

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

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In re : Chapter 11
  
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AFA INVESTMENT INC., *et al.*,<sup>1</sup> : Case No. 12-11127 (MFW)
  
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Debtors. : Jointly Administered
  
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: Requested Hearing Date: June 25, 2013
  
: Requested Objection Deadline: 12:00 p.m. (ET), one business day
  
-----X prior to the hearing

**AMENDED JOINT MOTION OF: (A) DEBTORS; (B) OFFICIAL COMMITTEE OF UNSECURED CREDITORS; (C) TERM B LOAN LENDERS; (D) SECOND LIEN AGENT; (E) BEEF PRODUCTS INC.; (F) AMERICAN CAPITAL, LTD.; (G) THE OTHER PREPETITION SECOND LIEN LENDERS; AND (H) NADIA SANCHEZ, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 9019 FOR AN ORDER APPROVING REVISED GLOBAL SETTLEMENT**

The Debtors,<sup>2</sup> the Committee, the Term B Loan Lenders, the Second Lien Agent, BPI, ACAS, the other Second Lien Lenders<sup>3</sup> and the WARN Claimants (as defined below) (collectively, the "Settlement Parties") hereby submit this motion (the "Amended Motion"), pursuant to section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, for entry of an order approving a revised global settlement (the "Revised Settlement") resolving substantially all

<sup>1</sup> The Debtors are the following nine entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): AFA Investment Inc. (0331); American Foodservice Corporation (1780); American Fresh Foods, Inc. (7389); American Fresh Foods, L.P. (7302); AFA Foods, Inc. (0429); American Fresh Foods, LLC (7301); Fairbank Reconstruction Corporation (2405); American Foodservice Investment Company, LLC (9525); and United Food Group LLC (7584). Each of the Debtors was formerly located at 860 First Avenue, Suite 9A, King of Prussia, Pennsylvania 19406.

<sup>2</sup> Except where otherwise stated, capitalized terms not defined herein have the meanings given to them in the Joint Motion of (a) Debtors, (b) Official Committee of Unsecured Creditors, (c) Term B Loan Lenders, (d) Second Lien Agent, (E) Beef Products Inc. and (F) Certain Prepetition Second Lien Lenders Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019 for an Order Authorizing Global Settlement (Docket No. 660) (the "Prior Motion"). For convenience, a copy of the Prior Motion is attached hereto as Exhibit A.

<sup>3</sup> The other Second Lien Lenders that are Settlement Parties moving for relief in this Amended Motion are the SPV and its members: YCIF II, YCIF II Parallel and NBPCo.



of the key disputes among the Settlement Parties, addressing the concerns expressed by the Court with respect to the settlement proposed in the Prior Motion (the "Original Settlement") and providing the foundation for the successful conclusion of these chapter 11 cases. In support of this Amended Motion, the Settlement Parties incorporate the term sheet containing the terms and conditions of the Revised Settlement, a copy of which attached hereto as Exhibit B (the "Revised Term Sheet"), and respectfully represent as follows:

### **BACKGROUND**

1. On September 18, 2012, the Debtors, the Committee, the Term B Loan Lenders, the Second Lien Agent, the SPV, YCIF II, YCIF II Parallel, NBPCo and BPI (collectively, the "Original Settlement Parties") filed the Prior Motion.<sup>4</sup> By the Prior Motion, the Original Settlement Parties sought an order of the Court authorizing the Debtors to enter into the Original Settlement.

2. On September 19, 2012, the Court entered an interim order (Docket No. 662) (the "Interim Cash Collateral Order") (a) authorizing the Debtors' consensual use of the cash collateral of the Second Lien Agent and Second Lien Lenders (together with the Second Lien Agent, the "Second Lien Secured Parties") pending the anticipated approval of the Original Settlement and (b) providing adequate protection to the Second Lien Secured Parties. Since that date, the Debtors have continued to use cash collateral under the Interim Cash Collateral Order with the consent of the Second Lien Secured Parties. It was anticipated by the Debtors that a final cash collateral order would be considered and approved upon the approval of the Original

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<sup>4</sup> Further details regarding, among other things, the Debtors' businesses and capital structure, the events leading up to these chapter 11 cases and significant events during these cases are set forth in the Prior Motion.

Settlement. See Interim Cash Collateral Order at ¶ 38 (setting final hearing on the same date as the hearing on the Original Settlement).

3. Certain parties filed objections to the Prior Motion including: Nadia Sanchez (the "WARN Class Representative"), on behalf of herself and all others similarly situated (collectively with the WARN Class Representative, the "WARN Claimants");<sup>5</sup> ACAS; and GOPAC and its insurers. See Docket Nos. 679, 681 and 687, respectively.

4. At a hearing on October 11, 2012, the Court expressed concern with several aspects of the Original Settlement, as proposed, and declined to approve the Prior Motion.<sup>6</sup> Notably, the Court indicated that the waiver of all avoidance actions under section 547 of the Bankruptcy Code (collectively, the "Preference Claims") and the proposed nonconsensual treatment of the claims of ACAS under the Original Settlement could not be approved absent the disclosures, voting and other protections of a chapter 11 plan. See Tr. of October 11, 2012 H'rg at 136:8-138:3. In light of the denial of the Prior Motion, the final hearing on the use of cash collateral was adjourned indefinitely, and the term of the Interim Cash Collateral Order has been extended. See Docket Nos. 734, 752, 766, 772, 781, 810, 825, 842, 854, 869, 903, 922, 949, 983, 1004, 1016, 1025, 1032 & 1044 (notices of extensions of deadlines under Interim Cash Collateral Order).

5. Since the October 11 hearing, the Original Settlement Parties have engaged in extensive negotiations with ACAS and the WARN Claimants in an effort to reach agreement on revisions to the terms of the Original Settlement that address the Court's concerns

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<sup>5</sup> On May 10, 2012, the WARN Claimants filed a complaint in this Court, alleging (among other things) certain violations of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, et seq., and similar state law, thereby commencing adversary proceeding number 12-50710 (the "WARN Action").

<sup>6</sup> On October 18, 2012, the Court entered an order formally denying the Prior Motion on the grounds stated at the hearing (Docket No. 728).

and that are acceptable to all of the Settlement Parties. After several weeks of active, arms' length bargaining, these negotiations ultimately yielded an agreement in principle, which was announced on the record at a hearing before the Court on December 17, 2012. The intent of the Settlement Parties was to pursue a prompt completion of settlement documents to permit the Revised Settlement to be approved at the end of 2012 or the start of 2013. Unfortunately, further discussions revealed additional complexities and issues that required resolution to allow the Revised Settlement to be finalized.

6. The Settlement Parties have worked in good faith over the subsequent months to resolve these various issues. This work has yielded the Revised Settlement, as reflected in the Revised Term Sheet. The Revised Term Sheet has not yet been executed by all of the Settlement Parties; however, the Debtors believe that the Revised Term Sheet is substantially in final form.<sup>7</sup>

7. Although the Revised Settlement broadly retains much of the economic structure of the Original Settlement, it omits elements that the Court determined are appropriately reserved for a chapter 11 plan or otherwise are improper. In particular, the Revised Settlement contains no waiver of Preference Claims. Rather, the Preference Claims and other claims under sections 542, 543, 544, 545, 548, 550, 551 and 553 of the Bankruptcy Code (together with the Preference Claims, the "Avoidance Actions") now will be managed by a committee representing the interests of the WARN Claimants, Yucaipa and the Committee (the "Avoidance Action Committee"), with the net proceeds of the Avoidance Actions being distributed, first, in a certain amount to the WARN Claimants; second, in a certain amount to the

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For example, BPI and NBPCo have indicated that they will not be in a position to sign the Revised Term Sheet unless BPI reaches a separate resolution of issues with the entity that insured certain of its claims against the Debtors or, alternatively, certain modifications are made to the Revised Term Sheet.

Second Lien Agent (for distribution to Yucaipa and BPI); and third, to the Debtors' estates, as more fully described below and in the Revised Term Sheet. The Revised Settlement also resolves the disputed claims of ACAS and incorporates a settlement of the claims asserted (or that could have been asserted) by the WARN Claimants in the WARN Action. The settlement of the WARN Claimants' claims is contained in a separate settlement stipulation among the WARN Class Representative, Yucaipa and Debtors AFA Foods, Inc. and AFA Investment Inc. (the "WARN Settlement"). A copy of the WARN Settlement is attached hereto as Exhibit C. By this Motion, the Debtors seek authority to enter into the WARN Settlement as part of the overall Revised Settlement, subject to the WARN Settlement being approved in the WARN Action as a class action settlement under Rule 23(e) of the Federal Rules of Civil Procedure (the "Civil Rules"), as made applicable in the WARN Action by Bankruptcy Rule 7023.

A motion to approve the WARN Settlement as a class action settlement (the "WARN Settlement Motion") is being prepared by counsel to the WARN Claimants, and the Settlement Parties anticipate that it will be filed shortly following the filing of this Amended Motion.

8. By resolving issues with ACAS, the Revised Settlement provides a complete settlement with all of the Second Lien Lenders and eliminates any arguments of disparate treatment among that group. Moreover, through the resolution of issues with ACAS and the WARN Claimants that objected to the Original Settlement, the Revised Settlement offers enhanced recoveries to the Debtors' creditors and a means of bringing closure to these cases.

#### **THE REVISED SETTLEMENT**

9. The Settlement Parties are the Debtors, the Committee, the Term B Loan Lenders, the Second Lien Agent, the SPV, YCIF II, YCIF II Parallel, NBPCo, BPI, ACAS and the WARN Claimants. As such, all of the major constituents in these cases are parties to the Revised Settlement.

10. The Revised Settlement will be effective upon this Court's entry of a final, non-appealable order approving the relief requested in this Amended Motion (the "Settlement Effective Date") and the entry of a final, non-appealable judgment approving the related WARN Settlement. Given the nature of the WARN Action as a class action requiring additional notices to class members after a preliminary hearing, the Debtors anticipate that final approval of the WARN Settlement will take additional time after the approval of this Amended Motion.

11. The Revised Settlement contemplates, among other things, the entry of a final order authorizing the Debtors' use of cash collateral at the consent of the Second Lien Agent (the "Final Cash Collateral Order" and, together with the Interim Cash Collateral Order, the "Cash Collateral Orders") in accordance with the terms of a budget (the "Budget") to be approved by the Second Lien Agent in its sole discretion, subject to the terms of the Revised Term Sheet (which contemplates Committee and Debtor approval of certain reserves in the Budget for the wind down of these cases). The Debtors anticipate that a final cash collateral order will be submitted for consideration at the time of final approval of the WARN Settlement. Until that time, the First Lien Agent has agreed to the extension of the Interim Cash Collateral Order.

12. As set forth in the Revised Term Sheet, the primary terms of the Revised Settlement are as follows:<sup>8</sup>

- (a) Liens and Claims of the First Lien Agent. On the Settlement Effective Date, the Settlement Parties stipulate as set forth in the

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<sup>8</sup> The following summary of the primary terms of the Revised Settlement is provided for the benefit of the Court and other parties in interest. Nothing herein is intended to modify the Revised Term Sheet or any other settlement document. To the extent that the terms and conditions summarized herein are inconsistent with the Revised Term Sheet or any other settlement document, the Revised Term Sheet or such other settlement document shall govern. Capitalized terms in this summary and not otherwise defined in this Amended Motion shall have the meanings given to them in the Revised Term Sheet.

Prior Motion with respect to the validity of the liens and claims of the First Lien Agent.

- (b) Liens and Claims of the Second Lien Agent. On the Settlement Effective Date, the Settlement Parties stipulate that: (i) the Second Lien Agent holds valid, perfected, enforceable and unavoidable second liens over all of the Assets; (ii) the Debtors are indebted to the Second Lien Agent without defense, counterclaim, offset or challenge of any kind in the aggregate principal amount of not less than \$71,595,210 on account of the Second Lien Obligations; (iii) the Second Lien Claim exceeds the value of the Assets and thereby applies to all Assets; (iv) the Second Lien Claim is deemed allowed for all purposes in an amount no less than \$71,595,210; and (v) the Second Lien Agent, on behalf of itself and for the benefit of the Second Lien Lenders, holds an allowed superpriority adequate protection claim in the amount of \$2,250,000 (the "Adequate Protection Claim"), which will be satisfied solely from the first \$2,250,000 in net recoveries on account of the Avoidance Actions, as more fully described below.
- (c) Liens and Claims of ACAS. On the Settlement Effective Date, the Settlement Parties stipulate that ACAS holds an allowed secured claim in the amount of \$3,100,000 against the Debtors' estates on account of its claims (Claim Nos. 606-615) (the "ACAS Claims"), which allowed claim is included in the \$71,595,210 in Second Lien Obligations. For the avoidance of doubt, pursuant to the Revised Settlement, the foregoing allowed secured claim of ACAS in the amount of \$3,100,000 will represent the sole recovery available to ACAS in these chapter 11 cases, and any and all other claims of ACAS in these cases, pursuant to the Revised Settlement, will be deemed waived and relinquished. The amount of \$3,100,000 will be payable to ACAS from the proceeds of the General Assets, according to the schedule set forth in the Revised Term Sheet.
- (d) The WARN Claimants. The effectiveness of the Revised Settlement is conditioned on, among other things, the entry of a final judgment in the WARN Action approving the WARN Settlement. The terms of the WARN Settlement are described in the WARN Settlement Motion, and a copy of the WARN Settlement is attached thereto. Consistent with the Revised Settlement and the Revised Term Sheet, the recovery for the members of the putative class in the WARN Action (collectively, the "WARN Claimants") will be funded solely by the first \$1,650,000 in net recoveries from the Avoidance Actions, as described below.

- (e) Recovery on the General Assets. After the Debtors have made any payments from the General Assets authorized by the Cash Collateral Orders and the Budget, the Debtors, the Committee and the Second Lien Agent will agree on the amount of a reasonable reserve, which in no event shall be of an amount that could impair the ability of the Debtors' estates to pay all amounts payable to ACAS as and when provided for in the Revised Term Sheet and on the terms set forth in the Third Amendment (defined below), for amounts in the Budget for the period after the Settlement Effective Date. The remaining General Assets will be distributed as follows, according to the schedules set forth in the Revised Term Sheet: (a) the first \$3,100,000 to ACAS and as otherwise set forth in the Revised Term Sheet and the Third Amendment on account of the ACAS Claims; (b) the next \$14,000,000 to the SPV, 80% of which shall be paid to NBPCo (i.e., up to \$11,200,000) and 20% to the Creditor Recovery Pool; and (c) all remaining amounts to the SPV, 90% of which shall be paid to Yucaipa and 10% to the Creditor Recovery Pool.
- (f) Recovery on the Litigation Claims. Any and all recoveries received from the Litigation Claims will be divided as set forth in the Prior Motion among the Second Lien Lenders and the Creditor Recovery Pool. Specifically: (i) 50% will be gifted to the Creditor Recovery Pool, provided, however, that the first \$2,000,000 of such recoveries that would be paid to the Creditor Recovery Pool will be divided equally between NBPCo and the Creditor Recovery Pool until NBPCo receives \$1,000,000 (the "NBPCo Litigation Recovery"); and (ii) 50% will be paid to Yucaipa provided, however, that any recovery received by Yucaipa between \$2,000,000 and \$4,000,000 will be divided equally between Yucaipa and NBPCo until NBPCo receives \$1,000,000 (the "Additional NBPCo Litigation Recovery").

The funds necessary to pursue and monetize the Litigation Claims shall be funded as follows: (i) an initial fund of \$250,000 (the "Litigation Recovery Fund") shall be established from recoveries received from the General Assets by the SPV and the Creditor Recovery Pool, with the SPV contributing 80% (i.e., \$200,000) and the Creditor Recovery Pool contributing 20% (i.e., \$50,000); and (ii) if the Second Lien Agent, NBPCo and the entity responsible for administering the Creditor Recovery Pool determine that additional funds must be contributed to the Litigation Recovery Fund to monetize the Litigation Claims, the SPV will contribute 80% of such funds and the Creditor Recovery Pool will contribute 20%. The first dollars of any recovery received from the Litigation Claims shall be used to return the funds contributed to the Litigation Recovery Fund, with



the SPV receiving 80% of all such returned funds and the Creditor Recovery Pool receiving 20%.

- (g) Avoidance Action Procedures. On the Settlement Effective Date, the Avoidance Action Committee shall be appointed to manage the prosecution of the Avoidance Actions. Yucaipa, the WARN Class Representative and the Committee shall each appoint one member of the Avoidance Action Committee; provided, however, the member appointed by the Committee shall not have received a preferential transfer. All decisions of the Avoidance Action Committee shall be subject to a majority vote (unless specifically provided otherwise in the Revised Term Sheet), with each member of the Avoidance Action Committee having equal voting power. The Court shall retain jurisdiction to resolve any dispute among the members of the Avoidance Action Committee.

The Avoidance Actions shall be prosecuted on behalf of the Debtors' estates by lead counsel retained on a contingency fee basis (the "Lead Avoidance Action Counsel") and local Delaware counsel (the "Delaware Avoidance Action Counsel" and, together with the Lead Avoidance Action Counsel, the "Avoidance Action Counsel"). Selection of the Delaware Avoidance Action Counsel shall be subject to (i) majority approval by the Avoidance Action Committee and (ii) confirmation that the proposed Delaware Avoidance Action Counsel is free from conflict; provided, further, that Delaware Avoidance Action Counsel's fees shall not exceed \$250/hour for counsel and \$150/hour for paraprofessionals. All Avoidance Action Counsel shall be retained on application to and order of this Court, and shall be free of conflicts.

The Avoidance Action Counsel initially shall make demands and/or file complaints for the avoidance of transfers only under section 547 of the Bankruptcy Code (and related section 550 claims); *provided, however*, any complaints filed by the Avoidance Action Counsel shall be without prejudice to subsequent amendments to include other Avoidance Actions prior to the deadline for commencing such Avoidance Actions under section 546 of the Bankruptcy Code.

Avoidance Actions other than those under section 547 of the Bankruptcy Code (and related section 550 claims) will not be brought without majority approval of the Avoidance Action Committee and will not be brought prior to February 10, 2014, without unanimous approval of the Avoidance Action Committee.

Each member of the Avoidance Action Committee will have standing in this Court to object to any decision by the Avoidance Action Committee not to prosecute an Avoidance Action.

Each member of the Avoidance Action Committee may independently request any information from Avoidance Action Counsel and/or the Debtors' financial advisor, FTI Consulting, Inc. ("FTI"), with a copy of such request and response being provided to other members of the Avoidance Action Committee.

No complaints will be settled unless and until the defendant and/or FTI shares information related to all transfers received by the defendant in the 2 years prior to the Petition Date.

All settlements of Avoidance Actions are subject to (i) the majority approval of the Avoidance Action Committee and (ii) Court approval, and each member of the Avoidance Action Committee will have standing in this Court to object to any proposed settlement of an Avoidance Action.

The Debtors and the Second Lien Agent will work in good faith to reach agreement on a modification to FTI's engagement, and its compensation, to address the additional responsibilities relating to Avoidance Actions called for under the Revised Settlement. The revised terms of engagement for FTI, and related compensation, must be acceptable to FTI and approved on motion to and order of the Court. In the absence of any order approving a modification of FTI's engagement, FTI's role with respect to the Avoidance Actions shall be limited to facilitating the Avoidance Action Counsel's access to the Debtors' books and records.

- (h) Recovery on Avoidance Actions. Avoidance Action Counsel shall be compensated solely on a contingency basis and paid from the gross proceeds of the Avoidance Actions. After payment of the fees and expenses of the Avoidance Action Counsel, the first \$1,650,000 of net recoveries received from the Avoidance Actions (the "WARN Settlement Amount") shall be paid to fund the maximum settlement amount in the WARN Settlement. The WARN Settlement Amount shall be the only source of funding for the settlement in the WARN Action, and neither the Debtors nor any other Settlement Party, including, but not limited to the Sanchez Released Parties (as defined in the WARN Settlement), shall have any obligation to separately fund the settlement of the WARN Action.

The WARN Settlement Amount having been paid, or a determination having been made by the WARN Class

Representative that only a partial payment will be possible and thus the maximum settlement amount will be lowered, the member of the Avoidance Action Committee appointed by WARN Class Representative shall resign from the Avoidance Action Committee.

Any and all net recoveries received from the Avoidance Actions between \$1,650,001 and \$2,250,000 will be divided 50%-50% between Yucaipa and NBPCo. Such funds shall be paid to the Second Lien Agent for distribution to Yucaipa and NBPCo.

Any and all net recoveries received from the Avoidance Actions above \$2,250,000 will be paid to the Creditor Recovery Pool; provided, however, that following the payment in full of all claims asserted against the Debtors arising under section 503(b)(9) of the Bankruptcy Code [and any other priority claims],<sup>9</sup> any and all net recoveries received from the Avoidance Actions will be divided 50%-50% between Yucaipa and the Creditor Recovery Pool (the "Creditor Avoidance Action Recovery").

In the event of any conflict between the Revised Term Sheet and the WARN Settlement, the Revised Term Sheet shall control in all respects.

- (i) Creditor Recovery Pool. Consistent with the Prior Motion, except with respect to the funding of the Litigation Recovery Fund, the funds in the Creditor Recovery Pool shall be distributed among creditors of the Debtors' estates other than the Settlement Parties (collectively, the "Creditors") according to the priority scheme of the Bankruptcy Code. Other than the Creditor Avoidance Action Recovery, all funds in the Creditor Recovery Pool represent a gift from the SPV out of its collateral.

For the avoidance of doubt, Yucaipa, the Second Lien Agent, the SPV, BPI, NBPCo, ACAS, the WARN Class Representative, and any party asserting a claim against the Debtors under or related to the Federal Worker Adjustment and Retraining Notification Act or similar claims under state laws, including each of the WARN Claimants, will not receive any distribution from the Creditor Recovery Pool, except as provided for above with respect to the NBPCo Litigation Claim Recovery.

- (j) Certain Releases. The Revised Term Sheet provides for certain releases (all such releases collectively, the "Releases").

