

**Cross-Motion Hearing Date and Time: April 22, 2010 @ 10:00 a.m.**

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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

**REPLY TO OBJECTIONS TO THE CROSS-MOTION OF OFFICIAL  
COMMITTEE OF UNSECURED CREDITORS FOR AN ORDER  
(A) AUTHORIZING ITS FINANCIAL ADVISORS, JEFFERIES & COMPANY, INC.,  
TO SOLICIT ALTERNATIVE PLAN PROPOSALS USING, INTER ALIA, THE  
DEBTORS' CONFIDENTIAL INFORMATION, AND (B) DIRECTING THE  
DEBTORS TO PROVIDE COOPERATION IN CONNECTION WITH SUCH EFFORTS**

The Official Committee of Unsecured Creditors (the "Committee")<sup>1</sup> of the above-captioned debtors and debtors-in-possession (the "Debtors"), by their undersigned counsel, hereby submits this reply (the "Reply") to the Objection of the Debtors [Docket No. 924] (the "Debtor Objection") and the Objection of the Successor Trustee [Docket No. 931] (the "Successor Trustee Objection") and together with the Debtor Objection, the "Objections") to the Cross-Motion of Official Committee of Unsecured Creditors for an Order (A) Authorizing Its Financial Advisors, Jefferies & Company, Inc., to Solicit Alternative Plan Proposals Using, Inter

<sup>1</sup> Any term not specifically defined herein shall have the meaning ascribed to it in the Cross-Motion.



Alia, the Debtors' Confidential Information, and (B) Directing the Debtors to Provide Cooperation in Connection with Such Efforts [Docket No. 818] (the "Cross-Motion"). In support of the Cross-Motion, as substantially modified and narrowed by this Reply, the Committee respectfully states as follows:

### **PRELIMINARY STATEMENT**

Based upon a review of the Successor Trustee Objection, it is clear that the two fiduciaries representing the major stakeholders in these chapter 11 cases -- the Committee and the Successor Trustee -- are deeply concerned about the lack of transparency and the conflict-laden sale process that the Debtors have been attempting to impose on their creditors over the past approximately two months. Since the filing of its Cross-Motion seven weeks ago, and as a direct result of the opposition raised by the Committee and the Successor Trustee, the Debtors have finally abandoned their multiple attempts to rush confirmation of an insider-driven reorganization plan backed by a chosen sponsor without the benefit of an open and transparent sales process with Court-approved bid procedures and reasonable notice periods and deadlines.

A few days ago, on April 15, 2010, the Debtors filed their expedited motion to approve bid procedures for an auction-based sale of substantially all of the Debtors' business assets (the "Bid Procedures Motion").<sup>2</sup> The Committee believes that this development represents a major step in the right direction and, in large part, obviates the need for the relief sought in the Committee's Cross-Motion. Consequently, the Committee withdraws that portion of the Cross-Motion seeking authority for the Committee and its investment banking firm, Jefferies & Company, Inc. ("Jefferies") to run an alternate sales process. Moreover, now that there will be

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<sup>2</sup> Debtors' Motion for Entry of an Order Pursuant to Sections 105(a) and 363 of the Bankruptcy Code Approving Bidding Procedures and Notice of the Auction Relating Thereto and Granted Related Relief, dated April 15, 2010 [Docket No. 946] (as defined, the "Bid Procedures Motion").

Court-ordered bidding procedures in place, the Committee has no objection to the Debtors' investment banking firm, Lazard Freres & Co. ("Lazard"), conducting the sales process, provided that it does so while consulting with and obtaining input from the Committee and the Successor Trustee.

