and compromise of the Causes of Action released by the Debtor Releases; (c) in the best interests of the Debtors and all Holders of Claims; (d) fair, equitable, and reasonable; (e) given and made after due notice and opportunity for hearing; and (f) a bar against any of the Debtors or any Holder of a Claim or Interest that would have been legally entitled to assert any Cause of Action on behalf of any of the Debtors or any of the Estates from asserting any Cause of Action released pursuant to the Debtor Releases against any of the Released Parties.