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<sup>9</sup> The Committee has indicated that it requires the phrase "and any other priority claims" be inserted at this point before it will execute the Revised Term Sheet.

In particular, on the Settlement Effective Date, the Debtors (on behalf of themselves and their estates and each of their affiliates and certain related entities), the Committee (on behalf of itself and its members and each of their affiliates and certain related entities) and all Creditors that accept a distribution from the Creditor Recovery Pool (collectively, the "Releasing Parties") will be deemed to release Yucaipa, ACAS, all ACAS Lenders, BPI, NBPCo, the SPV, the First Lien Agent, the Second Lien Agent and the Second Lien Lenders and each of their affiliates and related entities (collectively, the "Released Parties") from all claims (including Avoidance Action claims).

The Settlement Parties intend that this release be a mutual release. Accordingly, on the Settlement Effective Date, the Released Parties also shall release the Releasing Parties to the same extent that Releasing Parties released the Released Parties. For the avoidance of doubt, no Creditor or Committee member will be released from liability in connection with any Avoidance Action.

In addition, the Revised Term Sheet provides for certain Releases among BPI, NBPCo, ACAS, all ACAS Lenders, and Yucaipa from all claims.

- (k) Authority to Enter Into Third Amendment and Definitive Settlement Agreement. Simultaneously with execution of the Revised Term Sheet, the Debtors and the Second Lien Lenders will enter into the Third Amendment to Credit Agreement (the "Third Amendment") to amend the terms of the Second Lien Credit Agreement consistent with the terms of the Revised Settlement. A copy of the Third Amendment is attached hereto as Exhibit D.

The Settlement Parties expect that the Revised Term Sheet and the Third Amendment (along with the order approving this Amended Motion) will adequately document and govern the Revised Settlement. The Settlement Parties nevertheless request that, without further order of the Court, the Debtors be granted authority to enter into a definitive settlement agreement or other ancillary settlement document (each a "Settlement Document") — on terms consistent with those of this Amended Motion and the Revised Term Sheet — provided that any such Settlement Document is filed with the Court and served on the Bankruptcy Rule 2002 service list at least three business days prior to its execution by the Debtors. However, if no Settlement Document is entered into, the Revised Term Sheet and the Third Amendment shall nevertheless be binding upon and enforceable against the parties.

**RELIEF REQUESTED**

13. Pursuant to section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, the Settlement Parties hereby request approval of the Revised Settlement.

**ARGUMENT**

14. Settlements in bankruptcy are favored as a means of minimizing litigation, and expediting the administration of the bankruptcy estate. Myers v. Martin (In re Martin), 91 F.3d 389, 393 (3d Cir. 1996) (citing COLLIER ON BANKRUPTCY ¶ 9019.03[1] (15th ed. 1993)); In re TSIC, Inc., 393 B.R. 71, 78 (Bankr. D. Del. 2008).

15. Section 105(a) of the Bankruptcy Code provides in relevant part that the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a). Bankruptcy Rule 9019 governs the procedural prerequisites to approval of a settlement, providing that:

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019(a).

16. Courts in the Third Circuit examine four factors in determining whether to approve a proposed settlement: "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors." Martin, 91 F.3d at 393 (citing Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968)); In re World Health Alternatives, Inc., 344 B.R. 291, 296 (Bankr. D. Del. 2006); TSIC, 393 B.R. at 78.

17. When applying these criteria to a particular motion, "the court is not supposed to have a 'mini-trial' on the merits, but should canvass the issues to see whether the settlement falls below the lowest point in the range of reasonableness." Aetna Casualty & Surety Co. v. Jasmine, Ltd (In re Jasmine, Ltd), 258 B.R. 119, 123 (D.N.J. 2000) (internal quotations omitted); see also TSIC, 393 B.R. at 79; World Health, 344 B.R. at 296. Although approval of a compromise is within the "sound discretion" of the bankruptcy court (World Health, 344 B.R. at 296), the court should not substitute its judgment for that of a trustee or debtor in possession. In re Parkview Hosp.-Osteopathic Med. Ctr., 211 B.R. 603, 610 (Bankr. N.D. Ohio 1996). The ultimate inquiry is whether the compromise is "fair, reasonable, and in the interests of the estate." TSIC, 393 B.R. at 78. A court need not be convinced that a proposed settlement is the best possible settlement, but "must conclude that it is within the reasonable range of litigation possibilities." World Health, 344 B.R. at 296 (internal citations omitted).

18. The Revised Settlement is fair, reasonable and in the best interests of the Debtors' estates. It is the product of extensive, active, good-faith discussions and arms' length bargaining among the Settlement Parties over many months. Just as with respect to the Original Settlement, the Second Lien Lenders have agreed to give up a portion of their available lien proceeds for distribution to creditors and other permitted purposes consistent with the provisions of the Bankruptcy Code.<sup>10</sup> In return, the Committee has agreed to resolve its objections

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<sup>10</sup> As agreed to by the Settlement Parties, the terms of the Revised Settlement require several "gifts" from the Second Lien Lenders to the WARN Claimants and the Debtors' unsecured priority and nonpriority creditors. Courts in the Third Circuit have held that settlements that include a "gifting" provision are appropriate and, without more, do not constitute violations of the absolute priority rule. TSIC, 393 B.R. at 75-77; World Health, 344 B.R. at 303-04. Notably, the "gifting" provisions of the Revised Settlement do not involve any skipping of administrative or priority claims and follow the priority scheme of the Bankruptcy Code.

concerning the liens of the settling Second Lien Lenders and its potential claims against certain Settlement Parties.

19. The Revised Settlement resolves additional issues not addressed in the Original Settlement, and enhances the value potentially available to unsecured creditors. Under the terms of the Revised Settlement, the claims of ACAS and the WARN Claimants have been reduced, liquidated and allowed by agreement among the Settlement Parties. In doing so, the Debtors believe that additional value will be available in the Debtors' estates for the benefit of creditors. For example, WARN Claimants have agreed to reduce their asserted claim and limit recoveries to a portion of the recoveries on Avoidance Actions that otherwise would be paid to the Second Lien Agent on account of its Adequate Protection Claim. In addition, litigation of contested issues in the WARN Action – and the related costs and delays attendant thereto – are avoided. Likewise, by reducing the ACAS Claims from the asserted secured amount of at least \$6.1 million to the allowed amount of \$3.1 million, additional value is freed for distribution to other stakeholders without further litigation of disputed issues with ACAS.

20. As noted, the Revised Settlement also seeks to resolve the concerns stated by the Court on the record of the hearing on October 11, 2012 with respect to the Original Settlement. In particular, (a) Preference Claims no longer will be waived and instead will be pursued by the Avoidance Action Committee, potentially along with other Avoidance Actions, consistent with the terms of the Revised Term Sheet; (b) all Second Lien Lenders have agreed to the terms of the Revised Settlement, ensuring no disparate treatment among that group; and (c) no plan terms are dictated by the terms of the Revised Settlement.<sup>11</sup> These compromises will

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<sup>11</sup> As set forth above, under the Revised Settlement, all Creditors that accept a distribution from the Creditor Recovery Pool are deemed to be Releasing Parties and thereby grant releases to the Released Parties (collectively, the "Creditor Releases"). The Settlement Parties believe that the Creditor Releases are

allow the Debtors to proceed with an orderly and cost efficient wind down of their estates that maximizes recoveries to creditors.

21. The Debtors and the other Settlement Parties submit that the Revised Settlement is fair, reasonable and appropriate. Moreover, the Debtors have determined in their business judgment that the Revised Settlement is in the best interests of the Debtors and their estates and creditors. As such, the Settlement Parties request that the Revised Settlement be approved.

**Notice**

22. Notice of this Amended Motion will be provided to the following parties:

(a) the United States Trustee for the District of Delaware; (b) counsel to the DIP Agent; (c) counsel to the First Lien Agent; (d) counsel to the Second Lien Agent; (e) counsel to the Committee; (f) counsel to the WARN Claimants; (g) counsel to ACAS; (h) GOPAC and any other parties that objected to the Prior Motion; and (i) all parties that have filed a request for notice in these cases pursuant to Bankruptcy Rule 2002 (collectively, the "Notice Parties").

The Settlement Parties respectfully submit that such notice to the Notice Parties is consistent with the Court's instructions on the record of the hearing held on December 17, 2012 and that no further notice of the Amended Motion is necessary. In addition, each of the WARN Claimants will receive notice of proposed WARN Settlement as part of the class action notices to be served upon Court approval in the WARN Action.

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appropriate in this case because, absent the funds gifted to the Creditor Recovery Pool by senior creditors, none of the Creditors would be entitled to any recovery from the Debtors' estates pursuant to the priority scheme of the Bankruptcy Code. Accordingly, Creditors are at liberty to elect to provide the Creditor Releases in consideration for the gift they receive from the Creditor Recovery Pool or else forego any distribution from that source and retain all of their rights.



WHEREFORE, the Settlement Parties respectfully request that the Court (a) enter an order in substantially the form attached hereto as Exhibit E approving the Revised Settlement and (b) grant such other and further relief to the Settlement Parties as the Court may deem just and proper.

Dated: June 14, 2013

PACHULSKI STANG ZIEHL & JONES  
LLP

/s/ Peter J. Keane

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**EXHIBIT A**

**[Prior Motion]**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

-----X  
:
  
In re : Chapter 11
  
:
  
AFA INVESTMENT INC., *et al.*,<sup>1</sup> : Case No. 12-11127 (MFW)
  
:
  
Debtors. : Jointly Administered
  
:
  
: Hearing Date: October 11, 2012 at 11:30 a.m. (ET)
  
: Objection Deadline: October 2, 2012 at 4:00 p.m. (ET)
  
-----X

**JOINT MOTION OF (A) DEBTORS,  
(B) OFFICIAL COMMITTEE OF UNSECURED CREDITORS,  
(C) TERM B LOAN LENDERS, (D) SECOND LIEN AGENT, (E) BEEF PRODUCTS  
INC. AND (F) CERTAIN PREPETITION SECOND LIEN LENDERS PURSUANT  
TO SECTION 105(a) OF THE BANKRUPTCY CODE AND BANKRUPTCY  
RULE 9019 FOR AN ORDER AUTHORIZING GLOBAL SETTLEMENT**

The above-captioned debtors (the "Debtors"), the official committee of unsecured creditors appointed in these chapter 11 cases (the "Committee"), the Term B Loan Lenders (as defined below),<sup>2</sup> the Second Lien Agent<sup>3</sup>, certain Second Lien Lenders<sup>4</sup> and Beef Products, Inc. ("BPI") (collectively with the Second Lien Agent, the Term B Loan Lenders, the Second Lien

<sup>1</sup> The Debtors are the following nine entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): AFA Investment Inc. (0331) ("AFA Investment"); American Foodservice Corporation (1780); American Fresh Foods, Inc. (7389); American Fresh Foods, L.P. (7302); AFA Foods, Inc. (0429) ("AFA Foods"); American Fresh Foods, LLC (7301); Fairbank Reconstruction Corporation (2405) ("Fairbank"); American Foodservice Investment Company, LLC (9525); and United Food Group LLC (7584) ("UFG"). The address of each of the Debtors is 860 First Avenue, Suite 9A, King of Prussia, Pennsylvania 19406.

<sup>2</sup> As further defined below, the Term B Loan Lenders are Yucaipa Corporate Initiatives Fund II, L.P. ("YCIF II") and Yucaipa Corporate Initiatives (Parallel) Fund II, L.P. ("YCIF II Parallel").

<sup>3</sup> Except where otherwise stated, capitalized terms not defined herein have the meanings given to them in the Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 363(c), 363(d), 363(e), 364(c), 364(d)(1) and 364(e) and (B) Utilize Cash Collateral of Prepetition Secured Parties, (II) Granting Adequate Protection to Prepetition Secured Entities, and (III) Granting Related Relief (Docket No. 199) (the "Final DIP Order").

<sup>4</sup> The Second Lien Lenders that are Settlement Parties moving for relief in the Motion are: YCIF II Second Lien Holdings LLC (the "SPV") and its members YCIF II, YCIF II Parallel and NBPCo Holdings, LLC ("NBPCo").



Lenders, the Committee and the Debtors, the "Settlement Parties") hereby move the Court, pursuant to section 105(a) of title 11 of the United States Code (the "Bankruptcy Code") and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") for entry of an order approving a settlement (the "Global Settlement") resolving substantially all of the key disputes among the Settlement Parties and providing the foundation for the successful conclusion of these chapter 11 cases. In support of this Motion, the Settlement Parties incorporate the summary of proposed terms and conditions attached hereto as Exhibit A (the "Term Sheet") and respectfully represent as follows:

**PRELIMINARY STATEMENT**

1. The Debtors commenced these chapter 11 cases on an emergency basis on April 2, 2012 (the "Petition Date") to pursue the prompt sale of substantially all of their assets. In the five months since the Petition Date, the Debtors have closed sales of the assets associated with four of their five production facilities, comprising the vast majority of realizable value in the Debtors' estates, and anticipate closing the Court-approved sale of assets of the remaining facility in the coming days. As a result of these sales, the Debtors have paid off the DIP Facility and their obligations to their First Lien Lenders. The Debtors have determined that the value of the remaining assets is not sufficient to satisfy the asserted claims of the Second Lien Lenders.

2. Throughout the sale process, the Debtors, the DIP Agent, the First Lien Agent, the Second Lien Agent and the Committee have deferred at least three key disputes to allow the sales to proceed uninhibited by litigation. These deferred issues include any potential: (a) challenge by the Committee to the validity and priority of certain of the liens asserted by the Second Lien Lenders; (b) assertion by the Committee of estate claims against certain of the Second Lien Lenders and the Term B Loan Lenders in their capacity as potential insiders of certain of the Debtors; and (c) arguments by the Committee that the Debtors (or their lenders) are

obligated to satisfy in full the prepetition claims asserted under section 503(b)(9) of the Bankruptcy Code ("Twenty-Day Claims") as a condition to utilizing the chapter 11 process to maximize value.

3. With the sale process substantially complete, the prompt resolution of these disputes has now become critical for the Debtors to (a) obtain agreements for the ongoing consensual use of cash collateral; (b) continue the efforts to wind down their estates and maximize the value of their remaining assets for the benefit of their stakeholders; (c) provide an opportunity to propose and confirm a chapter 11 plan; and (d) ultimately, seek to bring these cases to a successful conclusion. The proposed Global Settlement – the key terms of which are set forth in the Term Sheet<sup>5</sup> – resolves each of these disputes among the Settlement Parties and establishes a means for bringing these chapter 11 cases to an efficient and expeditious conclusion. Accordingly, the Settlement Parties believe that approval of the Global Settlement is fair, reasonable and appropriate, and the Debtors have determined that the Global Settlement is in the best interest of their estates and creditors.

### **BACKGROUND**

#### *The Debtors' Businesses*

4. As of the Petition Date, the Debtors were among the largest ground beef processing enterprises in the United States, operating beef processing facilities (collectively, the "Facilities") in California, Georgia, New York, Pennsylvania and Texas and employing approximately 850 full time employees. The Debtors maintain their headquarters in King of Prussia, Pennsylvania.

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<sup>5</sup> The Settlement Parties have executed the Term Sheet, but have not yet completed definitive documentation of the Global Settlement. The Settlement Parties anticipate that they will file the definitive settlement documents with the Court prior to the hearing on this Motion.

5. The Debtors' books and records reflected approximately \$958 million in annual revenues on a consolidated basis as of December 31, 2011. As of February 29, 2012, on a consolidated basis, the Debtors' books and records reflected approximately \$219 million in assets and \$197 million in liabilities.

6. The Debtors produced case ready ground beef and individually quick frozen hamburger patties for sale to customers across a national retail and foodservice market. Annually, the Debtors processed more than 500 million pounds of ground beef products, distributed primarily to restaurants and retail grocery stores across the United States. In the ordinary course of their businesses, the Debtors purchased large quantities of meat and meat products to be processed through the Debtors' value-added production operations and distributed to their customers. Given their perishable nature, these and other goods were received by the Debtors on a regular basis, and substantial amounts of such goods were received by the Debtors within 20 days immediately prior to the Petition Date.

*The Prepetition Recall Litigation*

7. Prior to the Petition Date, claims were asserted against certain of the Debtors arising from outbreaks of E. coli bacterial infections involving tainted beef the Debtors had received from certain vendors and subsequently processed and sold in 2007 (the "Western States Outbreak") and 2009 (the "Northeast Outbreak"). The beef in the Northeast Outbreak and the Western States Outbreak led to illness, injuries or death to certain customers and was recalled. These recalls and related consumer lawsuits resulted in significant business losses and costs, and litigation defense costs, for the Debtors.

8. The Debtors in turn have asserted multi-million dollar contractual, indemnification and contribution claims against the parties they have identified as the suppliers



of the tainted beef: Greater Omaha Packing Company, Inc. ("GOPAC") (in respect of the Northeast Outbreak) and Cargill, Inc. and affiliates (collectively, "Cargill") (in respect of the Western States Outbreak). The claims against Cargill are pending in the United States District Court for the Central District of California and are in the preliminary phases of discovery. The claims against GOPAC are pending in multiple courts in various states of development.

Events Leading Up To These Chapter 11 Cases

9. The Debtors have operated in a highly competitive industry, characterized by narrow margins and growing overcapacity. For several years preceding the Petition Date, the Debtors had been unable to maintain a reasonable level of profitability for various reasons, including: (a) decreasing retail demand; (b) costly, customer specified requirements for finished product testing; and (c) lower sales in certain foodservice outlets. In response to these challenges, the Debtors pursued a strategy to increase sales to retail customers. This transition further strained the Debtors' resources, but was successfully being implemented until unanticipated market developments jeopardized the Debtors' liquidity, including an unfounded public outcry over the use of boneless lean beef trimmings (derogatively referred to in press reports as "pink slime") and changes to the imported meat market.

10. The Debtors took aggressive action to increase productivity and decrease costs, working with their lenders cooperatively to address potential defaults and provide for the liquidity needs of the Debtors. To that end, the Debtors entered into, among other things, a series of four amendments and forbearance agreements with their First Lien Lenders during 2011 and 2012. To further assist in their restructuring efforts, the Debtors also obtained (a) \$14 million (including forgiveness of trade receivables owed to BPI) from an equity issuance to the SPV, an entity owned by YCIF II, YCIF II Parallel and NBPCo (an affiliate of BPI), in

August 2011; and (b) \$10 million (in the form of additional debt under the Debtors' prepetition Second Lien Credit Facility) from the SPV in December 2011.

11. After evaluating all potential options, the Debtors ultimately determined that the sale of their businesses would provide the best opportunity to maximize the value of their assets and address the business challenges that they faced. To that end, on March 23, 2012, the Debtors hired Imperial Capital LLC ("Imperial") to market the Debtors' assets for sale. From its preliminary work, Imperial determined that there potentially would be significant interest in the Debtors assets. The Debtors, however, faced an immediate, unanticipated and growing liquidity crisis. As such, they determined that they would not be able to maintain operations in the near term absent an additional infusion of liquidity. When it became apparent that no additional lending would be available outside of bankruptcy, the Debtors explored the possibility of bankruptcy financing with their lenders and initiated preparations for an emergency chapter 11 filing.

*The Debtors' Prepetition Capital Structure*

*The First Lien Credit Facility*

12. Prior to the Petition Date, the Debtors (some as borrowers and some as guarantors) entered into the Amended and Restated Credit Agreement, dated as of February 9, 2010 (as further amended, restated, supplemented or otherwise modified from time to time and in effect on the date hereof, and collectively with all collateral and ancillary documents executed or delivered in connection therewith, the "First Lien Credit Facility") among (a) the Debtors, (b) the First Lien Lenders, (c) the First Lien L/C Issuer and (d) the First Lien Agent.

13. Pursuant to the Forbearance Agreement and Amendment No. 1, dated April 5, 2011, YCIF II and YCIF II Parallel assisted the Debtors' efforts to obtain a forbearance under the First Lien Credit Facility by purchasing \$1,400,000 of the outstanding revolving loans

and commitments from the First Lien Lenders. Upon being purchased, these revolving loans and commitments were converted into Term B Loans.

14. As of the Petition Date, the Debtors were indebted to the First Lien Agent, the First Lien L/C Issuer and the other First Lien Lenders (collectively, the "First Lien Secured Parties") pursuant to the First Lien Credit Facility: (a) in the aggregate principal amount of \$47,855,725.94 in respect of Prepetition Revolving Loans; (b) in the aggregate principal amount of \$11,511,196.00 in respect of term loans (including Term A Loans in the amount of \$10,111,196.00 and Term B Loans in the amount of \$1,400,000.00); (c) in the aggregate principal amount of \$3,103,451.61 in respect of letters of credit issued; plus (d) accrued and unpaid interest with respect thereto and any additional fees, costs and expenses due thereunder.

15. Pursuant to the First Lien Credit Facility, the First Lien Agent and the other First Lien Secured Parties held first priority valid, perfected and enforceable security interests (the "Prepetition First Priority Liens") in substantially all of the Debtors' assets.

*The Second Lien Credit Facility*

16. Also prior to the Petition Date, the Debtors (some as borrowers and some as guarantors) entered into that certain Second Lien Credit Agreement, dated as of February 9, 2010 (as amended from time to time, the "Second Lien Credit Facility") among (a) the Debtors, (b) certain subordinated second lien creditors (collectively, the "Second Lien Lenders") and (c) Yucaipa Corporate Initiatives Fund II, LLC, as administrative agent (in such capacity, the "Second Lien Agent").

17. The Second Lien Lenders consist of (a) the SPV, whose members are YCIF II, YCIF II Parallel and NBPCo; and (b) American Capital, Ltd. (together with its transferees, successors or assigns, "ACAS"), the ultimate parent of the entity that sold UFG to AFA Investment.