However, despite these improvements, the Committee continues to have serious concerns about the ability of the Debtors' professionals to act independently, in large part, due to the fact that Lazard is answerable only to the Debtors' boards of directors, and as reconfirmed by the Examiner's Report, there are no independent directors serving on the boards of the two parent-Debtor entities (Extended Stay Inc. and Homestead Village L.C.C.).<sup>3</sup> The Debtors' boards of directors (collectively, the "Boards") are, in reality, dominated by David Lichtenstein ("Lichtenstein"),<sup>4</sup> who is a director on each of the Boards, and his appointments, the majority of whom are employees of Lichtenstein's company, The Lightstone Group, LLC ("The Lightstone Group"). The Committee believes that the Boards have direct conflicts of interest with the Debtors' estates and their creditors, which conflicts are evidenced in each of the plan proposals put forth by the Debtors. Those proposals involved a sales process that did not include a formal, transparent auction, but did include proposed payments to Lichtenstein amounting to tens of millions of dollars and full releases for no consideration of all of the estates' claims against insiders. In fact, the first version of the plan filed by the Debtors went so far as to include a backstop by the reorganized debtors of Lichtenstein's \$100 million "bad boy" personal guarantee.

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<sup>3</sup> Report of Ralph R. Mabey, As Examiner, dated March 12, 2010 (the "Examiner's Report") at Exh. III-E-2.

<sup>4</sup> Lichtenstein is the Debtors' CEO, President and Chairman. Examiner's Report at Exh. III-E-2.

The Committee submits that these serious conflicts of interest, which have repeatedly manifested themselves in plan proposals submitted by the Debtors, will continue to exist unless an independent fiduciary is appointed by this Court to oversee the Debtors' actions with respect to the formulation of bidding procedures, the conduct of the auction and the negotiation of a plan of reorganization with potential sponsors, the Committee, the Mortgage Debt Parties and other interested parties. By this Reply, therefore, the Committee proposes to modify the relief sought in its Cross-Motion by requesting that, instead of the Committee, the Court expand the powers of the existing Examiner to fulfill the important and necessary role as acting as an independent fiduciary to oversee the sales process.

**INHERENT CONFLICTS OF INTEREST EXIST IN THE  
OWNERSHIP AND CONTROL STRUCTURE OF THE DEBTORS THAT  
HAVE RESULTED IN A SEVERELY-FLAWED MARKETING & SALES PROCESS**

1. When the Committee filed its Cross-Motion on March 11, 2010, the Committee was convinced that the Debtors' actions in these chapter 11 cases required that an independent fiduciary take over the marketing of the Debtors' assets and conduct a transparent and unbiased auction process for the sale of the Debtors' business. At the time, the Debtors had filed a motion (the "CB/P Motion") seeking the Court's authorization to enter into a certain investment and standby purchase agreement (the "CB/P ISPA") and related plan of reorganization with Centerbridge Partners, L.P. ("Centerbridge") and Paulson & Co. Inc. ("Paulson" and together with Centerbridge, "CB/P Investors") that, among other things:

- resulted from negotiations that had excluded the Committee and the Special Servicer (*i.e.*, the fiduciaries that together represent over \$7.4 billion in claims in the Debtors' cases (approximately 99.99% of the total amount of all claims));<sup>5</sup>
- was opposed by the Committee and the Special Servicer;<sup>6</sup>
- proposed an approach to the sale of the Debtors' business that did not include bidding procedures or a potential auction in contravention of long-standing rules, customs and practices in this District;<sup>7</sup>
- would provide the CB/P Investors with an unjustified windfall in the form of a \$22.5 million break-up fee and millions of dollars in expense reimbursements;<sup>8</sup>
- failed to disclose many key components of the transaction, including the sale of millions of dollars in intellectual property and the details of new employment agreements and an incentive plan that would likely cover members of the Debtors' current management;<sup>9</sup> and
- proposed an unconfirmable plan that: (i) artificially depressed the Debtors' enterprise value; (ii) improperly favored the Debtors' insiders at the expense of the Debtors' creditors, including (x) releasing David Lichtenstein (the Debtors' president ("Lichtenstein")) from his obligations under a \$100 million "bad boy" guarantee, (y) paying Lichtenstein \$30 million related to the sale of HVM Manager, L.L.C. (the non-Debtor entity that ultimately controls the management of all of the Debtors' operations ("HVM Manager")) and (z) granting a Lichtenstein-owned, Debtor-affiliated entity millions of dollars in warrants in the new company; and (iii) would turn-over to the new entity that purchased the Debtors' business the right to pursue all of the Debtors' causes of action