18. As of the Petition Date, the Debtors were indebted to the Second Lien Agent and the Second Lien Lenders pursuant to the Second Lien Credit Facility, without defense, counterclaim or offset of any kind (other than any defense, claim, counterclaim or offset with respect to any alleged obligation owed to ACAS): (a) in the approximate amount of \$71,595,210 in respect of loans made; plus (b) accrued and unpaid interest with respect thereto and any additional fees, costs and expenses due thereunder. ACAS is a Second Lien Lender under the Second Lien Credit Facility with respect to certain alleged obligations owed to ACAS under an ACAS Second Lien Note in the original principal amount of \$4,725,000.<sup>6</sup>

19. Principal payments owed to ACAS and the other Second Lien Lenders are split on a percentage basis in accordance with the provisions of Section 1.10 of the Second Lien Credit Facility. In addition, NBPCo is entitled contractually to the first \$14 million of recoveries on the Second Lien Obligations by the SPV. Amounts paid to the SPV on account of the Second Lien Obligations above \$14 million are owed contractually to Yucaipa.

20. Pursuant to the Second Lien Credit Facility, the Second Lien Agent and the other Second Lien Lenders hold second priority security interests and liens (the "Prepetition Second Priority Liens") and, together with the Prepetition First Priority Liens, the "Prepetition Liens") in substantially all of the Debtors' assets, including Cash Collateral. However, the liens and claims of the Second Lien Lenders remain subject to the Committee's rights under the Final

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<sup>6</sup> In addition to the ACAS Second Lien Note, AFA Investment executed and delivered to ACAS an ACAS Offset Note in the original principal amount of \$7,275,000 (the "ACAS Offset Note"). The ACAS Offset Note is pledged to Debtors AFA Investment and UFG to secure the satisfaction of certain indemnification obligations of ACAS under Article IX of that certain Securities Purchase Agreement dated as of February 9, 2010 (the "UFG Purchase Agreement"), by and among UFG Intermediate Holding Corp. (seller), ACAS and AFA Investment. The Debtors, the Committee and all other parties in interest are reserving all of their rights, claims, counterclaims, defenses and offsets with respect to: (a) the obligations allegedly owed to ACAS under the Second Lien Credit Facility, the ACAS Second Lien Note and the ACAS Offset Note; (b) any indemnification obligation of ACAS owed to any of the Debtors under the UFG Purchase Agreement; and (c) the nature, extent, validity and priority of any alleged security interest or lien of ACAS.

DIP Order and subsequent stipulations, as described below. In addition, the Debtors and their estates have reserved all defenses, counterclaims and offsets as to the claims and liens of ACAS with respect to the Second Lien Credit Facility.

Significant Events During These Chapter 11 Cases

21. The Debtors commenced these chapter 11 cases to maximize value for their estates and stakeholders through an expeditious sale of substantially all of their assets (the "Sale Process"). From the outset of these cases, the Debtors disclosed that there was material uncertainty about whether a Sale Process – even if successful – would generate sufficient proceeds to satisfy all of their secured debt and Twenty-Day Claims.

The Debtors' Postpetition Financing Facility

22. On the Petition Date, the Debtors requested authority to obtain postpetition financing from their existing First Lien Lenders (the "DIP Facility"), to use cash collateral of their First Lien Lenders and Second Lien Lenders and to provide adequate protection to these lenders (Docket No. 11) (the "DIP Motion"). The DIP Credit Agreement governing the proposed DIP Facility was attached as Exhibit 1 to the Notice of Filing of Executed DIP Credit Agreement (Docket No. 180), filed on April 24, 2012.

23. Pursuant to the DIP Motion, the Debtors requested authorization, among other things, for (a) the Debtors (in their capacities as borrowers or guarantors) to borrow up to an aggregate principal amount not to exceed \$60,000,000 of DIP Loans and (b) the Debtors to use the proceeds of the DIP Loans and Cash Collateral in the operation of their businesses and to administer these cases and pursue the Sale Process. DIP Motion at ¶ 18.

24. The Debtors further requested that the DIP Agent, on behalf of and for the benefit of the DIP Secured Parties, be granted, subject only to the Carve Out:<sup>7</sup> (a) valid, binding and fully perfected security interests in, and liens upon, all present and after-acquired property of the Debtors; and (b) superpriority administrative claims with priority in payment over, among other things, any and all administrative expenses allowed in these chapter 11 cases on account of the DIP Obligations. Id. As adequate protection for their security interests, the Debtors requested that the First Lien Lenders and the Second Lien Lenders separately be granted certain superpriority claims and liens with respect to the DIP Collateral, solely to the extent of the diminution in value of each of their prepetition liens and subject and subordinate to the claims and liens supporting the DIP Obligations. Id.

25. The DIP Motion further provided that, from the Petition Date until the DIP Obligations were paid in full in cash, all cash receipts, Cash Collateral and all proceeds from the sale or other disposition of the DIP Collateral and all other proceeds would be transferred to the DIP Agent and, subject to the Carve Out, applied to the payment of the following, in order of priority: (a) certain costs and expenses of the DIP Agent; (b) certain attorney costs of the DIP Lenders; (c) all unpaid interest and fees under the DIP Facility; (d) principal of the Prepetition Revolving Loans (the "Proceeds Roll-Up"); (e) principal under the DIP Facility, including pursuant to the Prepetition Letters of Credit; and (f) any other amounts under the DIP Facility. Id.

26. The DIP Credit Agreement provided for certain milestones for the sale of substantially all of the Debtors' assets. The failure to accomplish any of these milestones would

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<sup>7</sup> The Carve Out provided for the payment of certain allowed fees, costs and expenses of, among other things, certain professionals retained by the Debtors and the Committee in these chapter 11 cases, as set forth in the Final DIP Order. Final DIP Order at ¶ 17.

constitute an additional Event of Default under the DIP Credit Agreement that, absent waiver or amendment, would entitle the DIP Agent to exercise its remedies under the DIP Credit Agreement. Id.

27. The order approving the DIP Motion on an interim basis (Docket No. 42) (the "Interim DIP Order") provided that the Committee would be afforded a period of 60 days from the date of its appointment to investigate the Prepetition Liens, upon the expiration of which period, among other things: (a) the Prepetition Liens would be deemed to constitute valid, binding, enforceable and perfected liens and security interests not subject to avoidance or disallowance pursuant to the Bankruptcy Code or applicable non-bankruptcy law; and (b) all claims of the Debtors — including those asserted by the Committee on behalf of the Debtors — against the First Lien Secured Parties and their respective officers and directors, among others, would be deemed released, waived and discharged. Interim DIP Order at ¶ 17.

28. The Committee, among other parties, filed an objection to final approval of the DIP Facility (Docket No. 145) (the "DIP Objection"). Among other grounds, the Committee objected that the proposed DIP Facility would not provide for the full satisfaction of asserted Twenty-Day Claims, which constitute administrative priority expenses of the estates. DIP Objection at ¶¶ 9-14. In addition, the Committee asserted that the provisions of the DIP Facility, as proposed, afforded the Committee inadequate time to investigate the Prepetition Liens. Id. at ¶¶ 24-26. In particular, the Committee was concerned that the proposed 60-day sunset on its rights to investigate the Prepetition Liens and the releases contemplated by the Interim DIP Order could result in the inadvertent release of claims against certain Yucaipa entities that may be insiders of the Debtors. Id. at ¶ 25.

29. Prior to the final hearing on the DIP Motion, the Debtors, the Committee, the DIP Agent, the First Lien Agent and the Second Lien Agent, among other parties, engaged in negotiations with respect to the DIP Objection. As a result of these negotiations, the parties agreed that the Committee would withdraw the DIP Objection on condition that, among other things: (a) final approval of the DIP Facility would not limit the rights of the Committee or any other party to object to the sale of the Debtors' assets on any grounds, including with respect to the timeline proposed for the Sale Process, or to argue that the proceeds of any such sale be used to satisfy the Twenty-Day Claims; and (b) the deadline for the Committee to complete investigation of, and initiate any challenge to, the Prepetition Liens would be extended to June 11, 2012 (the "Challenge Deadline").

30. On April 30, 2012, the Court entered the Final DIP Order, thereby approving the DIP Facility, as modified, on a final basis. Since the Court entered the Final DIP Order, the Debtors, the Committee and, as applicable, the First Lien Agent and/or the Second Lien Agent have entered into a total of four stipulations extending the Challenge Deadline with respect to certain specific property. These stipulations have been approved by orders of the Court (Docket Nos. 332, 526, 537 and 615). As of the date of this Motion: (a) the Challenge Deadline with respect to the Prepetition First Priority Liens has expired; and (b) absent further extension, the Challenge Deadline with respect to the Prepetition Second Priority Liens will expire on September 28, 2012.

#### The Twenty-Day Claim Procedures

31. From the outset, the Debtors recognized that they would face substantial liability under section 503(b)(9) of the Bankruptcy Code because most of the Debtors' vendors supplied goods on less than 14-day terms. Accordingly, on the Petition Date the Debtors filed a motion (Docket No. 12) (the "Twenty-Day Claims Motion") seeking to establish certain



procedures with respect to Twenty-Day Claims as a means to (a) provide the Debtors with the opportunity to address the allowance of Twenty-Day Claims in an orderly and efficient way and (b) streamline the process for consideration of such claims.

32. The Committee filed an objection to the Twenty-Day Claims Motion (Docket No. 146) (the "Twenty-Day Procedures Objection"), arguing that the proposed procedures should (a) provide for the payment in full of all allowed Twenty-Day Claims and (b) establish a process for the assertion and reconciliation of Twenty-Day Claims. Twenty-Day Procedures Objection at ¶¶ 9-10. Certain vendors filed similar objections. Following negotiations between the Debtors, the Committee and certain holders of Twenty-Day Claims, among other parties, the Debtors requested, and the Court approved, the establishment of procedures for the assertion of Twenty-Day Claims and a bar date of June 11, 2012 (the "Twenty-Day Claim Bar Date").

33. In response to the Twenty-Day Claim Bar Date, approximately 157 Twenty-Day Claims were asserted against the Debtors' estates. The Debtors have completed an initial reconciliation of the Twenty-Day Claims against their books and records and have preliminarily determined that they may have obligations on account of Twenty-Day Claims in the amount of up to approximately \$29 million (subject to additional reconciliation and defenses). As of the date of this Motion, all disputes regarding any potential entitlement of holders of Twenty-Day Claims to payment on account of their claims remain deferred.

#### The WARN Action

34. Effective April 7, 2012, the Debtors suspended most of their operations at the California Facility as the facility was marketed for sale. On May 10, 2012, a complaint (the "WARN Complaint") was filed in this Court against: (a) AFA Investment; (b) AFA Foods; and (c) the Second Lien Agent (in its capacity as the majority shareholder of AFA Investment),

thereby commencing a putative class action adversary proceeding (Case No. 12-50710) (the "WARN Action") alleging violations of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, et seq., and California Labor Code § 1400, et seq., in connection with the suspension of operations at the California Facility. WARN Complaint at ¶ 1. By agreement of the parties, the deadline for the Debtors and the Second Lien Agent to answer the WARN Complaint was extended through August 10, 2012. On August 8, 2012, the Second Lien Agent filed a motion to dismiss the WARN Complaint (Adv. Proc. Docket No. 18). On August 10, 2012, the Debtors filed an answer to the WARN Complaint (Adv. Proc. Docket No. 20), denying the allegations in, and asserting certain affirmative defenses to, the WARN Complaint.

35. As noted below, the California Facility has been sold and resumed operations under new ownership on September 4, 2012.

#### The Sale Process

36. On April 16, 2012, the Debtors filed a motion (Docket No. 111) (the "Sale Motion") seeking approval of certain Sale Procedures (as defined in the Sale Motion) to conduct the Sale Process. On May 9, 2012, the Court entered an order (Docket No. 242) approving the Sale Procedures.

37. With the assistance of Imperial and the Debtors' other professional advisors, the Debtors marketed their assets and pursued asset sales through the Sale Process. Ultimately, based on the expressions of interest received and after discussions with the Consultation Parties (as defined in the Sale Procedures), the Debtors determined that the best approach to maximize value was to pursue separate sales of assets associated with each of the Debtors' five Facilities.

38. The Debtors scheduled an auction of the assets associated with their California Facility (collectively, the "California Assets") and their Georgia Facility (collectively, the "Georgia Assets") for June 21, 2012. Having received only one qualified bid for the California Assets, however, on June 20, 2012, the Debtors filed a notice of cancellation of the auction of the California Assets and designation of Tri West Investment LLC as the successful bidder for the California Assets for a cash purchase price of \$4,400,000 (Docket No. 372). On June 26, 2012, the Court entered an order (Docket No. 393) (the "California Sale Order") approving the sale of the California Assets, which closed on June 29, 2012.

39. The Debtors conducted the auction of the Georgia Assets on June 21, 2012, as scheduled. Following the auction, the Debtors filed a notice (Docket No. 378) designating FPL Food LLC as the successful bidder for the Georgia Assets for a cash purchase price of \$7,200,000. On June 26, 2012, the Court entered an order (Docket No. 394) (the "Georgia Sale Order") approving the sale of the Georgia Assets, which closed on July 9, 2012.

40. The Debtors scheduled an auction of the assets associated with their Pennsylvania Facility (collectively, the "Pennsylvania Assets"), their Texas Facility (collectively, the "Texas Assets") and their New York Facility (collectively, the "New York Assets") for July 10, 2012. Having received only one qualified bid for the Pennsylvania Assets, on July 10, 2012, the Debtors filed a notice (Docket No. 436) designating CTI King of Prussia LLC as the successful bidder for the Pennsylvania Assets for an estimated cash purchase price of \$16,800,000 after certain adjustments. On July 13, 2012, the Court entered an order (Docket No. 464) (the "Pennsylvania Sale Order") approving the sale of the Pennsylvania Assets, which closed on July 16, 2012.

41. The Debtors conducted the auction of the Texas Assets on July 10, 2012, as scheduled. Following the auction, the Debtors filed a notice (Docket No. 437) designating Cargill Meat Solutions Corporation as the successful bidder for the Texas Assets for an estimated cash purchase price of \$38,800,000. On July 13, 2012, the Court entered an order (Docket No. 463) (the "Texas Sale Order") approving the sale of the Texas Assets, which closed on July 20, 2012.

42. The Debtors did not receive any qualified bids for the New York Assets before the July 10, 2012 auction and did not conduct the auction for the New York Assets at that time. Instead, the Debtors determined to extend the Sales Process for these assets to permit continued marketing, as contemplated by the Sale Procedures. On August 22, 2012, the Debtors filed a notice (a) designating a stalking horse with respect to the New York Assets and (b) setting new dates for the remainder of the Sale Process, including scheduling an auction of the New York Assets for August 28, 2012. The Debtors conducted the auction of the New York Assets, as scheduled. Following the auction, the Debtors filed a notice (Docket No. 601) designating a joint venture of Counsel RB Capital, LLC, Harry Davis & Co. and BiditUp Auctions Worldwide, Inc. as the successful bidder for the New York Assets for a cash purchase price of \$2,500,000. On August 29, 2012, the Court entered an order (Docket No. 604) approving the sale of the New York Assets, which is expected to close in the coming days.

43. On July 7, 2012, the Committee filed an objection to the sales (Docket No. 427) (the "Sale Objection"). By the Sale Objection, the Committee, among other things, renewed its deferred objections with respect to the alleged obligations to satisfy Twenty-Day Claims, as well as the rights and claims of the Term B Loan Lenders and the Second Lien Lenders. See Sale Objection at ¶¶ 11-30. In particular, the Committee objected to any

distribution of the proceeds of the sales: (a) to the extent such a distribution would cause the Debtors to be unable to satisfy in full their obligations on account of Twenty-Day Claims; and (b) to the Second Lien Lenders and the Term B Loan Lenders pending the adjudication of any of the Committee's potential claims with respect to the validity and priority of their secured claims and potential claims against the Second Lien Lenders, the Term B Loan Lenders and related parties arising from their status as potential insiders of the Debtors. Id.

44. In light of this objection, all proceeds of the sales of the California Assets and the Georgia Assets were escrowed pending further order of the Court. See California Sale Order at ¶ 18; Georgia Sale Order at ¶ 26. At the hearing held on July 12, 2012 to consider, among other things, approval of the sales of the Pennsylvania Assets and the Texas Assets, the Court ordered on the record that Net Proceeds (as defined in the Texas Sale Order and the Pennsylvania Sale Order), or a portion thereof, be distributed (a) in full and final (i.e., nonprovisional) satisfaction of the DIP Facility and the First Lien Credit Facility<sup>8</sup> other than the Term B Loans and (b) in provisional (i.e., subject to potential clawback) satisfaction of the Term B Loans. See Texas Sale Order at ¶ 25; Pennsylvania Sale Order at ¶ 15. Following these distributions, the Debtors were prohibited from using any of the remaining Net Proceeds except pursuant to an order of the Court or by consent. Texas Sale Order at ¶ 25; Pennsylvania Sale Order at ¶ 15.

45. The DIP Obligations and the First Lien Obligations were paid in full and satisfied on July 24, 2012, consistent with the terms of the Texas Sale Order and the

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<sup>8</sup> Consistent with the Final DIP Order, the Debtors previously had satisfied the Prepetition Revolving Loans by operation of the Proceeds Roll-Up.

Pennsylvania Sale Order. Thereafter, the Debtors' rights to use Cash Collateral under the Final DIP Order expired at the end of day on July 31, 2012.

Second Lien Cash Collateral Order

46. Following the sales of the assets associated with each of the Debtors' five facilities and the payoff of the DIP Obligations and the First Lien Obligations, the Debtors project that they will retain approximately \$14 million in cash, as well as other tangible and intangible assets. Although the remaining assets are projected to be well short of the amount needed to pay the Second Lien Obligations in full, the Debtors have continued to pursue an orderly winddown that maximizes value for the benefit of stakeholders. To continue and complete that process, and in light of the expiration of the right to use Cash Collateral under the Final DIP Order, the Debtors promptly initiated discussions of a consensual cash collateral agreement with the Second Lien Agent.

47. The Debtors continued to use Cash Collateral for several weeks under an informal agreement with the Second Lien Agent, as they maintained their winddown efforts and engaged in negotiations with the Second Lien Agent on a formal cash collateral stipulation. Ultimately, the discussions of a cash collateral agreement were expanded to include discussions of a global settlement of the key remaining disputes in these cases, with the goal of promoting a prompt and efficient conclusion to these cases. The Second Lien Agent's agreement to permit the use of Cash Collateral, in fact, is conditioned on the Settlement Parties' agreement to and implementation of the Global Settlement.

48. Upon execution of the Term Sheet by the Settlement Parties, reflecting their agreement to the terms of a Global Settlement, the Debtors submitted an agreed form of order authorizing the interim use of Cash Collateral (the "Interim Cash Collateral Order") under

a Certification of Counsel filed concurrently with this Motion. The Debtors anticipate that the Interim Cash Collateral Order will be entered in the coming days. A hearing to consider a final order approving the use of Cash Collateral (the "Final Cash Collateral Order") currently is scheduled for October 11, 2012, the date of the scheduled hearing on this Motion. The Interim Cash Collateral Order, the Final Cash Collateral Order and the approved budgets thereunder are referred to herein collectively as the "Cash Collateral Order and Budget."

### **THE GLOBAL SETTLEMENT**

49. The Settlement Parties are the Debtors, the Committee, the Term B Loan Lenders, the Second Lien Agent, the SPV, BPI and NBPCo.

50. The Global Settlement will be effective upon this Court's entry of an order approving the relief requested in this Motion (the "Effective Date"), except that the occurrence of the Effective Date is conditioned upon the resolution of the WARN Action in a manner that is acceptable to Yucaipa in its sole discretion. Settlement discussions with plaintiffs' counsel in the WARN Action have been initiated and are ongoing as of the filing of this Motion.

51. As set forth in the Term Sheet, the primary terms of the Global Settlement are as follows:<sup>9</sup>

- (a) Liens and Claims of the First Lien Agent. On the Effective Date, the Debtors and the Committee stipulate that: (i) the First Lien Agent holds valid, perfected, enforceable and unavoidable liens over all the Debtors' assets of any kind (collectively, the "Assets"); and (ii) the Debtors are indebted to YCIF II and YCIF II Parallel (together with their general partner, Yucaipa Corporate Initiatives Fund II, LLC, ("Yucaipa")) in the aggregate principal amount of

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<sup>9</sup> The following summary of the primary terms of the Global Settlement is provided for the benefit of the Court and other parties in interest. Nothing herein is intended to modify the Term Sheet or any definitive settlement document. To extent that the terms and conditions summarized herein are inconsistent with the Term Sheet or any other settlement document, the Term Sheet or other applicable settlement document shall govern. Capitalized terms used in the following summary and not otherwise defined herein have the meanings given to them in the Term Sheet.

\$1,400,000, plus accrued interest, on account of the Term B Loans, which constitutes an allowed claim for which Yucaipa already has received payment.

- (b) Liens and Claims of the Second Lien Agent. On the Effective Date, the Debtors and the Committee stipulate that: (i) the Second Lien Agent holds valid, perfected, enforceable and unavoidable second liens over all of the Assets (other than any security interest or lien with respect to the ACAS Offset Note, as defined in the Second Lien Credit Agreement); (ii) the Debtors are indebted to the Second Lien Agent without defense, counterclaim, offset or challenge of any kind (other than any defense, counterclaim, offset or challenge with respect to ACAS) in the aggregate principal amount of not less than \$71,595,210 on account of the Second Lien Obligations; and (iii) the foregoing liens and claims of the Second Lien Agent, whether arising under the Second Lien Documents, the Final DIP Order, the Interim Cash Collateral Order, the Final Cash Collateral Order or otherwise (collectively, the "Second Lien Claim") exceed the value of the Assets and thereby apply to all Assets. The Second Lien Claim is deemed allowed for all purposes in an amount no less than \$71,595,210 (subject only to any defense, counterclaim, offset or challenge with respect to ACAS).
- (c) Recovery on the Assets Other Than the Litigation Claims. First, after the payment of the fees and expenses of the Second Lien Agent and the payments authorized under the Cash Collateral Order and Budget, the first \$14,000,000 of recoveries received by the SPV from the Assets other than Litigation Claims (as defined below) (the "General Assets")<sup>10</sup> will be divided as follows: (i) 80% to be paid to NBPCo (capped at \$11,200,000) and (ii) 20% to be gifted by the SPV to a fund for the benefit of Debtors' creditors as further described below (the "Creditor Recovery Pool"). NBPCo also is entitled to the NBPCo Litigation Recovery and the Additional NBPCo Litigation Recovery (as such terms are defined below), which are not subject to the \$11,200,000 cap.