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<sup>5</sup> Objection of the Official Committee of Unsecured Creditors to Debtors' Motion Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code Authorizing Debtors to Enter Into Investment and Standby Purchase Agreement [Docket No. 818] (the "Committee Objection") at 4; Examiner's Report at 255.

<sup>6</sup> Committee Objection at 4; ¶¶ 8(f), 23.

<sup>7</sup> Committee Objection at 4-5; ¶¶ 8(a); 11(e)-(f), (g)-(h), 35-58).

<sup>8</sup> Committee Objection at 4-5; ¶¶ 8(a); 11(e)-(f), (g)-(h), 35-58).

<sup>9</sup> Committee Objection at 4; ¶¶ 8(b)-(c), (k), (m); ¶ 11(a)-(d), (j)-(n).

(including causes of action arising under the Bankruptcy Code) and to keep the proceeds from such actions.<sup>10</sup>

2. The events that have transpired in the Debtors' cases since the Committee filed the Cross-Motion seven weeks ago, however, while a definite improvement, continue to demonstrate the need for an independent fiduciary to oversee the bidding and auction processes. Consequently, the Committee respectfully requests that the Court expand the Examiner's powers to oversee the sales process run by the Debtors' professionals. In connection with the Committee's separate objection that will be filed in opposition to the Debtors' Bid Procedures Motion, the Committee will be filing proposed bidding procedures that reflect a transparent and effective bidding process overseen by the Examiner.<sup>11</sup>

3. Despite the fact that the Debtors have rushed headlong into a severely flawed marketing and sales process to sell the largest extended stay hotel business in the world, a number of positive developments have occurred during the past few weeks. Due to the actions of the Committee, the Special Servicer and other key economic stakeholders, the Court granted the Committee's emergency letter motion to adjourn the hearing, originally scheduled for March 16, to consider whether to approve the CB/P Motion. By halting in its tracks the Debtors' misguided and unorthodox approach to selling their multi-billion dollar business, the Court set into motion a process that began to redirect the Debtors towards adopting a proper marketing and sales process.

4. In fact, the Court's decision to adjourn the March 16th hearing bore fruit in the form of an alternate transaction worth hundreds of millions of dollars more than the transaction

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<sup>10</sup> Committee Objection at 5; ¶ 8(d), (e), (g)-(j), (l), (n).

<sup>11</sup> Although the Committee has raised with the Examiner the Committee's proposal that the Examiner supervise the Debtors during the sale process, the Examiner has indicated that he has taken no position on the Committee's proposal and serves at the discretion of the Court.

proposed by the CB/P Investors. As a result of the Court's action, the Debtors had no choice but to terminate the CB/P ISPA and pursue a different transaction (the "Starwood ISPA") with a long-time suitor known as Starwood ESH, L.L.C. and certain of its indirect members (collectively, the "Starwood Investor"). On its face, the new proposed transaction with the Starwood Investor was worth at least \$200 million more than the transaction the Debtors originally proposed to enter into with the CB/P Investors.

5. On March 17, 2010, the Debtors filed a motion seeking authorization to enter into the Starwood ISPA (the "Starwood Motion").<sup>12</sup> However, the proposed transaction with the Starwood Investor did not address the fundamental flaw in the Debtors' approach to selling their business. Stated simply, both the process that led to the Starwood ISPA (and a related amended plan of reorganization) as well as the documents themselves continued to reflect many of the same serious flaws that existed with respect to the prior CB/P ISPA, including:

- the Debtors totally excluded the Committee and the Special Servicer from any negotiations over the proposed transaction with the Starwood Investor;
- the proposed transaction was opposed by the Committee and the Special Servicer;
- the Starwood ISPA and related amended plan of reorganization failed to include an auction process to maximize value for creditors;
- the Debtors agreed to pay the Starwood Investor a \$19.5 million "commitment fee" (a break-up fee) and up to \$10 million (or more) in expense reimbursements;
- the Debtors failed to disclose many of the components of the transaction;
- the Debtors proposed an amended plan of reorganization that was unconfirmable for many of the same reasons as reflected in the prior version, including the granting of full releases to insiders; and

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<sup>12</sup> The Debtors scheduled the hearing on the Starwood Motion for April 8, 2010.

- the Debtors agreed to a \$40 million payment to Lichtenstein from the sale of HVM Manager (an amount that was \$10 million higher than under the prior CB/P ISPA).

6. The Debtors' continued refusal to agree to a transparent and definitive auction process was of particular concern to the Committee. By disregarding the cumulative wisdom embodied in rules in this District governing asset sales that have stood the test of time for decades, whereby a debtor thoroughly markets its business in consultation with its major stakeholders, chooses a stalking-horse, proposes transparent and rational bidding procedures to encourage qualified bidders and holds an auction if there are qualified bidders, the Committee believed that the Debtors' faulty sale process would continue to have the effect of artificially depressing the Debtors' enterprise value while continuing to maintain the many insider benefits being sought at the expense of creditors. Accordingly, the Committee informed the Debtors that it had prepared, and was ready to file, a substantial objection to the Starwood Motion that would include, as an exhibit, proposed bidding procedures and a timeline for an auction.

7. On or around the beginning of April, the CB/P Investors reappeared and proposed a higher-and-better stalking-horse bid based upon the Starwood ISPA. Among other things, the CB/P Investors initially agreed to forego any of the bid protections requested by the Starwood Investor, including the \$19.5 million break-up fee and the \$10 million in expense reimbursements proposed in the Starwood ISPA.<sup>13</sup> Importantly, the CB/P Investors conceptually supported the Committee's view that there should be an organized process, including an auction, for the sale of the Debtors' business. In response to the new offer from the CB/P Investors and

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<sup>13</sup> As explained below, however, the proposed bidding procedures actually filed by the Debtors on April 15, 2010 reflect the latest in many setbacks because such bidding procedures now propose enormous potential break-up fees (labeled "liquidated damages") and expense reimbursements. Pursuant to the proposed bidding procedures, the CB/P Investors (or another successful bidder) would be entitled, under certain circumstances, to receive combined break-up fees and reimbursement of expenses totaling \$370 million.

repeated requests by the Committee and other interested parties, the Debtors withdrew the Starwood Motion and entered into a new commitment letter with the CB/P Investors.

8. On April 15, 2010, the Debtors filed their expedited Bid Procedures. Although the proposed bidding procedures attached to the Bid Procedures Motion incorporate numerous provisions originally proposed by the Committee, the bidding procedures continue to reflect a seriously-flawed sale process because the Debtors remain in control of it without an independent fiduciary with real powers to police the process.

9. As described in further detail in the Examiner's Report filed with the Court on March 12, 2010 and in various pleadings filed by the Committee,<sup>14</sup> the Committee believes that deep conflicts of interest exist among: (i) the Debtors (entities that are owned in whole or in significant part by affiliates of The Lightstone Group and managed by HVM L.L.C. ("HVM")); (ii) HVM (an entity that is owned by individuals who also serve as the Debtors' officers and is controlled by HVM Manager Manager L.L.C. ("HVM Manager") (an entity owned by Lichtenstein); (iii) Lichtenstein (the Debtors' president and the owner of The Lightstone Group and certain of its affiliates); and (iv) The Lightstone Group and its affiliates (entities that have financial interests in, and obtained control of, both the Debtors and HVM during 2007).