<sup>10</sup>

General Assets include the assets associated with the New York Facility and "Miscellaneous Assets," which are defined collectively in the Term Sheet as: "(i) money in the possession of any Debtor as of the Petition Date; (ii) cash retainers held as of the Petition Date by any professional retained by any of the Debtors' in these chapter 11 cases; (iii) any and all shares of stock of Churchill Casualty Ltd., an offshore insurance company located in the Cayman Islands, owned by American Foodservice Corporation or any other Debtor; (iv) any and all automobiles, trucks, trailers, lifts or other vehicles owned by any of the Debtors; and (v) any sale proceeds in excess of \$2.3 million generated from the sale of American Foodservice Corporation's real property located in Montgomery County, Pennsylvania."



Second, any and all recoveries from the General Assets received by the SPV above \$14,000,000 will be divided as follows: (i) 90% to be paid to Yucaipa; and (ii) 10% to be gifted by the SPV to the Creditor Recovery Pool.

- (d) Recovery on the Litigation Claims. With certain exceptions, the following applies to any and all recoveries the Debtors may become entitled to on account of the GOPAC Litigation and the Cargill Litigation (collectively, the "Litigation Claims").

Any and all recoveries received from the Litigation Claims by the SPV will be divided as follows: (i) 50% to be gifted to the Creditor Recovery Pool, *provided, however*, that the first \$2,000,000 of such recoveries that would be paid to the Creditor Recovery Pool will be divided equally between NBPCo and the Creditor Recovery Pool until NBPCo receives \$1,000,000 (the "NBPCo Litigation Recovery"); and (ii) 50% to be paid to Yucaipa *provided, however*, that any recovery received by Yucaipa between \$2,000,000 and \$4,000,000 will be divided equally between Yucaipa and NBPCo until NBPCo receives \$1,000,000 (the "Additional NBPCo Litigation Recovery").

The funds necessary to pursue and monetize the Litigation Claims shall be funded as follows: (i) an initial fund of \$250,000 (the "Litigation Recovery Fund") shall be established from recoveries received from the General Assets by the SPV and the Creditor Recovery Pool, with the SPV contributing 80% (*i.e.*, \$200,000) and the Creditor Recovery Pool contributing 20% (*i.e.*, \$50,000); and (ii) if the Second Lien Agent, NBPCo and the entity responsible for administering the Creditor Recovery Pool determine that additional funds must be contributed to the Litigation Recovery Fund to monetize the Litigation Claims, the SPV will contribute 80% of such funds and the Creditor Recovery Pool will contribute 20%. The first dollars of any recovery received from the Litigation Claims shall be used to return the funds contributed to the Litigation Recovery Fund, with the SPV receiving 80% of all such returned funds and the Creditor Recovery Pool receiving 20%.

- (e) Creditor Recovery Pool. The assets of the Creditor Recovery Pool shall be distributed pro rata among the Debtors' creditors under a chapter 11 plan according to the priority scheme of the Bankruptcy Code. For the avoidance of doubt, ACAS, NBPCo and the SPV will not receive any distribution from the Creditor Recovery Pool (other than NBPCo's rights to the NBPCo Litigation Recovery of up to \$1,000,000). The Debtors anticipate that the amounts in the

Creditor Recovery Pool could be used, under a chapter 11 plan, to pay a pro rata share of liabilities to holders of Twenty-Day Claims.

- (f) Cash Collateral and Professional Fee Escrow. As part of the agreements to the other terms of the Global Settlement, the Second Lien Agent has agreed to the use of Cash Collateral under the terms of the Cash Collateral Order and Budget. In addition, the Second Lien Agent has agreed to fund an escrow in the amount of \$2,313,653.50 of Net Proceeds (as defined in the Texas Sale Order and the Pennsylvania Sale Order) for the payment of professional fees incurred by the Debtors or the Creditors' Committee accruing on or before July 31, 2012 ("Unpaid Professional Fees"), of which (i) \$1,763,884.26 will be escrowed for the payment of Unpaid Professional Fees accrued by the Debtors and (ii) \$549,769.24 will be escrowed for the payment of the Unpaid Professional Fees accrued by the Committee.
- (g) Certain Releases. On the Effective Date, the Debtors, the Committee and certain related entities will release all claims against Yucaipa, BPI, NBPCo, the SPV, the First Lien Agent and the Second Lien Agent and the Second Lien Lenders (other than ACAS-related entities) and certain related entities (collectively, the "Released Parties").

In addition, on the Effective Date, there will be an exchange of releases between Yucaipa, the Second Lien Agent and certain related parties, on the one hand, and BPI, NBPCo and certain related parties, on the other hand.

For the avoidance of doubt, no releases are granted to any ACAS-related party under the Global Settlement.

- (h) Waiver of Release of Preference Actions. On the Effective Date, the Debtors and their bankruptcy estates will be deemed to have released and waived all preference actions under section 547 of the Bankruptcy Code.
- (i) Chapter 11 Plan. The Settlement Parties agree to take all reasonably feasible actions to pursue expeditiously the confirmation of a chapter 11 plan consistent with the Global Settlement. The chapter 11 plan will include a provision that all creditors voting in favor of the plan are deemed to give releases in favor of the Released Parties.

**RELIEF REQUESTED**

52. Pursuant to section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, the Settlement Parties hereby request approval of the Global Settlement.

**ARGUMENT**

53. Settlements in bankruptcy are favored as a means of minimizing litigation, and expediting the administration of the bankruptcy estate. Myers v. Martin (In re Martin), 91 F.3d 389, 393 (3d Cir. 1996) (citing COLLIER ON BANKRUPTCY ¶ 9019.03[1] (15th ed. 1993)); In re TSIC, Inc., 393 B.R. 71, 78 (Bankr. D. Del. 2008).

54. Section 105(a) of the Bankruptcy Code provides in relevant part that the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a). Bankruptcy Rule 9019 governs the procedural prerequisites to approval of a settlement, providing that:

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019(a).

55. Courts in the Third Circuit examine four factors in determining whether to approve a proposed settlement: "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors." Martin, 91 F.3d at 393 (citing Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968)); In re World Health Alternatives, Inc., 344 B.R. 291, 296 (Bankr. D. Del. 2006); TSIC, 393 B.R. at 78.

56. When applying these criteria to a particular motion, "the court is not supposed to have a 'mini-trial' on the merits, but should canvass the issues to see whether the settlement falls below the lowest point in the range of reasonableness." Aetna Casualty & Surety Co. v. Jasmine, Ltd (In re Jasmine, Ltd), 258 B.R. 119, 123 (D.N.J. 2000) (internal quotations omitted); see also TSIC, 393 B.R. at 79; World Health, 344 B.R. at 296. Although approval of a compromise is within the "sound discretion" of the bankruptcy court (World Health, 344 B.R. at 296), the court should not substitute its judgment for that of a trustee or debtor in possession. In re Parkview Hosp.-Osteopathic Med. Ctr., 211 B.R. 603, 610 (Bankr. N.D. Ohio 1996). The ultimate inquiry is whether the compromise is "fair, reasonable, and in the interests of the estate." TSIC, 393 B.R. at 78. A court need not be convinced that a proposed settlement is the best possible settlement, but "must conclude that it is within the reasonable range of litigation possibilities." World Health, 344 B.R. at 296 (internal citations omitted).

57. The Global Settlement is fair, reasonable and in the best interests of the Debtors' estates. The Global Settlement is the product of active, good-faith discussions and arm's length bargaining between the Settlement Parties. Notably, the agreement to the Global Settlement allows the Debtors to obtain consensual access to Cash Collateral — within the limitations of the Cash Collateral Order and Budget — which is essential for the Debtors to continue their efforts to wind down their estates, maximize value for stakeholders and pursue confirmation of a chapter 11 plan. At the same time, the terms of the Global Settlement resolve the other primary disputes in these cases and provides the foundation for any chapter 11 plan.

58. Under the circumstances, the Settlement Parties submit that the terms of the Global Settlement materially advance the interests of the Debtors, their estates and their creditors. The Second Lien Lenders that are Settlement Parties have agreed to give up a portion

of their lien proceeds for distribution to creditors consistent with the priority provisions of the Bankruptcy Code.<sup>11</sup> They also have agreed to fund the process of preserving, selling, monetizing or otherwise collecting assets for the benefit of stakeholders and to fund the distributions contemplated by the Global Settlement (including to the Creditor Recovery Pool). In return, the Committee has agreed to resolve its objections concerning the liens of the settling Second Lien Lenders and its potential claims against certain Settlement Parties, all of which allows these cases to proceed to resolution. These compromises will allow the Debtors to proceed with an orderly and cost efficient wind down of their estates and pursue a chapter 11 plan with the support of the Committee and the Second Lien Agent, and with the ability to provide a recovery to creditors.

59. By creating a mechanism to fund the Creditor Recovery Pool, the Global Settlement assures that assets will be available to creditors other than the Second Lien Lenders, without the need for costly and time consuming litigation. In particular, the Global Settlement provides a pool of assets that otherwise may not be available that may be used to fund certain obligations on account of Twenty-Day Claims and other priority claims under a chapter 11 plan. Although the Creditor Recovery Pool is not anticipated to provide any recovery to general unsecured, nonpriority creditors, the Global Settlement represents the best opportunity for the holders of Twenty-Day Claims and other priority creditors to maximize their recoveries without potentially protracted and expensive litigation concerning their asserted entitlement to any of the proceeds of the sales of the Debtors' assets and/or the validity and priority of the Prepetition Second Priority Liens.

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<sup>11</sup> As agreed to by the Parties, the terms of the Global Settlement require a "gift" from the SPV to the Debtors' unsecured creditors. Courts in the Third Circuit have held that settlements that include a "gifting" provision are appropriate and, without more, do not constitute violations of the absolute priority rule. TSIC, 393 B.R. at 75 77; World Health, 344 B.R. at 303-04.

60. The Debtors and the other Settlement Parties submit that the Global Settlement is fair, reasonable and appropriate. Moreover, the Debtors have determined in their business judgment that the Global Settlement is in the best interests of the Debtors and their estates and creditors. As such, the Settlement Parties request that the Global Settlement be approved.


**Notice**

61. Notice of this Motion will be provided to the following parties: (a) the United States Trustee for the District of Delaware; (b) counsel to the DIP Agent; (c) counsel to the First Lien Agent; (d) counsel to the Second Lien Agent; (e) counsel to the Committee; and (f) all parties that have filed a request for notice pursuant to Bankruptcy Rule 2002 (including counsel to ACAS). In addition to serving a notice and a copy of the Motion on the foregoing parties, the Debtors will serve all parties on the Debtors' creditor matrix by regular U.S. mail, postage prepaid, with a two-page notice (the "Notice") of this Motion and relief sought herein – as well as information about how to obtain a copy of this Motion without charge either on the internet or by mail. A copy of the Notice is attached hereto as Exhibit B. The Settlement Parties respectfully submit that no further notice of the Motion is necessary.

WHEREFORE, the Settlement Parties respectfully request that the Court (a) enter an order in substantially the form attached hereto as Exhibit C approving the Global Settlement and (b) grant such other and further relief to the Settlement Parties as the Court may deem just and proper.

Dated: September 18, 2012

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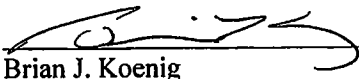
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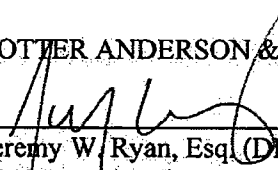
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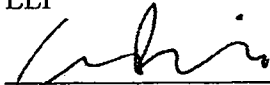
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Fund II, LLC, as Administrative Agent, the  
Term B Loan Lenders and the SPV*

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

-----X  
In re : Chapter 11  
: AFA INVESTMENT INC., *et al.*,<sup>1</sup> : Case No. 12-11127 (MFW)  
: Debtors. : Jointly Administered  
: :  
: : Hearing Date: October 11, 2012 at 11:30 a.m. (ET)  
: : Objection Deadline: October 2, 2012 at 4:00 p.m. (ET)  
-----X

**NOTICE OF JOINT MOTION OF (A) DEBTORS,  
(B) OFFICIAL COMMITTEE OF UNSECURED CREDITORS,  
(C) TERM B LOAN LENDERS, (D) SECOND LIEN AGENT, (E) BEEF PRODUCTS  
INC. AND (F) CERTAIN PREPETITION SECOND LIEN LENDERS PURSUANT  
TO SECTION 105(A) OF THE BANKRUPTCY CODE AND BANKRUPTCY  
RULE 9019 FOR AN ORDER AUTHORIZING GLOBAL SETTLEMENT**

TO: (a) the U.S. Trustee, (b) counsel to the Creditors' Committee, (c) counsel to the agent for the Debtors' prepetition second lien lenders, (d) each of the Counterparties and (e) all entities that have requested notice pursuant to Bankruptcy Rule 2002.

**PLEASE TAKE NOTICE** that on September 18, 2012, the above-captioned debtors (collectively, the "Debtors") filed the *Joint Motion of (A) Debtors, (B) Official Committee of Unsecured Creditors, (C) Term B Loan Lenders, (D) Secured Lien Agent, (E) Beef Products Inc. and (F) Certain Prepetition Second Lien Lenders Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019 for an Order Authorizing Global Settlement* (the "Motion"), with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, Wilmington, Delaware 19801 (the "Bankruptcy Court"). A copy of the Motion is attached hereto.

<sup>1</sup> The Debtors are the following nine entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): AFA Investment Inc. (0331); American Foodservice Corporation (1780); American Fresh Foods, Inc. (7389); American Fresh Foods, L.P. (7302); AFA Foods, Inc. (0429); American Fresh Foods, LLC (7301); Fairbank Reconstruction Corporation (2405); American Foodservice Investment Company, LLC (9525); and United Food Group LLC (7584). The address of each of the Debtors is 860 First Avenue, Suite 9A, King of Prussia, Pennsylvania 19406.

**PLEASE TAKE FURTHER NOTICE** that any response or objection to the relief sought in the Motion must be filed with the Bankruptcy Court on or before **October 2, 2012 at 4:00 p.m. prevailing Eastern Time.**

**PLEASE TAKE FURTHER NOTICE** that at the same time, you must also serve a copy of the response or objection upon: (i) counsel to the Debtors, (a) Jones Day, 555 California Street, 26<sup>th</sup> Floor, San Francisco, CA 94104 , Attn: Tobias S. Keller, Esq.; (b) Jones Day, 1480 Peachtree Street, N.E., Suite 800, Atlanta, GA 30309, Attn: Jeffrey B. Ellman and Brett J. Berlin; and (c) Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17<sup>th</sup> Floor, P.O. Box 8705, Wilmington, DE 19899-8705 (Courier 19801), Attn: Laura Davis Jones, Esq.; (ii) the Office of the United States Trustee, J. Caleb Boggs Federal Building, 844 N. King Street, Suite 2207, Lock Box 35, Wilmington, DE 19801, Attn: Mark Kenney, Esq.; (iii) counsel to the agent for the Debtors' first priority prepetition and proposed postpetition lenders: (a) Richards, Layton & Finger, P.A., One Rodney Square, 920 North King Street, Wilmington, DE 19801, Attn: Mark D. Collins, Esq.; (b) Sidley Austin LLP, 1313 787 Seventh Avenue, New York, NY 10019, Attn: Michael G. Burke, Esq.; and (c) Sidley Austin LLP, 555 West Fifth Street, 40<sup>th</sup> Floor, Los Angeles, CA 90013, Attn: Jennifer C. Hagle, Esq.; (iv) counsel to the agent for the Debtors' second priority prepetition lenders: (a) Munger, Tolles & Olson LLP, 355 South Grand Avenue, 35<sup>th</sup> Floor, Los Angeles CA 90071-1560, Attn: Thomas B. Walper, Esq.; and (b) Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 18<sup>th</sup> Floor, P.O. Box 1347, Wilmington, Delaware 19899 (courier 19801), Attn: Robert J. Dehney, Esq.; and (v) [proposed] counsel to the Official Committee of Unsecured Creditors: (a) McDonald Hopkins LLC, 600 Superior Avenue, East, Suite 2100, Cleveland, OH 44114, Attn: Scott N. Opincar, Esq. and Sean

D. Malloy, Esq.; and (b) Potter Anderson Corroon LLP, 1313 N. Market Street, P.O. Box 951, Wilmington, DE 19899-095, Attn: Jeremy R. Ryan, Esq.

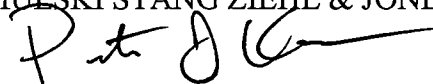
**PLEASE TAKE FURTHER NOTICE THAT IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE FINAL RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.**

**PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER THE RELIEF SOUGHT IN THE MOTION WITH RESPECT TO THE MOTION WILL BE HELD BEFORE THE HONORABLE MARY F. WALRATH, UNITED STATES BANKRUPTCY JUDGE, AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 NORTH MARKET STREET, FIFTH FLOOR, COURTROOM NO. 4, WILMINGTON, DELAWARE 19801 ON **OCTOBER 11, 2012 AT 11:30 A.M. (PREVAILING EASTERN TIME).****

*[Remainder of page intentionally left blank]*

Dated: September 18, 2012  
Wilmington, Delaware

PACHULSKI STANG ZIEHL & JONES LLP



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Counsel to the Debtors and Debtors in Possession

**EXHIBIT A**

**AFA INVESTMENT, INC., ET AL.**

**SUMMARY OF TERMS AND CONDITIONS OF THE GLOBAL SETTLEMENT OF CHAPTER 11 CASES AMONG THE DEBTORS, THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS, YUCAIPA CORPORATE INITIATIVES FUND II, L.P., YUCAIPA CORPORATE INITIATIVES (PARALLEL) FUND II, L.P., YCIF II SECOND LIEN HOLDINGS LLC, YUCAIPA CORPORATE INITIATIVES FUND II, LLC, AS ADMINISTRATIVE AGENT, BEEF PRODUCTS, INC., AND NBPCO**

This summary of proposed terms and conditions ("Term Sheet") should not be construed as a commitment to settle or compromise on any terms or conditions whatsoever. This Term Sheet is not intended to be a comprehensive list of all relevant terms and conditions of the transactions contemplated herein. It is for the purpose of outlining the proposed global settlement (the "Global Settlement") described below and is for discussion purposes only.

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| <b>Parties:</b>         | The Debtors, the Committee, Yucaipa, the Second Lien Agent, the SPV, BPI, and NBPCo (all as defined below) (collectively, the " <u>Parties</u> "). <sup>1</sup>  |
| <b>Effective Date:</b>  | The Global Settlement will be effective upon entry of a final, non-appealable order by the Bankruptcy Court approving the Global Settlement under Federal Bankruptcy Rule 9019 (the " <u>Effective Date</u> "). The Parties agree to use their best efforts to seek entry of such order.   |
| <b>The First Liens:</b> | <p>The deadline to bring a Challenge shall be deemed to be extended until the Effective Date while the Parties seek approval of this Global Settlement and deemed to have expired on the Effective Date.</p> <p>On the Effective Date, AFA Investment, Inc., and its affiliated debtors and debtors in possession (collectively, the "<u>Debtors</u>") and the Official Committee of Unsecured Creditors (the "<u>Committee</u>") stipulate and agree for all purposes that (i) Yucaipa Corporate Initiatives Fund II, L.P. and Yucaipa Corporate Initiatives (Parallel) Fund II, L.P., as the sole remaining first lien lenders and as assignees of General Electric Capital Corporation, in its former capacity as administrative agent for the first lien lenders, pursuant to the terms of the first lien credit agreement (including any successor thereto or appointee thereof as administrative agent for the first lien lenders, collectively, the "<u>First Lien Agent</u>") hold prepetition and/or postpetition first liens that are valid, perfected, enforceable and unavoidable with respect to and in all the Debtors' assets of any kind, including, but not limited to, the</p> |

<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the *Final Order (i) Authorizing the Debtors to (a) Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 363(c), 363(e), 364(c), 364(d)(1) and 364(e) and (b) Utilize Cash Collateral of Prepetition Secured Entities, (ii) Granting Adequate Protection to Prepetition Secured Entities, and (iii) Granting Related Relief* (the "Final DIP Order") [D.I. 199].