10. With respect to the Debtors' intent to sell its business through a plan of reorganization, such conflicts of interest have manifested themselves in: (i) a non-transparent sales process that continues to exclude the Debtors' major stakeholders from important negotiations over the material terms of proposed bids and the terms of a plan of reorganization;

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<sup>14</sup> See, e.g., Objection of the Official Committee of Unsecured Creditors to Debtors' Motion for Order Authorizing Use of Cash Collateral for Payments Regarding HVM LLC Incentive Program [Doc No. 530] ("KEIP Objection"). To the extent relevant, the Committee incorporates herein by reference paragraphs 1-21 of the KEIP Objection that sets forth facts concerning the interlocking relationship among these parties.

(ii) proposed bidding procedures filed by the Debtors that will chill the bidding; and (iii) a plan of reorganization under the appearance of being supported by a third-party, plan sponsor that will favor insiders -- particularly Lichtenstein -- at the expense of the Debtors' creditors.

11. The Committee's deeply held concerns about the problems inherent in the Debtors' sale process appear to be shared by the Successor Trustee. Similar to the Committee, the Debtors have for months excluded the Successor Trustee from any meaningful negotiations concerning the original or revised CB/P proposals, the Starwood proposal, as well as the related documents and plans of reorganization. In the Successor Trustee Objection, the Successor Trustee states that it shares the Committee's frustration with the lack of transparency and inclusiveness in the process that the Debtors and their financial advisor have been following with respect to seeking an investor (or investors) to infuse cash into the Debtors. Successor Trustee Objection, ¶ 5. The Successor Trustee also indicates that the Debtors have been generally ignoring and excluding the Committee and the Successor Trustee from any negotiations with the CB/P Investors or the Starwood Investor. *Id.*

12. It is black letter law that debtors must act in a manner that maximizes the value of their estates for all parties-in-interest. *In re Northwest Airlines Corp.*, 349 B.R. 338, 369 (S.D.N.Y. 2006), *aff'd*, 483 F.3d 160 (2d Cir. 2007) (noting that debtor-in-possession is a fiduciary obligated to maximize the value of the estate and treat all parties of the case fairly); *In re Penick Pharm., Inc.*, 227 B.R. 229, 232 (Bankr. S.D.N.Y. 1998) (stating that there is a duty to maximize value of the estate). Here, the Debtors are not acting in a way that will maximize the value of their estates and distributions to their creditors.

13. Not surprisingly, the Debtors' proposed bidding procedures reflect unreasonable provisions that will severely chill the bidding. Despite the Debtors' pronouncement a few weeks

ago that the new proposal by the CB/P Investors was better than the then Starwood proposal because the CB/P Investors were willing to go forward without requiring a break-up fee or reimbursement of expenses, the bidding procedures actually filed by the Debtors provide otherwise. Importantly, the bidding procedures now include a new “liquidated damages” provision that will reward, under certain circumstances, the successful bidder at the auction with a fee “in an amount equal to 10% of the total enterprise value” set forth in the successful bid and reimbursement of up to \$10 million.<sup>15</sup>

14. Even based upon the Debtors’ own low-ball estimate of the company’s enterprise value (estimated between \$2.8 to \$3.6 billion)<sup>16</sup>, such “liquidated damages” provision could provide a windfall to the CB/P Investors in an amount of up to \$370 million (= (\$3.6 billion x 10%) + \$10 million). The Committee submits that such provision is truly extraordinary and has no economic justification, other than to lock-in the transaction proposed by the CB/P Investors in advance of the auction, and therefore, result in either no auction or a highly-stylized Kabuki-like auction without any real substance in which the CB/P investors are “declared” the successful bidder by the Debtors.

15. Despite the fact that the current proposed plan proposes essentially to wipe out the general unsecured creditors, the proposed bidding procedures require the Debtors to consider potential recoveries to their prepetition “shareholders” in evaluating whether a proposal qualifies as a qualified proposal entitling an interested party to participate in the auction.<sup>17</sup> The Committee submits that this provision would be unheard of in a typical sale of assets under

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<sup>15</sup> Bid Procedures Motion, Exhibit B, pp. 6, 13.

<sup>16</sup> The Committee has conducted its own valuation of the Debtors’ business and believes that its value is substantially greater than the Debtors’ internally-depressed estimate. Indeed, even the existing stalking-horse offer values the Debtors’ business substantially higher than the Debtors’ own depressed estimate.

<sup>17</sup> Bid Procedures Motion, Exhibit B, pp. 8.

section 363 of the Bankruptcy Code, but exists merely to grant unjustified review powers to Lichtenstein and various entities of The Lightstone Group controlled by Lichtenstein who are the primary shareholders of the Debtors. Other provisions also permit the CB/P Investors an enormous unfair advantage over other interested investors by requiring the Debtors to provide the CB/P Investors with proposals submitted by other interested investors and permitting the CB/P Investors to review such proposals.

16. An official committee of creditors plays a pivotal role in the bankruptcy process. *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 717, 722 (Bankr. S.D.N.Y.), *aff'd*, 140 B.R. 347 (S.D.N.Y. 1992); *Retail Mktg. Co. v. Northwest Nat'l Bank (In re Mako, Inc.)*, 120 B.R. 203, 212 (Bankr. E.D. Okla. 1990). Pursuant to section 1103 of the Bankruptcy Code, one of the Committee's key roles in the Debtors' cases is to participate in the formulation of a plan. Despite repeated requests by the Committee, the Debtors continue to attempt to marginalize the Committee and their professionals. Not once did the Debtors negotiate with the Committee regarding the terms of the CB/P ISPA, the Starwood ISPA, or multiple iterations of the proposed plans and disclosure statements filed by the Debtors, despite the fact that the Debtors having been negotiating such documents for the past five months. Upon information and belief, the Debtors have treated the Special Servicer with the same disregard in this process. As such, the Committee submits that Debtors are intentionally acting in a way that is severely hampering the Committee from fulfilling its fiduciary obligations under section 1103 of the Bankruptcy Code to work with the Debtors to formulate a plan. Accordingly, the Committee submits that the Court should not countenance the Debtors' actions and should grant the Cross-Motion as revised herein.

**EXPANSION OF THE EXAMINER'S POWERS TO OVERSEE MARKETING AND SALE PROCESS AND NEGOTIATIONS CONCERNING THE PLAN OF REORGANIZATION**

17. Due to the conflicts of interests permeating the Debtors' ownership and management structure and the lack of transparency in this sale process, the Committee submits that the Court should expand the powers of the Examiner to oversee the process of soliciting bids and the proposed auction. Courts have expanded the power of an examiner to include the solicitation of bids for the sale of a debtor's assets. For example, in *In re Patton's Busy Bee Disposal Serv., Inc.*, 182 B.R. 681, 684 (Bankr. W.D.N.Y. 1995), the court initially appointed an examiner to "investigate the acts, conduct, assets, liabilities and financial condition of the debtor, the operation of the debtor's waste hauling business and the desirability of the continuance or sale of such business, and any other matter relevant to the case or to the consummation of a sale." Thereafter, upon the motion of the Office of the United State Trustee, the court authorized an expansion of the examiner's power to enable him to solicit bids for the sale of the debtor's assets. *Id.* Pursuant to the examiner's recommendations, the estate ultimately sold all of its operating assets.<sup>18</sup> *Id.*

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<sup>18</sup> Subsequently, upon the examiner's motion, the *Busy Bee* court authorized the examiner to initiate adversary proceedings to enforce certain avoidance powers, including the power to "initiate adversary or other proceedings to enforce such powers either in his own name or on behalf of the Bankruptcy Estate or in the name of the debtor, in Order to recover property of the Bankruptcy Estate." *Id.* Upon a motion to dismiss, the court affirmed its prior decision to expand the examiner's power explaining that, "the pleadings clearly indicate the concern that the debtor-in-possession might not commence this litigation, particularly insofar as it sought recovery from insiders." *Id.* at 686.