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|  | <p>Debtors' cash (including, but not limited to, all cash received from the sale of the Debtors' assets), the Litigation Claims (as defined below), the Miscellaneous Assets (as defined below) and the proceeds from all such assets (collectively, the "<u>Assets</u>"); and (ii) the Debtors are indebted to Yucaipa Corporate Initiatives Fund II, L.P. and Yucaipa Corporate Initiatives (Parallel) Fund II, L.P. (together with their general partner, Yucaipa Corporate Initiatives Fund II, LLC, "<u>Yucaipa</u>") without defense, counterclaim, offset or challenge of any kind in the aggregate principal amount of \$1,400,000, plus accrued interest, on account of the Term B Loans (the "<u>Term B Loan Claim</u>"). The Term B Loan Claim is deemed allowed for all purposes in an amount no less than \$1,400,000, plus accrued interest. Yucaipa has received payment on the Term B Loan Claim.</p>  |
| <p><b>Liens and Claims of the Second Lien Agent:</b></p> | <p>The deadline to bring a Second Lien Challenge shall be deemed to be extended until the Effective Date while the Parties seek approval of this Global Settlement and deemed to have expired on the Effective Date.</p> <p>On the Effective Date, the Debtors and the Committee stipulate and agree for all purposes that (i) Yucaipa Corporate Initiatives Fund II, LLC, as administrative agent (the "<u>Second Lien Agent</u>") holds prepetition and/or postpetition second liens that are valid, perfected, enforceable and unavoidable with respect to and in all the Assets (other than any security interest or lien with respect to the ACAS Offset Note, as defined in the Second Lien Credit Agreement dated February 9, 2010); (ii) the Debtors are indebted to the Second Lien Agent, without defense, counterclaim, offset or challenge of any kind (other than any defense, counterclaim or offset with respect to ACAS (defined below)) in the aggregate principal amount of not less than \$71,595,210 on account of the Second Lien Obligations; (iii) the liens and claims of the Second Lien Agent, granted under the Second Lien Documents, the Final DIP Order, the Cash Collateral Order, or otherwise (collectively, the "<u>Second Lien Claim</u>"), have a value in excess of the value of the Assets, and therefore apply to all Assets. The Second Lien Claim is deemed allowed for all purposes in an amount no less than \$71,595,210; <u>provided, however</u>, nothing in this Term Sheet determines the allowance of any claim on account of the ACAS Second Lien Note or the ACAS Offset Note and all parties' rights are reserved with respect to such claims.</p> |
| <p><b>Miscellaneous Assets:</b></p>                      | <p>The term "Miscellaneous Assets" means, collectively: (i) money in the possession of any Debtor as of the Petition Date; (ii) cash retainers held as of the Petition Date by any professional retained by any of the Debtors' in these chapter 11 cases; (iii) any and all shares of stock of Churchill Casualty</p>   |

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|  | <p>Ltd., an offshore insurance company located in the Cayman Islands, owned by American Foodservice Corporation or any other Debtor; (iv) any and all automobiles, trucks, trailers, lifts or other vehicles owned by any of the Debtors; and (v) any sale proceeds in excess of \$2.3 million generated from the sale of American Foodservice Corporation's real property located in Montgomery County, Pennsylvania.</p>  |
| <p><b>Recovery on the General Assets:</b></p>    | <p>The following applies to all Assets, including, but not limited to, the Miscellaneous Assets, but not the Litigation Claims (defined below) (collectively, the "<u>General Assets</u>").</p> <p>First, and after the payment of the fees and expenses of the Second Lien Agent and the payments authorized under the Cash Collateral Order and Budget (defined below), including the Unpaid Professional Fees (defined below), the first \$14,000,000 of recoveries received from the General Assets by YCIF II Second Lien Holdings LLC (the "<u>SPV</u>") will be divided as follows: (i) 80% to be paid over to NBPCo (the "<u>NBPCo General Asset Recovery</u>"); and (ii) 20% to be gifted from the SPV to the Creditor Recovery Pool (defined below) (the "<u>First Creditor General Asset Recovery</u>").</p> <p>Second, any and all recoveries received from the General Assets by the SPV above \$14,000,000 will be divided as follows: (i) 90% to be paid over to Yucaipa; and (ii) 10% to be gifted from the SPV to the Creditor Recovery Pool (the "<u>Second Creditor General Asset Recovery</u>").</p> <p>NBPCo agrees that its recovery from the General Assets on account of the NBPCo General Asset Recovery, the Second Lien Claim or otherwise is capped at \$11,200,000. NBPCo is also entitled to the NBPCo Litigation Claim Recovery and the Additional NBPCo Litigation Claim Recovery, which are not subject to the \$11,200,000 cap.</p> |
| <p><b>Recovery on the Litigation Claims:</b></p> | <p>Except with respect to the return of funds contributed to the Litigation Recovery Fund (defined below), the following applies to any and all recoveries the Debtors may become entitled to on account of the litigation claims involving Cargill and GOPAC (collectively, the "<u>Litigation Claims</u>").</p> <p>Any and all recoveries received from the Litigation Claims by the SPV will be divided as follows: (i) 50% to be paid over to Yucaipa; <u>provided, however</u>, any recovery received by Yucaipa between \$2,000,000 and \$4,000,000 will be divided 50%-50% between Yucaipa and NBPCo until NBPCo receives \$1,000,000 (the "<u>Additional NBPCo Litigation Claim Recovery</u>"); and (ii) 50% to be gifted from the SPV to the Creditor Recovery Pool (the "<u>Creditor Litigation Claim Recovery</u>"), <u>provided, however</u>,</p>   |

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|  | <p>the first \$2,000,000 in Creditor Litigation Claim Recovery will be divided 50%-50% between NBPCo and the Creditor Recovery Pool until NBPCo receives \$1,000,000 (the "<u>NBPCo Litigation Claim Recovery</u>").</p> <p>The funds necessary to monetize the Litigation Claims shall be funded as follows: (i) an initial fund of [\$250,000] (the "<u>Litigation Recovery Fund</u>") shall be established from recoveries received from the General Assets by the SPV and the Creditor Recovery Pool, with the SPV contributing 80% and the Creditor Recovery Pool contributing 20%; and (ii) if the Second Lien Agent, NBPCo and the entity responsible for administering the Creditor Recovery Pool determine that additional funds must be contributed to the Litigation Recovery Fund in order to monetize the Litigation Claims, the SPV will contribute 80% of such funds and the Creditor Recovery Pool will contribute 20%. The first dollars of any recovery received from the Litigation Claims shall be used to return the funds contributed to the Litigation Recovery Fund, with the SPV receiving 80% of such returned funds and the Creditor Recovery Pool receiving 20%.</p> |
| <p><b>Creditor Recovery Pool:</b></p>  | <p>The First Creditor General Asset Recovery, the Second Creditor General Asset Recovery, and the Creditor Litigation Claim Recovery represent a gift from the SPV and will be combined (the "<u>Creditor Recovery Pool</u>") and distributed <i>pro rata</i> to the Debtors' creditors (collectively, the "<u>Creditors</u>") under the Chapter 11 Plan (defined below) according to the priority scheme of the Bankruptcy Code.</p> <p>No Creditor will receive a distribution from the Assets in excess of its <i>pro rata</i> distribution from the Creditor Recovery Pool.</p> <p>For the avoidance of doubt, ACAS, NBPCo and the SPV will not receive any distribution from the Creditor Recovery Pool, except as provided for regarding the NBPCo Litigation Claim Recovery.</p>  |
| <p><b>Cash Collateral:</b></p>         | <p>The Second Lien Agent will consent to use of its cash collateral in accordance with (i) a budget approved by the Second Lien Agent in its sole discretion (the "<u>Budget</u>") and (ii) a cash collateral order approved by the Bankruptcy Court, the form of which is acceptable to the Second Lien Agent in its sole discretion (the "<u>Cash Collateral Order</u>"). The Cash Collateral Order and Budget will provide for professional fees after July 23, 2012, in budgeted amounts and for the payment the Debtors' legitimate unpaid post-petition trade payables (currently estimated at \$750,000 to \$1,000,000).</p>  |
| <p><b>Professional Fee Escrow:</b></p> | <p>Under the Cash Collateral Order, the Second Lien Agent agrees</p>   |

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|                                   | <p>to use \$2,313,653.50 of the Net Proceeds<sup>2</sup> to fund an escrow account for the payment of unpaid professional fees incurred by the Debtors and the Creditors Committee accruing on or before July 31, 2012 (the “<u>Unpaid Professional Fees</u>”). In particular, \$1,763,884.26 of the Net Proceeds will be escrowed for the payment of the Unpaid Professional Fees accrued by the Debtors and \$549,769.24 of the Net Proceeds will be escrowed for the payment of the Unpaid Professional Fees accrued by the Committee.</p> <p>All rights are reserved with respect to the allowance of any and all professional fees, including, but not limited to, the Unpaid Professional Fees.</p>   |
| <p><b>Release and Waiver:</b></p> | <p>On the Effective Date, the Debtors, each of their respective bankruptcy estates and the Committee, on behalf of themselves, their parents, subsidiaries and affiliates, and each of their respective directors, managing directors, officers, trusts, trustees, members, attorneys, consultants, other professionals, partners, associates, principals, divisions, employers, employees, insurers, agents, representatives, consultants, guarantors, indemnitors, indemnitees, sureties, heirs, assigns, and successors (collectively, the “<u>Releasing Parties</u>”) will irrevocably and unconditionally waive, release and discharge with prejudice Yucaipa, BPI, NBPCo, the SPV, the First Lien Agent, the Second Lien Agent and the Second Lien Lenders (other than ACAS) and their parents, subsidiaries and affiliates, and each of their respective directors, managing directors, officers, trusts, trustees, members, attorneys, consultants, other professionals, partners, associates, principals, divisions, employers, employees, insurers, agents, representatives, consultants, guarantors, indemnitors, indemnitees, sureties, heirs, assigns, and successors (collectively, the “<u>Released Parties</u>”) from any and all claims, liens, causes of action or suits at law or in equity (including, but not limited to, any and all causes of action arising under sections 502(d), 544, 545, 547, 548, 550 and 553 of the Bankruptcy Code) damages, liabilities, demands, grievances, losses and costs (including costs of suit and attorneys’ fees and expenses), existing or contingent, known or unknown, and whether arising by statute, common</p> |

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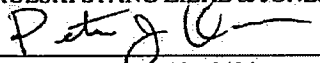
The term “Net Proceeds” is used as defined in the *Order, Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code, Authorizing (I) The Sale of Substantially All of the Debtors’ Assets Related to Their Texas Facility, Free and Clear of Liens, Claims, Interests and Encumbrances, (II) Approving Asset Purchase Agreement, (III) Authorizing and Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith and (IV) Granting Related Relief* [D.I. 463]; and the *Order, Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code, Authorizing (I) The Sale of Substantially All of the Debtors’ Assets Related to Their Pennsylvania Facility, Free and Clear of Liens, Interests and Encumbrances, (II) Approving Asset Purchase Agreement and (III) Granting Related Relief* [D.I. 464].

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|   | <p>law or otherwise, of whatsoever kind or nature, that the Releasing Parties have or might have from the beginning of time to the effective date of the Chapter 11 Plan (defined below) in any way arising out of or related to the Debtors or the Debtors' chapter 11 cases. Any Creditor that receives a distribution from the Creditor Recovery Pool shall be deemed a Releasing Party. The Chapter 11 Plan shall include a provision under which all Creditors voting in favor of the Chapter 11 Plan are deemed to be Releasing Parties. ACAS, in its capacity as a Second Lien Lender or otherwise, shall not be a Released Party.</p> <p>The term "ACAS" means, collectively, American Capital, Ltd., its parents, subsidiaries and affiliates, and each of their respective directors, managing directors, officers, trusts, trustees, members, attorneys, consultants, other professionals, partners, associates, principals, divisions, employers, employees, insurers, agents, representatives, consultants, guarantors, indemnitors, indemnitees, sureties, heirs, assigns, and successors.</p>  |
| <p><b>Release and Waiver Between BPI and NBPCo and Yucaipa:</b></p> | <p>On the Effective Date, BPI and NBPCo on behalf of themselves, their parents, subsidiaries and affiliates, and each of their respective directors, managing directors, officers, trusts, trustees, members, attorneys, consultants, other professionals, partners, associates, principals, divisions, employers, employees, insurers, agents, representatives, consultants, guarantors, indemnitors, indemnitees, sureties, heirs, assigns, and successors (collectively, the "<u>BPI Releasing Parties</u>") will irrevocably and unconditionally waive, release and discharge with prejudice Yucaipa, the SPV and the Second Lien Agent and their parents, subsidiaries and affiliates, and each of their respective directors, managing directors, officers, trusts, trustees, members, attorneys, consultants, other professionals, partners, associates, principals, divisions, employers, employees, insurers, agents, representatives, consultants, guarantors, indemnitors, indemnitees, sureties, heirs, assigns, and successors (collectively, the "<u>Yucaipa Released Parties</u>") from any and all claims, liens, causes of action or suits at law or in equity, damages, liabilities, demands, grievances, losses and costs (including costs of suit and attorneys' fees and expenses), existing or contingent, known or unknown, and whether arising by statute, common law or otherwise, of whatsoever kind or nature, that the BPI Releasing Parties have or might have from the beginning of time to the effective date of the Chapter 11 Plan in any way arising out of or related to the SPV, the Second Lien Obligations, the Debtors or the Debtors' chapter 11 cases.</p> <p>On the Effective Date, Yucaipa, the SPV and the Second Lien Agent, on behalf of themselves, their parents, subsidiaries and affiliates, and each of their respective directors, managing</p> |

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|  | <p>directors, officers, trusts, trustees, members, attorneys, consultants, other professionals, partners, associates, principals, divisions, employers, employees, insurers, agents, representatives, consultants, guarantors, indemnitors, indemnitees, sureties, heirs, assigns, and successors (collectively, the "<u>Yucaipa Releasing Parties</u>") will irrevocably and unconditionally waive, release and discharge with prejudice BPI and NBPCo and their parents, subsidiaries and affiliates, and each of their respective directors, managing directors, officers, trusts, trustees, members, attorneys, consultants, other professionals, partners, associates, principals, divisions, employers, employees, insurers, agents, representatives, consultants, guarantors, indemnitors, indemnitees, sureties, heirs, assigns, and successors (collectively, the "<u>BPI Released Parties</u>") from any and all claims, liens, causes of action or suits at law or in equity, damages, liabilities, demands, grievances, losses and costs (including costs of suit and attorneys' fees and expenses), existing or contingent, known or unknown, and whether arising by statute, common law or otherwise, of whatsoever kind or nature, that the Yucaipa Releasing Parties have or might have from the beginning of time to the effective date of the Chapter 11 Plan in any way arising out of or related to the SPV, the Second Lien Obligations, the Debtors or the Debtors' chapter 11 cases.</p> |
| <b>Release of Certain Causes of Actions:</b> | On the Effective Date, the Debtors and their bankruptcy estates will be deemed to have released and waived all preference actions under section 547 of the Bankruptcy Code.   |
| <b>Conditions to Effective Date:</b>         | The Effective Date shall not occur unless and until the adversary proceeding captioned <i>Nadia Sanchez, on behalf of herself and all others similarly situated, v. AFA Foods, Inc., AFA Investment, Inc., and Yucaipa Corporate Initiatives Fund II, LLC</i> , 12-50710 (MFW) (Bankr. D. Del.) (the " <u>Sanchez Action</u> ") is resolved in a manner that is consistent with the Release and Waiver provisions set forth above. The foregoing condition to the Effective Date may be waived only by Yucaipa, which it may do in its sole discretion. In connection with a resolution of the Sanchez Action, any and all terms of this Term Sheet or any settlement agreement based on this Term Sheet may be modified with the agreement of the SPV, BPI/NBPCo and the Committee.  |
| <b>Chapter 11 Plan:</b>                      | The Parties to this Global Settlement will take all reasonably feasible actions to pursue expeditiously the confirmation and consummation of a chapter 11 plan of liquidation (the " <u>Chapter 11 Plan</u> ") that is consistent with the terms of this Global Settlement.   |

Dated: September 17, 2012

PACHULSKI STANG ZIEHL & JONES LLP



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*Counsel for the Debtors and Debtors in Possession*

Dated: September \_\_\_\_, 2012

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*Counsel for Beef Products, Inc., and NBPCo*

Dated: September \_\_\_\_, 2012

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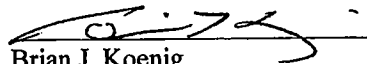
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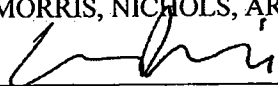
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Dated: September 12, 2012

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*Counsel for Yucaipa Corporate Initiatives Fund II, LLC, as Administrative Agent*

**EXHIBIT B**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

-----X  
: Chapter 11  
In re :  
: Case No. 12-11127 (MFW)  
AFA INVESTMENT INC., *et al.*,<sup>1</sup> :  
: Jointly Administered  
Debtors. :  
: **Hearing Date: October 11, 2012 at 11:30 a.m. (ET)**  
: **Objection Deadline: October 2, 2012 at 4:00 p.m. (ET)**  
-----X

**NOTICE OF JOINT MOTION SEEKING  
APPROVAL OF PROPOSED GLOBAL SETTLEMENT**

**PLEASE TAKE NOTICE OF THE FOLLOWING:**

**The Debtors**

On April 2, 2012, AFA Investment Inc. and its affiliated debtors in the above-captioned cases (collectively, the "Debtors") filed voluntary petitions under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). The Debtors are authorized to continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

**The Global Settlement**

On September 14, 2012, the Debtors, the Committee, the Term B Loan Lenders, the Second Lien Agent, Beef Products, Inc. and certain prepetition second lien lenders (collectively, the "Settlement Parties") filed a motion in the Bankruptcy Court (the "Settlement Motion"). Capitalized terms used but not defined herein have the meanings given to them in the Settlement Motion.

Pursuant to section 105(a) of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Settlement Motion seeks approval of a settlement resolving substantially all of the key disputes remaining among the Settlement Parties in these chapter 11 cases (the "Global Settlement"). The Global Settlement provides for, among other things: (a) agreements as to the validity of certain first and second lien secured debt; (b) the establishment of a Creditor Recovery Pool as a gift from certain secured creditors to provide a source of recoveries to certain of the Debtors' creditors according to the priority scheme of the Bankruptcy Code; (c) releases of certain claims by the Debtors, their estates and the Committee against certain of the secured lenders and related parties,

<sup>1</sup> The Debtors are the following nine entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): AFA Investment Inc. (0331); American Foodservice Corporation (1780); American Fresh Foods, Inc. (7389); American Fresh Foods, L.P. (7302); AFA Foods, Inc. (0429); American Fresh Foods, LLC (7301); Fairbank Reconstruction Corporation (2405); American Foodservice Investment Company, LLC (9525); and United Food Group LLC (7584). The address of each of the Debtors is 860 First Avenue, Suite 9A, King of Prussia, Pennsylvania 19406.

as well as other releases among the settlement parties; and (d) the waiver and release by the Debtors and their estates of all potential preference actions under section 547 of the Bankruptcy Code.

*The foregoing is only a brief summary of certain terms of the Global Settlement and is qualified in all respects by the terms of the Settlement Motion, the attachments thereto and the related settlement documents. A more complete description of the Global Settlement is contained in the Settlement Motion.*

#### **Obtaining Copies of Papers**

You may obtain further information regarding the Global Settlement, including a copy of the Settlement Motion and its attachments, free of charge by accessing the website maintained by the Debtors' claims and noticing agent, Kurtzman Carson Consultants, at <http://www.kccllc.net/afa> (the "**AFA Bankruptcy Website**"). Alternatively, you may obtain copies of these documents by sending a written request to the Debtors' counsel at: (a) Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, P.O. Box. 8705, Wilmington, Delaware 19899 (courier 19801), Fax No. (302) 652-4400 (Attn: Laura Davis Jones, Esq.); or (ii) Jones Day, 1420 Peachtree Street, N.E., Suite 800, Atlanta, Georgia 30309, Fax No. (404) 581-8330 (Attn: Jeffrey B. Ellman, Esq. and Brett J. Berlin, Esq.). Please note that the AFA Bankruptcy Website is updated regularly and provides access to all pleadings in the Debtors' bankruptcy cases.

#### **Notice of Hearing and Objection Deadline**

A hearing to approve the Settlement Motion is scheduled to be conducted on **October 11, 2012 at 11:30 a.m., Eastern Time**, at the United States Bankruptcy Court for the District of Delaware, 824 North Market Street, Wilmington, Delaware 19801, or as soon thereafter as counsel may be heard. The hearing may be adjourned, from time to time, without further notice to creditors or parties in interest other than by announcement of the adjournment in open court or on the Bankruptcy Court's calendar.

To be timely and otherwise eligible for consideration by the Bankruptcy Court, objections to the Settlement Motion must: (a) be in writing; (b) state the basis of such objection with specificity; (c) conform to the Bankruptcy Rules and the Local Rules; and (d) be filed with the Bankruptcy Court by, and served so as to be received by the following parties by, no later than **4:00 p.m., Eastern Time, on October 2, 2012**: (i) counsel to the Debtors, (A) Jones Day, 555 California Street, 26th Floor, San Francisco, California 94104 (Attn: Tobias S. Keller, Esq.), (B) Jones Day, 1420 Peachtree Street, N.E., Suite 800, Atlanta, Georgia 30309 (Attn: Jeffrey B. Ellman, Esq. and Brett J. Berlin, Esq.) and (C) Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, Wilmington, Delaware 19899 (courier 19801) (Attn: Laura Davis Jones, Esq.); (ii) counsel to the DIP Agent and the First Lien Agent, (A) Sidley Austin LLP, 555 West Fifth Street, 40th Floor, Los Angeles, California, 90013 (Attn: Jennifer C. Hagle, Esq.) and (B) Richards, Layton & Finger, P.A., One Rodney Square, 920 North King Street, Wilmington, Delaware 19801 (Attn: Mark D. Collins, Esq.); (iii) counsel to the Second Lien Agent, (A) Munger, Tolles & Olson LLP, 355 South Grand Avenue, Los Angeles, California 90071 (Attn: Thomas B. Walper, Esq.) and (B) Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 18th Floor, P.O. Box 1347, Wilmington, Delaware 19899 (courier 19801) (Attn: Robert J. Dehney, Esq.); (iv) counsel to the Committee, (A) McDonald Hopkins LLC, 600 Superior Avenue, East Suite 2100, Cleveland, Ohio 44114 (Attn: Scott N. Opincar, Esq. and Sean D. Malloy, Esq.) and (B) Potter Anderson Corroon LLP, 1313 N. Market Street, 6th Floor, P.O. Box 951, Wilmington, Delaware 19899 0951 (courier 19801) (Attn: Jeremy W. Ryan, Esq.); and (v) the Office of the United States Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801 (Attn: Mark Kenney, Esq.).

Dated: September 18, 2012

**EXHIBIT C**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

-----X  
:
  
In re : Chapter 11
  
:
  
AFA INVESTMENT INC., *et al.*,<sup>1</sup> : Case No. 12-11127 (MFW)
  
:
  
Debtors. : Jointly Administered
  
:
  
: Re: Docket No. \_\_
  
-----X

**ORDER APPROVING GLOBAL SETTLEMENT**

This matter coming before the Court on: (a) the Joint Motion of (A) Debtors, (B) Official Committee of Unsecured Creditors, (C) Term B Loan Lenders, (D) Second Lien Agent, (E) Beef Products, Inc. and (F) Certain Prepetition Second Lien Lenders Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019 for an Order Authorizing Global Settlement (Docket No. \_\_) (the "Motion")<sup>2</sup> and (b) Notice of Filing of Settlement Stipulation with Respect to Global Settlement (Docket No. \_\_) (the "Settlement Agreement Notice"), both filed by the Settlement Parties; the Court having reviewed the Motion and the settlement stipulation attached as Exhibit A to the Settlement Agreement Notice (the "Settlement Agreement") and having considered the statements of counsel and the evidence adduced with respect to the Motion and Settlement Agreement at a hearing before the Court (the "Hearing"); the Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C.