Other courts agree with the *Busy Bee* approach and likewise have expanded the power of examiners to pursue actions on behalf of the debtor-in-possession. See, e.g., *Williamson v. Roppollo*, 114 B.R. 127, 129 (W.D. La. 1990) (indicating that power to sue to recover preferences or fraudulent conveyances may properly be given to an examiner); *In re Carnegie Int'l Corp.*, 51 B.R. 252, 254 (Bankr. S.D. Ind. 1984) (extending power of examiner to institute litigation in order to collect and reduce to money property of debtor's estate in form of causes of action which estate holds against third parties); *Liberal Mkt., Inc. v. Malone & Hyde, Inc.*, 14 B.R. 685, 690 (Bankr. S.D. Ohio 1981) (affirming appointment of examiner to assume authority formerly vested in debtor-in-possession to supervise and control operations of business, upon approval of the creditors' committee, and designating responsibility to both examiner and committee to pursue corporate rights and remedies).

18. Additionally, courts have expanded the powers of examiners to include mediating negotiations between parties regarding a consensual plan. *See, e.g., In re Big Rivers Elec. Corp.*, 355 F.3d 415, 425-26 (6th Cir. 2004) (noting the appointment of the examiner played a significant role in the negotiations leading to a consensual reorganization plan which added considerable value to the estate); *In re Mirant Corp.*, 314 B.R. 555, 562 (Bankr. N.D. Tex. 2004) (appointing an examiner to monitor negotiations among parties regarding a plan of reorganization and upon request of a fiduciary, participate in the role of mediator); *In re Public Serv. Co. of New Hampshire*, 99 B.R. 177, 182-184 (Bankr. D. N.H. 1989) (court appoints an examiner *sua sponte* to mediate effort of a consensual plan and providing court with a report at the end of 60-day negotiation period); *In re UNR Indus., Inc.*, 72 B.R. 789, 795-96 (Bankr. N.D. Ill. 1987) (appointing an examiner to determine whether negotiations toward a consensual plan of reorganization were at an impasse and to act as a mediator to facilitate resolution of substantive differences); *see also In re Med. Software Solutions*, 286 B.R. 431, 437 (Bankr. D. Utah 2002) (directing the examiner to investigate any offer to buy debtor's assets and specifically, to investigate the propriety of any sale to secured lender).

19. As shown by these decisions, ample authority exists to expand the powers of the Examiner for the narrow and limited purpose of overseeing the sale of the Debtors' business and the negotiation of a plan of reorganization. The Committee envisions that the Examiner would undertake an expanded role in which the Examiner, in consultation with the Debtors, the Committee and the Mortgage Debt Parties, designs fair and transparent bidding procedures that will maximize the value from the sale of the Debtors' assets and negotiate the terms of a plan of reorganization. Due to the Examiner's thorough investigation of the Debtors' business, the Examiner is already familiar with the Debtors and other major stakeholders in the Debtors'

cases. Thus, the Examiner will require little or no time to get up to speed and deal effectively with the many complex issues that are involved in the bidding procedures, the auction and negotiating the terms of a plan. In short, the Examiner is the ideal fiduciary to oversee the Debtors in this role, and the Committee's proposal represents a narrowly tailored solution to the conflict problem which should disrupt as little as possible the proposed sale process.

20. Other than the Committee, the Examiner represents the only other truly independent fiduciary in the Debtors' cases and the Committee has full confidence that the Examiner will seek to balance the rights and obligations of all of the major parties in a manner that brings value to the process free of the inherent conflicts of interests exhibited to date by the Debtors.

### **CONCLUSION**

**WHEREFORE**, the Committee respectfully that the Court overrule the Objections and enter an order granting the Committee's Cross-Motion, as narrowed and modified by this Reply, and grant such other relief as is just, proper and equitable.

Dated: New York, New York  
April 20, 2010

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