<sup>1</sup> The Debtors are the following nine entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): AFA Investment Inc. (0331); American Foodservice Corporation (1780); American Fresh Foods, Inc. (7389); American Fresh Foods, L.P. (7302); AFA Foods, Inc. (0429); American Fresh Foods, LLC (7301); Fairbank Reconstruction Corporation (2405); American Foodservice Investment Company, LLC (9525); and United Food Group LLC (7584). The address of each of the Debtors is 860 First Avenue, Suite 9A, King of Prussia, Pennsylvania 19406.

<sup>2</sup> Capitalized terms not otherwise defined herein have the meanings given to them in the Motion.

§§ 157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (c) notice of the Motion and the Hearing was sufficient under the circumstances and in full compliance with Bankruptcy Rule 2002 and the Local Rules of this Court, (d) the Global Settlement (i) is the product of good faith, arms' length negotiations among the Settlement Parties, without collusion, (ii) is fair, reasonable, appropriate and in the best interests of the Debtors' estates and (iii) represents a sound exercise of the Debtors' business judgment and (e) the Settlement Agreement is supported by proper and sufficient consideration provided by each of the Settlement Parties; and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.
2. The Global Settlement is APPROVED, pursuant to Bankruptcy Rule 9019.
3. The Debtors are authorized to enter into the Settlement Agreement and are further authorized to execute any documents, and take any additional steps necessary to implement the provisions and requirements of the Settlement Agreement.
4. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, enforcement or interpretation of this Order.

Dated: \_\_\_\_\_, 2012  
Wilmington, Delaware

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE



**EXHIBIT B**

**[Revised Term Sheet]**

**AFA INVESTMENT, INC., ET AL.****TERMS AND CONDITIONS OF THE GLOBAL SETTLEMENT AMONG THE DEBTORS, THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS, YUCAIPA CORPORATE INITIATIVES FUND II, L.P., YUCAIPA CORPORATE INITIATIVES (PARALLEL) FUND II, L.P., YCIF II SECOND LIEN HOLDINGS LLC, YUCAIPA CORPORATE INITIATIVES FUND II, LLC, AS ADMINISTRATIVE AGENT, BEEF PRODUCTS, INC., NBPCO HOLDINGS, LLC, AMERICAN CAPITAL, LTD. AND THE WARN CLASS REPRESENTATIVE**

|                         |   |
|-------------------------|---|
| <b>Parties:</b>         | The Debtors, the Committee, Yucaipa, the Second Lien Agent, the SPV, BPI, NBPCo, ACAS and the WARN Class Representative (all as defined below) (collectively, the “ <u>Parties</u> ”).  |
| <b>Effective Date:</b>  | The global settlement described in this term sheet (the “ <u>Global Settlement</u> ”) will be effective upon the last to occur of entry of: (a) a final, non-appealable order by the Bankruptcy Court (the “ <u>Global Settlement Order</u> ”) approving (i) this term sheet (the “ <u>Term Sheet</u> ”) under Federal Bankruptcy Rule 9019 and (ii) the Third Amendment (as defined below); and (b) a final, non-appealable order approving the Stipulation Re: Settlement of Class Action <sup>1</sup> on a final basis (the “ <u>Effective Date</u> ”). The Parties agree to use their best efforts to seek entry of such orders by filing motions for such approvals within five business days of the parties’ mutual execution hereof. |
| <b>The First Liens:</b> | While the Parties seek approval of this Global Settlement, the deadline to bring a Challenge (as defined in the Final DIP Order) <sup>2</sup> shall be deemed to be extended until the earliest of: (a) the Effective Date; (b) two business days after the entry of any order denying approval of the Global Settlement; or (c) two business days after entry of any order denying with prejudice approval of the Stipulation Re: Settlement of Class Action on a preliminary basis (such earliest date, the “ <u>Extended Challenge Deadline</u> ”). Unless and until an order is entered denying the approval of the Global Settlement, the withdrawal of a motion to seek approval of the Global Settlement, or an order is entered     |

<sup>1</sup> The Stipulation Re: Settlement of Class Action will be submitted in, and to resolve, the claims asserted or that could have been asserted in the adversary proceeding captioned *Nadia Sanchez, on behalf of herself and all others similarly situated v. AFA Foods, Inc., AFA Investment, Inc. and Yucaipa Corporate Initiatives Fund II, LLC*, Adv. Pro. No. 12-50710 (MFW) (Bankr. D. Del. 2012) (the “WARN Action”). The parties to the Stipulation Re: Settlement of Class Action are Debtors AFA Investment, Inc. and AFA Foods, Inc.; Yucaipa Corporate Initiatives Fund II, LLC; and Nadia Sanchez, by and through her attorneys, as class representative for the plaintiffs in the WARN Action (the “WARN Class Representative”).

<sup>2</sup> The Final DIP Order is the *Final Order (i) Authorizing the Debtors to (a) Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 363(c), 363(e), 364(c), 364(d)(1) and 364(e) and (b) Utilize Cash Collateral of Prepetition Secured Entities, (ii) Granting Adequate Protection to Prepetition Secured Entities, and (iii) Granting Related Relief* [D.I. 199].

|  |  |
|--|--|
|  | <p>denying with prejudice approval on a preliminary basis of the Stipulation Re: Settlement of Class Action, no such Challenge shall be brought, and the right to make a Challenge shall expire on the Extended Challenge Deadline.</p> <p>On the Effective Date, AFA Investment, Inc., and its affiliated debtors and debtors in possession (collectively, the “<u>Debtors</u>”) and the Official Committee of Unsecured Creditors (the “<u>Committee</u>”) stipulate and agree for all purposes that: (i) Yucaipa Corporate Initiatives Fund II, L.P. and Yucaipa Corporate Initiatives (Parallel) Fund II, L.P., as the sole remaining first lien lenders and as assignees of General Electric Capital Corporation, in its former capacity as administrative agent for the first lien lenders, pursuant to the terms of the first lien credit agreement (including any successor thereto or appointee thereof as administrative agent for the first lien lenders, collectively, the “<u>First Lien Agent</u>”) hold prepetition and/or postpetition first liens and claims that are valid, perfected, enforceable and unavoidable with respect to and in all the Debtors’ assets of any kind, including, but not limited to, the Debtors’ cash (including, but not limited to, all cash received from the sale of the Debtors’ assets), the Litigation Claims (as defined below), the Miscellaneous Assets (as defined below) and the proceeds from all such assets other than the Avoidance Actions and Avoidance Action proceeds (each as defined in the Final DIP Order) (collectively, the “<u>Assets</u>”)<sup>3</sup>; and (ii) the Debtors were indebted to Yucaipa Corporate Initiatives Fund II, L.P. and Yucaipa Corporate Initiatives (Parallel) Fund II, L.P. (together with their general partner, Yucaipa Corporate Initiatives Fund II, LLC, “<u>Yucaipa</u>”) without defense, counterclaim, offset or challenge of any kind in the aggregate principal amount of \$1,400,000, plus accrued interest, on account of the Term B Loans (the “<u>Term B Loan Claim</u>”). The Term B Loan Claim is deemed allowed for all purposes in an amount no less than \$1,400,000, plus accrued interest through the date it was paid. Yucaipa has received payment on the Term B Loan Claim.</p> |
| <p><b>Liens and Claims of the Second Lien Agent:</b></p> | <p>The deadline to bring a Second Lien Challenge (as defined in the Final DIP Order) shall be deemed to be extended until the Extended Challenge Deadline while the Parties seek approval of this Global Settlement. Unless and until an order is entered denying the approval of the Global Settlement, the withdrawal of a motion to seek approval of the Global Settlement, or an order is entered denying with prejudice approval on a</p>   |

<sup>3</sup>

Pursuant to the Final DIP Order, the First Lien Agent was also granted a Prepetition Superpriority Claim (as defined in the Final DIP Order) in, among other things, the Avoidance Action Proceeds, but not a lien on Avoidance Action Proceeds. When addressing liens under this “The First Liens” section of the Term Sheet, the term “Assets” does not include the Avoidance Actions or the Avoidance Action Proceeds.

|                                     |  |
|-------------------------------------|--|
|                                     | <p>preliminary basis of the Stipulation Re: Settlement of Class Action, no such Challenge shall be brought, and the right to make a Second Lien Challenge shall expire on the Extended Challenge Deadline.</p> <p>On the Effective Date, the Debtors and the Committee stipulate and agree for all purposes that: (i) Yucaipa Corporate Initiatives Fund II, LLC, as administrative agent (the “<u>Second Lien Agent</u>”) holds prepetition and/or postpetition second liens that are valid, perfected, enforceable and unavoidable with respect to and in all the Assets; (ii) the Debtors are indebted to the Second Lien Agent, without defense, counterclaim, offset or challenge of any kind in the aggregate principal amount of not less than \$71,595,210 on account of the Second Lien Obligations (as defined in the Final DIP Order); (iii) the liens and claims of the Second Lien Agent, granted under the Second Lien Documents, the Final DIP Order, the Cash Collateral Order (as defined below), or otherwise, (collectively, the “<u>Second Lien Claim</u>”), have a value in excess of the value of the Assets, and therefore apply and attach to all Assets; and (iv) the Adequate Protection Liens (as defined in the Cash Collateral Order (defined below)) and the Adequate Protection Claims (as defined in the Cash Collateral Order) are liquidated and allowed in the amount of \$2,250,000 (the “<u>Allowed Adequate Protection Claim</u>”). The Allowed Adequate Protection Claim shall be satisfied solely from the first \$2,250,000 in net recoveries on account of the Avoidance Actions (defined below), as described below. The Second Lien Claim is deemed allowed for all purposes in an amount no less than \$71,595,210. Notwithstanding the foregoing sentence, the Second Lien Note held by American Capital, Ltd. (“<u>ACAS</u>”), dated February 9, 2010 (the “<u>ACAS Second Lien Note</u>”), is deemed an allowed secured claim for all purposes in the amount of \$3,100,000, which claim is part of the \$71,595,210 in Second Lien Obligations.</p> |
| <p><b>Miscellaneous Assets:</b></p> | <p>The term “Miscellaneous Assets” means, collectively: (i) money in the possession of any Debtor as of the Petition Date; (ii) cash retainers held as of the Petition Date by any professional retained by any of the Debtors’ in these chapter 11 cases to the extent not applied to pay fees and expenses as approved by an order of the Bankruptcy Court; (iii) any and all shares of stock of Churchill Casualty Ltd., an offshore insurance company located in the Cayman Islands, owned by American Foodservice Corporation or any other Debtor; (iv) any and all automobiles, trucks, trailers, lifts or other vehicles owned by any of the Debtors; and (v) any sale proceeds in excess of \$2.3 million generated from the sale of American Foodservice Corporation’s real property located in Montgomery County, Pennsylvania.</p>  |

|   |   |       |   |       |          |             |          |
|---|---|-------|---|-------|----------|-------------|----------|
|   |   |       |   |       |          |             |          |
| <p><b>Recovery on the General Assets:</b></p> | <p>The following applies to all Assets, including, but not limited to, the Miscellaneous Assets, but shall not apply to the Litigation Claims or the Avoidance Actions (collectively, the “<u>General Assets</u>”): The Debtors will make the payments authorized by the Cash Collateral Order and the Budget (defined below), including the payment of reasonable fees and expenses of the Second Lien Agent. The Debtors, the Committee, and the Second Lien Agent will agree on a reasonable reserve for amounts in the Budget for the period after the Effective Date (the “<u>Reserve</u>”), which will be set aside from the General Assets, and which in no event shall be of an amount that could impair the ability of the Debtors’ estates to pay all amounts payable to ACAS as and when provided for herein and on the terms set forth in the Third Amendment (as defined below). The Litigation Recovery Fund (as defined below) is included as part of the Reserve. The Second Lien Agent, Yucaipa, and the SPV shall not have any obligation to fund any amounts beyond the Second Lien Agent’s portion of the Reserve. The Creditor Recovery Pool shall not have any obligation to fund any amounts beyond the Creditor Recovery Pool’s portion of the Reserve. Notwithstanding the foregoing, in no event shall the payments authorized by the Cash Collateral Order, the Budget, and the Reserve, be of an amount that, individually or in the aggregate, could impair the ability of the Debtors’ estates to pay all amounts payable to ACAS as and when provided for herein and on the terms set forth in the Third Amendment. Recoveries of \$3,100,000 received from the General Assets will be applied to payment of the ACAS Second Lien Note, on the terms set forth in that certain Third Amendment to Credit Agreement, dated as of [_____], 2013 (the “<u>Third Amendment</u>”), in full and final satisfaction of the ACAS Second Lien Note and all claims that ACAS or any ACAS Lender (as defined in Second Lien Credit Agreement) may have against the Debtors, including any claim based on the ACAS Offset Note dated February 9, 2010. For the avoidance of doubt, and notwithstanding anything to the contrary herein, such payment shall be paid, without offset or deduction of any sort, as follows:</p> <p>(1) on the second business day following the Effective Date, the Debtors’ estates shall pay to ACAS the amount of Two Million Four Hundred Thousand Dollars (\$2,400,000), by wire transfer of immediately available funds to the account of ACAS set forth below:</p> <table border="1" data-bbox="727 1745 1385 1881"> <tr> <td>Bank:</td> <td>The Bank of New York Mellon, Brooklyn, NY</td> </tr> <tr> <td>ABA#:</td> <td>21000018</td> </tr> <tr> <td>SWIFT Code:</td> <td>IRVTUS3N</td> </tr> </table> | Bank: | The Bank of New York Mellon, Brooklyn, NY | ABA#: | 21000018 | SWIFT Code: | IRVTUS3N |
| Bank:   | The Bank of New York Mellon, Brooklyn, NY   |       |   |       |          |             |          |
| ABA#:   | 21000018  |       |   |       |          |             |          |
| SWIFT Code:                                   | IRVTUS3N  |       |   |       |          |             |          |

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|---------------|-----------------------|
| Account Name: | American Capital Ltd. |
| Account #:    | 8900700815            |
| Reference:    | AFA                   |

(2) on the first date on which the Debtors make a payment to the SPV (or any transferee, successor or assign of the SPV), pursuant to the terms of the Global Settlement Order (such date, the “Initial SPV Distribution Date”), the Debtors’ estates shall pay to ACAS the amount of Three Hundred Fifty Thousand Dollars (\$350,000), by wire transfer of immediately available funds to the account of ACAS set forth above in clause (1); and

(3) on the Initial SPV Distribution Date, the Debtors’ estates shall also pay directly to Yucaipa on behalf of ACAS, the amount of Three Hundred Fifty Thousand Dollars (\$350,000), by wire transfer of immediately available funds to the account of Yucaipa set forth below:

**[insert Yucaipa wire transfer instructions].**

As of and following the payment to ACAS of the amounts contemplated in clauses (1) and (2) above, and the payment to Yucaipa of the amount contemplated in clause (3) above, (such amounts totaling \$3,100,000 in the aggregate), (A) the ACAS Lenders Claim shall be deemed fully and finally satisfied and extinguished, and (B) neither ACAS nor any ACAS Lender shall have any additional or further claims against the Debtors or their estates, or against any other party to the Third Amendment (including the Second Lien Agent), and, similarly, no such party shall have any claim against ACAS or any ACAS Lender, related to assets of the Debtors or to the Credit Agreement, the Second Lien Obligations or the Loan Documents, nor shall ACAS or any ACAS Lender be, or be deemed to be, a Lender under or other party to the Credit Agreement or any other Loan Document, and all of the rights and obligations of ACAS and any other ACAS Lender under the Credit Agreement and the Loan Documents shall be deemed terminated and replaced in their entirety with the rights and obligations of ACAS set forth in the Term Sheet, the Global Settlement Order, and the Third Amendment. For the avoidance of doubt, as of the Effective Date, the rights of ACAS and any ACAS Lender to receive payments or any other amounts from the Debtors or their estates, or from any other Party to the Third Amendment (including the Second Lien Agent), or from any affiliate, transferee, successor or assign thereof, from or related to assets of the Debtors, shall be limited

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|  | <p>to the rights to the payments to ACAS set forth in clauses (1) and (2) above. Nothing in this paragraph shall limit any rights of ACAS to enforce the provisions of and obligations under the Third Amendment, the Global Settlement Order, or the Term Sheet, including without limitation ACAS's right to receive payments specified in clauses (1) and (2) above.</p> <p>The remainder of all recoveries received from the General Assets will be paid to the SPV (defined below) and distributed immediately according to the following waterfall.</p> <p>The first \$14,000,000 of recoveries received from the General Assets by YCIF II Second Lien Holdings LLC (the "<u>SPV</u>") will be divided as follows: (i) 80% to be paid over to NBPCo Holdings, LLC ("<u>NBPCo</u>") (such 80% amount, the "<u>NBPCo General Asset Recovery</u>"); and (ii) 20% to be gifted from the SPV to the Creditor Recovery Pool (defined below) (such 20% amount, the "<u>First Creditor General Asset Recovery</u>").</p> <p>Second, any and all recoveries received from the General Assets by the SPV above \$14,000,000 will be divided as follows: (i) 90% to be paid over to Yucaipa; and (ii) 10% to be gifted from the SPV to the Creditor Recovery Pool (such 10% amount the "<u>Second Creditor General Asset Recovery</u>").</p> <p>NBPCo agrees that its recovery from the General Assets on account of the NBPCo General Asset Recovery, the Second Lien Claim or otherwise is capped at \$11,200,000. NBPCo is also entitled to the NBPCo Litigation Claim Recovery, the Additional NBPCo Litigation Claim Recovery and, as set out below, certain recoveries from the Avoidance Actions, which are not subject to the \$11,200,000 cap.</p> |
| <p><b>Recovery on the Litigation Claims:</b></p> | <p>Except with respect to the return of funds contributed to the Litigation Recovery Fund (defined below), the following applies to any and all recoveries the Debtors may become entitled to on account of the litigation claims involving Cargill and GOPAC (collectively, the "<u>Litigation Claims</u>"). For the avoidance of doubt, the Litigation Claims do not include the Avoidance Actions.</p> <p>Any and all recoveries received from the Litigation Claims by the Debtors will be paid over to the SPV and divided immediately as follows: (i) 50% to be paid over to Yucaipa; <u>provided, however,</u> any recovery received by Yucaipa between \$2,000,000 and \$4,000,000 will be divided 50%-50% between Yucaipa and NBPCo until NBPCo receives \$1,000,000 (the "<u>Additional NBPCo Litigation Claim Recovery</u>"); and (ii) 50% to be gifted from the SPV to the Creditor Recovery Pool (the "<u>Creditor Litigation Claim Recovery</u>"), <u>provided, however,</u> the</p>  |

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|                                       | <p>first \$2,000,000 in Creditor Litigation Claim Recovery will be divided 50%-50% between NBPCo and the Creditor Recovery Pool until NBPCo receives \$1,000,000 (the “<u>NBPCo Litigation Claim Recovery</u>”).</p> <p>The funds necessary to monetize the Litigation Claims shall be funded as follows: (i) an initial fund of \$250,000 (the “<u>Litigation Recovery Fund</u>”) shall be established from recoveries received from the General Assets by the SPV and the Creditor Recovery Pool, with the SPV contributing 80% and the Creditor Recovery Pool contributing 20%; and (ii) if the SPV and the entity responsible for administering the Creditor Recovery Pool determine that additional funds must be contributed to the Litigation Recovery Fund in order to monetize the Litigation Claims, the SPV will contribute 80% of such funds and the Creditor Recovery Pool will contribute 20%. The first dollars of any recovery received from the Litigation Claims shall be used to return the funds contributed to the Litigation Recovery Fund, with the SPV receiving 80% of such returned funds and the Creditor Recovery Pool receiving 20%.</p>   |
| <p><b>Creditor Recovery Pool:</b></p> | <p>The First Creditor General Asset Recovery, the Second Creditor General Asset Recovery, and the Creditor Litigation Claim Recovery represent a gift from the SPV and/or Yucaipa in consideration of the Committee’s agreement to be bound to the provisions of the Term Sheet and will be combined along with the Creditor Avoidance Action Recovery (as defined below) into a fund (the “<u>Creditor Recovery Pool</u>”) and distributed to the Debtors’ creditors that are not Parties to this Term Sheet, (collectively, the “<u>Creditors</u>”) consistent with the Bankruptcy Code and any further orders of the Bankruptcy Court. For the avoidance of doubt, the members of the Creditors Committee in their individual capacities as creditors of the Debtors are Creditors.</p> <p>No Creditor will receive a distribution from the Assets in excess of its appropriate share of the Creditor Recovery Pool.</p> <p>For the avoidance of doubt, Yucaipa, the Second Lien Agent, the SPV, BPI, NBPCo, ACAS, the WARN Class Representative, and any party asserting a claim against the Debtors under or related to the Federal Worker Adjustment and Retraining Notification Act or similar claims under state laws, including members of the WARN class, will not receive any distribution from the Creditor Recovery Pool, except as provided for regarding the NBPCo Litigation Claim Recovery, and nothing in this “<u>Creditor Recovery Pool</u>” section of this Term Sheet shall impair or otherwise affect the recovery Yucaipa, the Second Lien Agent, the SPV, BPI, NBPCo, ACAS and the WARN Class Representative are entitled to receive</p> |



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|                            | <p>pursuant to other provisions of this Term Sheet and the Third Amendment.</p> <p>The Creditor Recovery Pool will be structured and managed in a manner chosen by the Committee, subject to approval by the Debtors, which approval shall not be unreasonably withheld.</p>  |
| <b>Cash Collateral:</b>    | <p>The Second Lien Agent will consent to use of its cash collateral in accordance with (i) a budget approved by the Second Lien Agent in its sole discretion (the "<u>Budget</u>") and (ii) a final cash collateral order approved by the Bankruptcy Court, the form of which is acceptable to the Second Lien Agent in its sole discretion (the "<u>Cash Collateral Order</u>"). The term Cash Collateral Order includes the <i>Interim Order (i) Authorizing the Debtors to Use Cash Collateral of the Second Lien Secured Parties and (ii) Providing Adequate Protection to the Second Lien Secured Parties</i> [D.I. 662].</p>  |
| <b>Release and Waiver:</b> | <p>On the Effective Date, the Debtors, each of their respective bankruptcy estates and the Committee, on behalf of themselves, their parents, subsidiaries and affiliates, and, in their capacity as such, each of their respective directors, managing directors, officers, trusts, trustees, members, attorneys, consultants, other professionals, partners, associates, principals, divisions, employers, employees, insurers, agents, representatives, consultants, guarantors, indemnitors, indemnitees, sureties, heirs, assigns, successors, and any person claiming, or who could claim, by, through, or on behalf of any of them (collectively, the "<u>Releasing Parties</u>") will, and as of the Effective Date, hereby do irrevocably and unconditionally waive, release and discharge with prejudice Yucaipa, ACAS, all ACAS Lenders, Beef Products, Inc. ("<u>BPI</u>"), NBPCo, the SPV, the First Lien Agent, the Second Lien Agent and the Second Lien Lenders and their parents, subsidiaries and affiliates, and each of their respective directors, managing directors, officers, trusts, trustees, members, attorneys, consultants, other professionals, partners, associates, principals, divisions, employers, employees, insurers, agents, representatives, consultants, guarantors, indemnitors, indemnitees, sureties, heirs, assigns, and successors (collectively, the "<u>Released Parties</u>") from any and all claims, liens, causes of action or suits at law or in equity (including, but not limited to, any and all causes of action arising under sections 502(d), 542, 543, 544, 545, 547, 548, 549, 550, 551, 552 and 553 of the Bankruptcy Code), damages, liabilities, demands, grievances, rights of setoff or recoupment, indemnification obligations, losses and costs (including costs of suit and attorneys' fees and expenses), existing or contingent, known or unknown, and whether arising by contract, statute, common law or otherwise, of whatsoever kind or nature, that the Releasing Parties have or might have</p> |

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|  | <p>from the beginning of time to the Effective Date, in any way arising out of or related to the Debtors or the Debtors' chapter 11 cases; <i>provided, however</i>, that the obligations under this Term Sheet, the Global Settlement Order, the Third Amendment and the Cash Collateral Order and claims for the enforcement thereof are not released hereby. Any Creditor that accepts a distribution from the Creditor Recovery Pool shall be deemed a Releasing Party. The Parties intend that this Term Sheet effectuate a mutual release, and on the Effective Date the Released Parties will irrevocably and unconditionally waive, release, and discharge with prejudice the Releasing Parties to the same extent that the Releasing Parties released the Released Parties; <i>provided, however</i>, that the obligations under this Term Sheet, the Global Settlement Order, the Third Amendment and the Cash Collateral Order and claims for the enforcement thereof are not released hereby.</p>  |
| <p><b>Release and Waiver Among BPI, NBPCo, ACAS and Yucaipa:</b></p> | <p>On the Effective Date, each of ACAS, all ACAS Lenders, BPI, NBPCo, the SPV, the SPV Members and the Agent, for and on behalf of itself and each of their respective parents, subsidiaries and affiliates (other than, for the avoidance of doubt, any Debtor), and each of their respective directors, managing directors, officers, trusts, trustees, members, attorneys, consultants, other professionals, partners, associates, principals, divisions, employers, employees, insurers, agents, representatives, consultants, guarantors, indemnitors, indemnitees, sureties, heirs, assigns, and successors (collectively, the "<u>Release Parties</u>", and each, a "<u>Release Party</u>"), does hereby irrevocably remise, release, and forever discharge each other Release Party, and each of their respective heirs, executors, administrators, trustees and personal representatives, of and from all, and all manner of, actions and causes of action, proceedings, orders, obligations, suits, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, claims, demands, and liabilities (whether liquidated, contingent, or otherwise) whatsoever, whether known or unknown, suspected or unsuspected, both at law or in equity (individually and collectively, a "<u>Claim</u>" or "<u>Claims</u>"), that any Release Party now has, has ever had or may hereafter have against any other Release Party, in each case in any way arising out of or related to the Credit Agreement, the Second Lien Obligations, the Loan Documents, the Debtors or the Debtors' chapter 11 cases. Nothing in this section shall release (i) any Release Party of its obligations under this Term Sheet, the Third Amendment or the Global Settlement Order, or (ii) any Debtor of any of its obligations under this Term Sheet, the Third Amendment, the Loan Documents, the Global Settlement Order, the Debtors' chapter 11 cases or otherwise. Unless defined in this Term Sheet or in this "Release and Waiver Among BPI, NBPCo, ACAS and Yucaipa" section of this Term Sheet, capitalized terms used in this section shall have the</p> |

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|  | meanings ascribed to them in the Third Amendment.   |
| <b>Prosecution of the Avoidance Actions:</b> | <p>On the Effective Date, a committee of three members (the "<u>Avoidance Action Committee</u>") shall be appointed to manage the prosecution of the Debtors' causes of action under sections 542, 543, 544, 545, 547, 548, 550, 551 and 553 of the Bankruptcy Code (collectively, the "<u>Avoidance Actions</u>"). Yucaipa, the WARN Class Representative and the Committee shall each appoint one member of the Avoidance Action Committee; <i>provided, however</i>, the member appointed by the Committee shall not have received a preferential transfer. All decisions of the Avoidance Action Committee shall be subject to a majority vote (unless specifically provided otherwise herein), with each member of the Avoidance Action Committee having equal voting power. The Court shall retain jurisdiction to resolve any dispute among the members of the Avoidance Action Committee.</p> <p>The Avoidance Actions shall be prosecuted on behalf of the Debtors' estates by ASK LLP on a contingency fee basis; <i>provided, however</i>, that ASK LLP's bid must be market as determined by the Avoidance Action Committee. ASK LLP will select its own Delaware counsel (ASK LLP and its Delaware counsel, the "<u>Avoidance Action Counsel</u>"), which selection shall be subject to (i) majority approval by the Avoidance Action Committee and (ii) confirmation that the proposed Delaware counsel is free from conflict; <i>provided, further</i>, that Delaware counsel's fees shall not exceed \$250/hour for counsel and \$150/hour for paraprofessionals.</p> <p>Upon selection of the Avoidance Action Counsel, the Avoidance Action Counsel (if not previously retained) shall file a retention application(s) with the Bankruptcy Court to serve as special counsel to the Debtors for the purposes of evaluating, prosecuting and/or settling the Avoidance Actions.</p> <p>The Avoidance Action Committee shall at all times act as the fiduciary to the Debtors' estates with respect to the Avoidance Actions and seek to maximize the return to creditors from such actions.</p> <p>The Debtors' financial advisor, FTI, will cooperate fully in the prosecution and settlement of the Avoidance Actions.</p> <p>The Avoidance Action Counsel initially shall only make demands and/or file complaints for the avoidance of transfers under section 547 of the Bankruptcy Code (and related section 550 claims); <i>provided, however</i>, any complaints filed by the Avoidance Action Counsel shall be without prejudice to subsequent amendments in order to include other Avoidance</p> |

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|  | <p>Actions prior to the section 546 statutory deadline.</p> <p>Avoidance Actions other than those under section 547 of the Bankruptcy Code (and related section 550 claims) will not be brought without majority approval of the Avoidance Action Committee and will not be brought prior to February 10, 2014, without unanimous approval of the Avoidance Action Committee.</p> <p>Each member of the Avoidance Action Committee will have standing in the Bankruptcy Court to object to any decision by the Avoidance Action Committee not to prosecute an Avoidance Action.</p> <p>Each member of the Avoidance Action Committee may independently request any information from Avoidance Action Counsel and/or FTI with a copy of such request and response being provided to other members of the Avoidance Action Committee.</p> <p>No section 547 demands or complaints will be settled unless and until the defendant and/or FTI shares information related to all transfers received by the defendant in the 2 years prior to the Petition Date.</p> <p>All settlements of Avoidance Actions are subject to (i) the majority approval of the Avoidance Action Committee and (ii) Court approval, and each member of the Avoidance Action Committee will have standing in the Bankruptcy Court to object to any proposed settlement of an Avoidance Action.</p> |
| <p><b>Recovery on Avoidance Actions:</b></p> | <p>Avoidance Action Counsel shall solely be compensated on a contingency basis and paid from the gross proceeds of the Avoidance Actions. After payment of fees and expenses of the Avoidance Action Counsel, the first \$1,650,000 of net recoveries received from the Avoidance Actions shall be paid to fund the maximum settlement amount in the WARN Action. This shall be the only source of funding for the settlement in the WARN Action, and neither the Debtors nor any other Party, including, but not limited to the Sanchez Released Parties (as defined in the Stipulation Re: Settlement of Class Action), shall have any obligation to separately fund the settlement.</p> <p>Once this payment is completed, or it is determined that only a partial payment will be possible and thus the maximum settlement amount will be lowered, the member of the Avoidance Action Committee appointed by WARN Class Representative shall resign from the Avoidance Action Committee.</p>   |

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|                               | <p>Any and all net recoveries received from the Avoidance Actions between \$1,650,001 and \$2,250,000 will be divided 50%-50% between Yucaipa and NBPCo. Such funds shall be paid to the Second Lien Agent for distribution to Yucaipa and NBPCo.</p> <p>Any and all net recoveries received from the Avoidance Actions above \$2,250,000 will be paid to the Creditor Recovery Pool; <i>provided, however</i>, following the payment of all claims asserted against the Debtors arising under section 503(b)(9) of the Bankruptcy Code, any and all net recoveries received from the Avoidance Actions above \$2,250,000 will be divided 50%-50% between Yucaipa and the Creditor Recovery Pool (the "<u>Creditor Avoidance Action Recovery</u>").</p> <p>In the event of any conflict between the Term Sheet and the Stipulation Re: Settlement of Class Action, the Term Sheet shall control in all respects.</p> |
| <p><b>Binding Effect:</b></p> | <p>The provisions of this Term Sheet, any order approving it, and any actions taken pursuant to the Term Sheet or any order approving the Term Sheet shall survive entry of any order that may be entered: (a) confirming any plan of reorganization or liquidation in the Debtors' cases; (b) converting any of the Debtors' cases to a case under chapter 7 of the Bankruptcy Code; (c) dismissing any of the Debtors' cases; (d) discharging any Debtor; or (e) pursuant to which the Bankruptcy Court abstains from hearing any of the Debtors' cases.</p>   |

Dated: \_\_\_\_\_, 2013

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Dated: \_\_\_\_\_, 2013

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Dated: \_\_\_\_\_, 2013

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*Co-Counsel for the Official Committee of Unsecured Creditors*

Dated: \_\_\_\_\_, 2013

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*Counsel for Yucaipa Corporate Initiatives Fund II, LLC, as Administrative Agent*

Dated: \_\_\_\_\_, 2013

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Dated: \_\_\_\_\_, 2013

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*Counsel to American Capital, Ltd.*

7043701

**EXHIBIT C**

**[WARN Settlement]**



**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

In re:

AFA INVESTMENT, INC., *et al.*

Debtors.

NADIA SANCHEZ, on behalf of herself and  
all others similarly situated,

Plaintiff,

-against-

AFA FOODS, INC., AFA INVESTMENT,  
INC., and YUCAIPA CORPORATE  
INITIATIVES FUND II, LLC,

Defendants.

Chapter 11

Case No. 12-11127 (MFW)

Jointly Administered

Adversary Proceeding No. 12-50710 (MFW)

**STIPULATION RE: SETTLEMENT OF CLASS ACTION**

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Investment, Inc. and AFA Foods,  
Inc.*

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*Counsel to Yucaipa Corporate  
Initiatives Fund II, LLC*

IT IS HEREBY STIPULATED AND AGREED by and between Plaintiff Nadia Sanchez (as Class Representative), on behalf of herself and the settlement class defined more fully below, on the one hand, and Defendants AFA Foods, Inc., AFA Investment, Inc. and Yucaipa Corporate Initiatives Fund II, LLC (collectively, “Defendants”), on the other hand, as set forth below:

**I. The Conditional Nature of This Stipulation.**

This Stipulation re: Settlement of Class Action, including all associated exhibits or attachments (this “Stipulation”) is made for the sole purpose of attempting to consummate settlement of the above-captioned adversary proceeding on a class-wide basis. This Stipulation and the settlement it evidences is made in compromise of disputed claims. Because this action was filed and is being settled as a class action, this settlement must receive preliminary and final approval from the Court. Accordingly, the Parties enter into this Stipulation and associated settlement on a conditional basis. In the event that the Court does not execute and enter the Order Granting Final Approval of Settlement, or in the event that the Court does not enter the Judgment, or in the event that the associated Judgment does not become Final for any reason, this Stipulation shall be deemed null and void *ab initio*, it shall be of no force or effect whatsoever, it shall not be referred to or utilized for any purpose whatsoever, and the negotiation, terms and entry of it shall remain subject to the provisions of Federal Rule of Evidence 408.

Defendants deny all of the claims as to liability, damages, penalties and restitution asserted in the WARN Action. Defendants have agreed to resolve this WARN Action via this Stipulation, but to the extent this Stipulation is not approved on a final basis, Defendants do not waive, but rather expressly reserve, all rights to challenge all such claims and allegations in the WARN Action upon all procedural and factual grounds, including without limitation the ability to oppose class certification on any grounds or to assert any and all defenses or privileges. The Class Representative and Class Counsel agree that Defendants retain and reserve these rights,

and agree not to take any position to the contrary, and the Defendants agree that the Class Representative and Class Counsel retain and reserve all rights, including the continued prosecution of the WARN Action.

## **II. The Parties to this Stipulation.**

This Stipulation is made and entered into by and among the following Settling Parties: (i) the Class Representative (on behalf of herself and each of the Settlement Class Members), with the assistance and approval of Class Counsel; (ii) AFA Foods, Inc. and AFA Investment, Inc. and their subsidiaries (collectively, the “Debtors”), with the assistance of their counsel of record in the WARN Action; and (iii) Yucaipa Corporate Initiatives Fund II, LLC (“Yucaipa”), with the assistance of its counsel of record in the WARN Action. The Stipulation is intended by the Settling Parties to result in the completion and termination of the WARN Action pursuant to the Judgment and to fully, finally and forever resolve, discharge and settle the Sanchez Released Claims upon and subject to the terms and conditions hereof.

## **III. The WARN Action.**

Class Representative Nadia Sanchez filed a complaint to initiate the WARN Action on May 10, 2012. Sanchez was employed by AFA Foods, Inc. at a meat-processing plant in Southern California until April 2, 2012. Sanchez is represented by The Rosner Law Group LLC and Outten and Golden LLP. On behalf of herself and others similarly situated to her, Sanchez has alleged that Defendants violated the federal Worker Adjustment and Retraining Notification Act (“WARN Act”), 29 U.S.C. §§ 2101, *et seq.*, and California’s Worker Adjustment and Retraining Notification Act (the “Cal-WARN Act”), Cal. Labor Code §§ 1400, *et seq.*, and the New York State Worker Adjustment and Retraining Notification (WARN) Act (Chapter 475 of the laws of 2008), as set forth in §598 *et seq.* of the New York State Labor Law.

Class Counsel has obtained adequate information to enter this Stipulation. Through counsel experienced in these types of cases, the Settling Parties engaged in settlement discussions over the course of several months, which included a formal mediation with a mediator from JAMS. The negotiation process was an extensive, adversarial negotiation process conducted at arm's length. After the Court dismissed the Class Representative's claims against Yucaipa without prejudice, the Settling Parties reached agreement on a class-wide settlement and executed a term sheet summarizing key settlement terms. The additional final terms of the Settling Parties' agreement are reflected in this Stipulation.

**IV. Defendants' Denial of Wrongdoing or Liability.**

Defendants take the position that they had no obligations under and thus face no liability pursuant to the WARN Act and/or the Cal-WARN Act and/or the New York WARN Act or any other law. Defendants deny all of the claims and contentions alleged by the Class Representative in the WARN Action. Nonetheless, Defendants have concluded that further conduct of the WARN Action could be protracted and expensive and that it is desirable that the WARN Action be fully and finally settled in the manner and upon the terms and conditions set forth in this Stipulation. Defendants also have taken into account the uncertainty and risks inherent in any litigation, especially in putative class actions like this WARN Action. Under the circumstances, Defendants have determined that it is desirable and beneficial to Defendants that the WARN Action be settled in the manner and upon the terms and conditions set forth in this Stipulation.

**V. Claims of the Class Representative and Benefits of Settlement.**

The Class Representative believes that the claims asserted in the WARN Action on behalf of former employees of Debtors in California and New York have merit and that evidence developed to date supports the claims. However, the Class Representative and Class Counsel recognize and acknowledge the expense and length of the type of continued proceedings

necessary to prosecute the WARN Action against Defendants through trial and through appeals. Class Representative Sanchez and Class Counsel also have taken into account the uncertain outcome and the risk of any litigation, especially in class actions such as this WARN Action, as well as the difficulties and delays inherent in such litigation. In particular, the Class Representative and Class Counsel recognize that the claims against Yucaipa have been dismissed without prejudice, that the Debtors have asserted colorable defenses to the claims and that the Cal-WARN Act and other state law WARN statutes have received little judicial interpretation. In addition, the Class Representative and Class Counsel understand and have considered the issues associated with eventual collection of any remedies (even if successful) given the bankruptcy of Debtors. The Class Representative and Class Counsel believe that the settlement set forth in the Stipulation confers substantial benefits upon the Settlement Class. Based upon their evaluation, the Class Representative and Class Counsel have determined that the settlement set forth in the Stipulation is in the best interests of the Class Representative and the Settlement Class. The Class Representative and Class Counsel acknowledge that this Stipulation provides consideration to them from Defendants, specifically, that the agreements concerning some of the proceeds of the Avoidance Actions is valuable consideration to the Class Representative and Class Counsel.

**VI. Terms of Stipulation and Agreement of Settlement.**

NOW, THEREFORE, IT IS HEREBY FURTHER STIPULATED AND AGREED by and between the Settling Parties, including all Settlement Class Members, the WARN Action and the Sanchez Released Claims shall be finally and fully compromised, settled and released, and the WARN Action shall be conclusively terminated as to all Settling Parties, upon and subject to the terms and conditions of the Stipulation and the Judgment.

1. Definitions.

As used in all parts of this Stipulation (including the exhibits which are part of the Stipulation), the following terms have the meanings specified below:

1.1 “Avoidance Actions” means those actions arising under §§542, 544, 545, 547, 550 and 553 of the Bankruptcy Code. After the payment of reasonable fees and expenses incurred in prosecuting the Avoidance Actions, the first \$1,650,000 of recoveries received from the Avoidance Actions shall be paid to fund the Maximum Settlement Amount in the WARN Action. This shall be the only source of funding for the settlement in the WARN Action, and it is understood and agreed that none of the Sanchez Released Parties shall have any obligation to separately fund the settlement and the members of the Settlement Class do not have recourse to any other assets to collect the settlement amounts granted hereunder, except to the extent necessary to enforce any term or provision of this Stipulation. If the proceeds of the Avoidance Actions, following the payment of reasonable fees and expenses incurred in prosecuting the Avoidance Actions, is less than \$1,650,000, then the Maximum Settlement Amount shall consist only of the proceeds of the Avoidance Actions, following the payment of reasonable fees and expenses incurred in prosecuting the Avoidance Actions and nothing more.

1.2 “Claims Administrator” means the third-party claims administration or third-party payment firm, in this case anticipated to be Settlement Services, Inc.

1.3 “Class” means the collective group of all Persons whose employment with Debtors in California or New York was terminated by Debtors in 2012 in association with any plant closing or other facility shutdown. This Class consists of approximately 450 people.

1.4 “Class Counsel” means counsel for Plaintiff Nadia Sanchez, Outten and Golden LLP, collectively.

1.5 “Class Member” or “Member of the Class” means a Person who is a member of the Class, including without limitation Class Members who eventually submit valid Opt Outs.

1.6 “Class Representative” means Plaintiff Nadia Sanchez.

1.7 “Court” means the United States Bankruptcy Court for the District of Delaware.

1.8 “Debtors” means, collectively, AFA Foods, Inc. and AFA Investment, Inc. and their subsidiaries.

1.9 “Defendants” means, collectively, all of the named defendants in the WARN Action, and specifically and collectively each and all of the following entities: AFA Investment, Inc., AFA Foods, Inc. and Yucaipa Corporate Initiatives Fund II, LLC.

1.10 “Effective Date” means the date on which the Judgment becomes Final.

1.11 “Final” means: (i) the date of final affirmance on an appeal of the Judgment; (ii) the date of final dismissal with prejudice of any appeal from the Judgment; or (iii) if no appeal is filed, the expiration date of the time for the filing or noticing of any form of valid appeal from the Judgment. Any proceeding or order, or any appeal or petition for a writ pertaining solely to Class Counsel’s application for or award of attorney fees and/or costs shall not, by itself, in any way delay or preclude the Judgment from becoming Final, provided the result of any such proceeding or order and the other terms of this Stipulation shall govern the payment of such fees and/or costs.

1.11(a) “Global Settlement” means that certain settlement agreement among the Debtors, the Committee, Yucaipa, the Second Lien Agent, the SPV, BPI, NBPCo, ACAS and the WARN Class Representative, dated [\_\_\_\_\_], 2013.

1.12 “Judgment” means the judgment to be rendered by the Court pursuant to this Stipulation, substantially in the form attached hereto as Exhibit 4.

1.13 “Last Known Address” means the mailing address for a Class Member as contained in the Debtors’ books and records.

1.14 “Maximum Settlement Amount” means the maximum total amount that can be paid pursuant to this Stipulation. It is agreed that the Maximum Settlement Amount is \$1,650,000 (one million, six hundred and fifty thousand United States dollars), *provided that* this amount shall be paid solely from the net proceeds of the Avoidance Actions and if the proceeds from the Avoidance Actions are lower than \$1,650,000, then the Maximum Settlement Amount shall be the lower amount of the actual proceeds of the Avoidance Actions. (When this Stipulation refers to the proceeds of the Avoidance Actions, it refers to the net proceeds.) Specifically, because the Avoidance Actions represent a speculative form of recovery, Plaintiff Sanchez agrees and understands that, in the event the proceeds from the Avoidance Actions are lower than \$1,650,000, then the Maximum Settlement Amount for the WARN Action shall consist of the lower amount of funds that are available from the proceeds of the Avoidance Actions, but in no event shall the Maximum Settlement Amount be greater than \$1,650,000. It is further agreed that pursuant to the terms of this Stipulation, there will be no *cy pres* payment or other distribution of the Maximum Settlement Amount allocated to class-member payments that are not claimed because the Class Member opts out of the WARN Litigation, and any funds allocated for payment to Class Members who does not become a Participating



Claimant shall not be paid and shall be paid out in the same manner as proceeds from the Avoidance Actions beyond the Maximum Settlement Amount.

The Maximum Settlement Amount shall cover all liability associated with the WARN Action, including all legal fees and expenses associated with the settlement, including the following items: (1) the Maximum Settlement Amount for Payments to Participating Claimants (subject to the occurrence of the Effective Date); (2) the maximum total gross amount to be paid (subject to the occurrence of the Effective Date) to Class Counsel for all attorneys' fees and costs, for which Class Counsel will separately seek and obtain Court approval and which Debtor and the Committee will not oppose; (3) the maximum total gross amount to be paid (subject to the occurrence of the Effective Date) to Nadia Sanchez as a plaintiff service payment pursuant to Paragraph 2.8.2, which is \$5,000, and for which Class Counsel will separately seek and obtain Court approval; (4) the fees to be paid to the Claims Administrator for the payment administration, which are estimated to be approximately \$10,000 (ten thousand United States dollars); and (5) all Payroll Taxes associated with payments to Participating Claimants (subject to the occurrence of the Effective Date).

1.15 The "Maximum Settlement Amount for Payments to Participating Claimants" shall mean the maximum amount to be paid to Participating Claimants, which shall be equal to the difference between (a) the Maximum Settlement Amount minus (b) the sum of the following: (1) the maximum total gross amount to be paid (subject to the occurrence of the Effective Date) to Class Counsel pursuant to Paragraph 2.8.1 for all attorneys' fees, which shall not exceed one-third of the Maximum Settlement Amount; (2) maximum total gross amount to be paid to Class Counsel pursuant to Paragraph 2.8.1 for allowable expenses and costs; (3) the maximum total gross amount to be paid (subject to the occurrence of the Effective Date) to Nadia Sanchez as a service award pursuant to

Paragraph 2.8.2, which is \$5,000; (4) the fees to be paid to the Claims Administrator for the payment administration, which are estimated to be approximately \$10,000 (ten thousand United States dollars); and (5) all Payroll Taxes on any payments to Participating Claimants.

1.16 The “Non-Settlement Class” consists of or means the group of all Class Members who properly and timely elect to opt out of the Settlement Class by submitting “Opt Outs” pursuant to Paragraph 2.5.4 of this Section VI of the Stipulation.

1.17 “Non-Settlement Class Member” or “Member of the Non-Settlement Class” means a Person who is a member of the Non-Settlement Class.

1.18 “Notice Mailing Deadline” means the deadline for Class Counsel to mail the Class Notices, which shall be thirty (30) days after the Preliminary Approval Date.

1.19 “Notice re: Pendency of Class Action” or “Notice To Class Members Re: Pendency of a Class Action and Notice of Hearing On Proposed Settlement” or “Class Notice” means a notice and associated forms entitled “Notice to Class Members Re: Pendency of a Class Action and Notice of Hearing on Proposed Settlement” to be approved by the Court, substantially in the form attached hereto as Exhibit 2. This Notice Re: Pendency of Class Action shall constitute the class notice pursuant to Federal Rule of Civil Procedure 23(e).

1.20 “Notice Response Deadline” means the deadline for all Class Members to respond to the Class Notice either sending an Opt Out or submitting an objection, which shall be forty-five (45) days after the Notice Mailing Deadline.

1.21 “Opt Out” or “Opt Outs” means written and signed requests by Class Members to be excluded from the Settlement Class.

1.22 “Order of Final Approval” or “Order Granting Final Approval of Settlement” shall mean an order to be entered by the Court entitled “Order Granting Final Approval of Settlement,” substantially in the form attached hereto as Exhibit 3.

1.23 “Participating Claimant” means a Member of the Settlement Class.

1.24 “Payroll Taxes” shall mean the payroll taxes or other payments customarily borne by an employer when making standard Wage payments to employees, *i.e.*, the employer share of the payroll tax.

1.25 “Person” means a natural person.

1.26 “Plaintiff Sanchez,” “Plaintiff,” or “Sanchez” means Nadia Sanchez, the named plaintiff in the WARN Action and the Class Representative.

1.27 “Preliminary Approval Date” shall mean the date on which the Court enters the Preliminary Approval Order thereby granting preliminary approval for the settlement of the WARN Action.

1.28 “Preliminary Approval Order” or “Order Granting Preliminary Approval of Settlement and Setting Settlement Hearing” shall mean an order to be executed and filed by the Court entitled “Order Granting Preliminary Approval for the Settlement and Setting a Settlement Hearing,” substantially in the form attached hereto as Exhibit 1.

1.29 “Qualifying Opt Out” shall mean an Opt Out that is submitted in the manner specified in the Class Notice and postmarked no later than the Notice Response Deadline.

1.30 “Reasonable Address Verification Measure” shall mean the utilization of the National Change of Address Database maintained by the United States Postal Service to review the accuracy of and, if possible, update a mailing address.

1.31 “Sanchez Released Claims” shall collectively mean all claims, liens, causes of action or suits at law or in equity, including without limitation “Unknown Claims” as defined in Paragraph 1.41 hereof, for any type of relief against any and all of the Sanchez Released Parties, including, but not limited to, unpaid wages, penalties, damages, fees, interest, liabilities, demands, grievances, losses and costs (including costs of suit and attorneys’ fees and expenses), existing or contingent, known or unknown, and whether arising by statute, common law or otherwise, for failure to provide advance notice of termination of employment or pay wages upon termination, that they have or might have from the beginning of time to the entry of the Judgment. Sanchez Released Claims shall include but are not limited to claims arising under the federal Worker Adjustment and Retraining Notification Act (“WARN Act”), 29 U.S.C. §§ 2101, *et seq.*, the California’s Worker Adjustment and Retraining Notification Act (the “Cal-WARN Act”) and related claims under Cal. Labor Code §§ 1400, *et seq.* and 2698 *et seq.*, and the New York State Worker Adjustment and Retraining Notification (WARN) Act (Chapter 475 of the laws of 2008), as set forth in §598 *et seq.* of the New York State Labor Law. Provided, however, nothing contained herein shall be, or deemed to be, a release of any action or claim based on a breach of this Stipulation.

1.32 “Sanchez Released Parties” means each and all Defendants, Yucaipa Corporate Initiatives Fund II, LLC, as administrative agent (the “Second Lien Agent”), YCIF II Second Lien Holdings LLC (the “SPV”), American Capital, Ltd. (“American Capital”) and any ACAS Lender (as that term is used in the Third Amendment to Credit Agreement dated as of June \_\_\_\_, 2013 by and among the Debtors, the Second Lien Agent, the SPV and American Capital), and each of their parents, subsidiaries and affiliates, and each of their respective directors, managing directors, officers, trusts,

trustees, members, attorneys, consultants, other professionals, partners, associates, principals, divisions, employers, employees, insurers, agents, representatives, consultants, guarantors, indemnitors, indemnitees, sureties, heirs, assigns and successors.

1.33 “Settlement Class” means the collective group of all of the Class Members who do not opt out of the Settlement Class by submitting Opt Outs pursuant to Paragraph 2.5.4, and thus do not object to becoming bound by the Judgment.

1.34 “Settlement Class Member” or “Member of the Settlement Class” means any Person who is a member of the Settlement Class.

1.35 “Settlement Hearing” or “Fairness and Good Faith Determination Hearing” means a hearing set by the Court to take place on or about the Settlement Hearing Date for the purpose of: (i) determining the fairness, adequacy and reasonableness of this Stipulation and associated settlement pursuant to class action procedures and requirements; (ii) determining the good faith of this Stipulation and associated settlement; and (iii) entering Judgment.

1.36 “Settlement Hearing Date” is the date that is on or near the date that is seventy (70) days after the Notice Response Deadline.

1.37 “Settlement Hearing Motion Date” is the date that is on or near the date that is forty-five (45) days after the Notice Response Deadline.

1.38 “Settlement Sum” means the total amount due to an individual Participating Claimant. Each Individual Participating Claimant’s Settlement Sum shall be calculated on a pro rata basis according to the Class Member’s final rate of pay when his or her employment was terminated by Debtors, as such information is contained in the records of Debtors. The Settlement Sums shall be calculated so that all Settlement Sums, when totaled, equal the Maximum Amount for Payments to Participating Claimants The

Settlement Sum for each Participating Claimants shall, before payment, be subject to an offset (reduction) for Payroll Taxes associated with the payment.

1.39 “Settling Parties” means Defendants and the Class Representative on behalf of herself and all Members of the Settlement Class.

1.40 “Stipulation” means, collectively, this agreement, the Stipulation Re: Settlement of Class Action and all of its attachments and exhibits, which the Settling Parties understand and agree sets forth all material terms and conditions of the Settlement between them, and which is subject to Court approval, except those of the Global Settlement agreement which may bear on this Settlement. It is understood and agreed that any obligations for payment under this Stipulation are conditioned on, *inter alia*, the occurrence of the Effective Date.

1.41 “Unknown Claims” means any Sanchez Released Claims that either the Class Representative or any Settlement Class Member does not know or suspect to exist in his or her favor at the time of the entry of the Judgment, and that, if known by him or her, might have affected his or her settlement with and release of the Sanchez Released Parties or might have affected his or her decision not to object to this settlement. With respect to any and all Sanchez Released Claims, the Settling Parties stipulate and agree that, upon the Effective Date, the Class Representative shall expressly and each of the Settlement Class Members shall be deemed to have, and by operation of the Judgment shall have, waived the provisions, rights and benefits of California Civil Code section 1542, or any similar law, and it is understood that California Civil Code section 1542 provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of

executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

The Class Representative and each Settlement Class Member may hereafter discover facts in addition to or different from those which he or she now knows or believes to be true with respect to the subject matter of the Sanchez Released Claims, but the Class Representative and each Settlement Class Member, upon the Effective Date, shall be deemed to have, and by operation of the Judgment shall have, fully, finally and forever settled and released any and all Sanchez Released Claims, known or unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or hidden, which then exist, or heretofore have existed upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is negligent, intentional, with or without malice or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts. The Class Representative acknowledges, and the Settlement Class Members shall be deemed by operation of the Judgment to have acknowledged, that the foregoing waiver was separately bargained for and a key element of the settlement of which this release is a part.

1.42 “Updated Address” means a mailing address that was updated via a Reasonable Address Verification Measure, or via an updated mailing address provided by the United States Postal Service or a Class Member.

1.43 The “WARN Action” or “Lawsuit” or “Litigation” shall mean Adversary Proceeding No. 12-ap-50710 in the United States Bankruptcy Court for the District of Delaware, entitled *Nadia Sanchez, on behalf of herself and all others similarly situated v. AFA Foods, Inc., AFA Investment, Inc., and Yucaipa Corporate Initiatives Fund II, LLC*.

1.44 “Wage” or “wage” shall mean any type of wages or other compensation for employment (or for advance notice of termination, including remedies under the federal WARN Act or any state statute or law) in the most expansive sense of the term.

2. The Settlement.

2.1 *Payment and Other Obligations of Defendants.*

2.1.1 Debtors shall transfer the Maximum Settlement Amount to the Claims Administrator following the completion of the Avoidance Actions, and the Claims Administrator shall, according to the terms, conditions and procedures set forth in this Section VI of this Stipulation, shall pay each Participating Claimant his or her Settlement Sum. The gross total of this payment shall equal the Settlement Sum. This payment shall be deemed payment in settlement of claims for unpaid wages.

2.1.2 As further detailed in Paragraphs 2.2.1, 2.2.2 and 2.2.3, and for each payment made pursuant to Paragraphs 2.1.1, 2.6.1, 2.6.2, 2.8.1 and 2.8.2 of this Section VI, the Claims Administrator shall report each payment to government authorities including the Internal Revenue Service as required by law, and all required deductions and/or withholdings shall be made. Unless otherwise required by law, there will not be taken from the Settlement Sums any additional deductions, withholdings or payments, including without limitation, medical or other insurance payments or premiums, employee 401(k) contributions or matching employer contributions, Wage garnishments or charity withholdings. Payments made pursuant to this Stipulation shall not be deemed wages earned or other compensation for purposes of any employment benefits or other benefits that accrue or are determined on the basis of wages or compensation paid.



2.2 *Taxes.*

2.2.1 With regard to the payment described in Paragraph 2.1.1, because this shall be deemed a payment in settlement of claims for a type of wages, this payment shall be subject to required withholdings and deductions for Wage payments, and because of such withholdings or deductions, the Settling Parties agree that the net amount payable will be less than the gross Settlement Sum. Each Participating Claimant's Settlement Sum will be adjusted downward by the amount of Payroll Taxes associated with this payment, such that the Payroll Taxes will come out of the Settlement Sums and no additional payments for Payroll Taxes shall be required.

2.2.2 The Claims Administrator shall report the payment made pursuant to Paragraph 2.1.1 to the Internal Revenue Service (and other relevant government agencies) as Wage income in the year of payment on a Form W-2 or similar form issued to the Participating Claimant in question. To the extent it is necessary to report a payee for these payments, AFA Foods, Inc. (or its most appropriate subsidiary as agreed by the Settling Parties) shall be the payee, though such reporting will in no affect or limit the release provided to Yucaipa under this Stipulation.

2.2.3 Other than the withholding and reporting requirements set forth in Paragraphs 2.1.2, 2.2.1, 2.2.2, 2.8.1 and 2.8.2, Settlement Class Members shall be solely responsible for the reporting and payment of any federal, state and/or local income or other tax or any other withholdings, if any, on any of the payments made pursuant to this Section VI of this Stipulation, including without limitation any payments to Participating Claimants, Class Counsel, or the Class Representative. It is understood and agreed that no representations have been made as to the taxability of any portions of the settlement payments to any Participating Claimants, the payment of any costs or an award of

attorney fees, or any payment to the Class Representative. The Notice re: Pendency of Class Action will advise Class Members of their opportunity to seek their own tax advice prior to acting in response to that notice, and the Class Representatives and Class Counsel agree that Class Members will have an adequate opportunity to seek tax advice prior to acting in response to the Class Notice.

2.3 *Approval of Notice to the Class and Scheduling of a Settlement Hearing.*

2.3.1 The Settling Parties, through their counsel of record, shall file this Stipulation with the Court and jointly move for preliminary approval of this Stipulation pursuant to Federal Rule of Civil Procedure 23(e), applicable to the WARN Action pursuant to Federal Rule of Bankruptcy Procedure 7023. Via this submission, and a supporting motion, the Settling Parties, through their counsel of record, shall request that the Court enter the Preliminary Approval Order thereby scheduling the Settlement Hearing for the purposes of determining the good faith of the settlement, granting final approval of the settlement, granting final approval of this Stipulation and obtaining entry of Judgment. Via this same motion, the Class Representative, through counsel shall advise the Court of the agreements set forth in Paragraphs 2.8.1 and 2.8.2 of this Section VI of this Stipulation.

2.3.2 Subject to the availability of the Court, the Settling Parties shall endeavor to notice the motion for entry of the Preliminary Approval Order described in Paragraph 2.3.1 for a hearing as soon as feasible. Failure of the Court to enter the Preliminary Approval Order in its entirety or in a substantially similar form will be grounds for Defendants to terminate the settlement and the terms of this Stipulation in accordance with Paragraphs 2.10.1 and 2.11.3.

2.3.3 If the Court enters the Preliminary Approval Order more than two (2) weeks after the date of the hearing on the motion(s) for preliminary approval, Class Counsel and Defendants' counsel shall meet and confer to reach agreement on revisions of the deadlines and timetables set forth in this Stipulation, if necessary. In the event that the Settling Parties fail to reach such agreement, any of the Settling Parties may apply to the Court for modification of the dates and deadlines in this Stipulation, provided that such a request to the Court may seek only reasonable modifications of the dates and deadlines contained in this Stipulation and no other changes.

2.3.4 If the Court enters the Preliminary Approval Order, then at the resulting Settlement Hearing, the Settling Parties, through their counsel of record, shall address any written objections from Class Members or any concerns from Class Members who attend the Settlement Hearing as well as any concerns of the Court, and shall and hereby do, unless provided otherwise in this Stipulation, stipulate to final approval of this Stipulation and entry of the Judgment by the Court.

2.4 *Notice to Class Members.*

2.4.1 If, by entering the Preliminary Approval Order, the Court provides authorization to send the Notice Re: Pendency of Class Action to Class Members, the Debtors' counsel will provide Class Counsel with a list of all Class Members, their last known daily rates of pay, and their Last Known Addresses. Class Counsel will prepare a list of the Settlement Sums for each Class Members, and Class Counsel will provide this list to all Settling Parties. Class Counsel will then prepare the Notices Re: Pendency of Class Action for mailing, and they shall be mailed via first class mail through the United States Postal Service, postage pre-paid. The Class Notice shall include a pre-printed change of address form. The Class Notice shall also include instructions explaining how

to opt out of the settlement via a written request. The mailing enclosing the Class Notice will not contain any other materials, and except as provided in Paragraph 2.4.7, no other materials will be sent to any Class Member unless specifically called for by this Stipulation or sent by Class Counsel to a specific Class Member in response to a submission or inquiry from a Class Member in response to the Class Notice.

2.4.2 This Notice Re: Pendency of Class Action and its envelope or covering shall be marked to denote the return address of Class Counsel.

2.4.3 Class Counsel will maintain detailed records of all Notices sent, including the names and addresses to which they were sent and the dates they were sent, as well as detailed information on any communications with Class Members in response to the Notice. Class Counsel agrees that the form of notice contemplated meets the requirements of due process, and it will maintain all records necessary to demonstrate that the notice process was carried out in compliance with this Stipulation. Class Counsel further agrees and represents that in any discussions with Class Members resulting from or related to the Notice, Class Counsel will discuss the WARN Litigation and this Stipulation only.

2.4.4 Prior to mailing the Notice Re: Pendency of Class Action to each Class Member, Class Counsel shall undertake a Reasonable Address Verification Measure to ascertain the current accuracy of the Last Known Address of each Class Member. To the extent this process yields an Updated Address, that Updated Address shall replace the Last Known Address and be treated as the new Last Known Address for purposes of this Stipulation and for subsequent mailings in particular.

2.4.5 Class Counsel shall mail the Class Notices to the Last Known Addresses of the Class Members no later than the Notice Mailing Deadline.

2.4.6 Class Counsel shall retain the Claims Administrator, and the fees reasonably charged by the Claims Administrator shall be paid from the Maximum Settlement Amount. To the extent the reasonable amount of Claims Administrator costs exceeds \$10,000, the additional amount shall be paid from the Maximum Settlement Amount through a downward adjustment of the Maximum Amount for Payment to Participating Claimants with no increase of the Maximum Settlement Amount and no adjustment of the other components of the Maximum Settlement Amount.

2.4.7 Unless Class Counsel receives a Notice Re: Pendency of Class Action returned from the United States Postal Service for reasons discussed below in this Paragraph, that Notice Re: Pendency of Class Action shall be deemed mailed and received by the Class Member to whom it was sent five days (5) days after mailing. In the event that subsequent to the first mailing of a Notice Re: Pendency of Class Action and on or after the Notice Response Deadline, that Notice is returned to Class Counsel by the United States Postal Service because the address of the recipient is no longer valid, *i.e.*, the envelope is marked "Return to Sender," Class Counsel shall be required to take no further action with that Class Notice and it shall be deemed to have been delivered. In the event that subsequent to the first mailing of a Notice Re: Pendency of Class Action and prior to the Notice Response Deadline, that Notice is returned to Class Counsel by the United States Postal Service with a forwarding address for the recipient, Class Counsel shall re-mail the notice to that address, the notice will be deemed mailed and received at that point, and the forwarding address shall be deemed the Updated Address for that Class Member. In the event that subsequent to the first mailing of a Notice Re: Pendency of Class Action and prior to the Notice Response Deadline, that Notice is returned to Class Counsel by the United States Postal Service because the address of the

recipient is no longer valid, *i.e.*, the envelope is marked “Return to Sender,” Class Counsel shall undertake another Reasonable Address Verification Measure to attempt to ascertain the current address of the particular Class Member in question and, if such an address is ascertained, Class Counsel will re-send the Notice within three (3) days of receiving such information; if no Updated Address is obtained for that Class Member, the Notice Re: Pendency of Class Action shall be sent again to the Last Known Address. In either event, the Notice Re: Pendency of Class Action shall be deemed received once it is mailed for the second time.

2.5 *Responses to the Notice Re: Pendency of Class Action; Motion for Final Approval.*

2.5.1 Class Members have the option to participate in this Lawsuit at their own expense by obtaining their own attorney(s). Class Members who choose this option will be responsible for any attorney fees or costs incurred as a result of this election. The Notice Re: Pendency of Class Action will advise Class Members of this option.

2.5.2 Class Members may also object to the Stipulation by submitting written objections to Class Counsel and counsel for all Defendants no later than the Notice Response Deadline. The Notice Re: Pendency of Class Action will advise Class Members of this option. To the extent an objection is submitted to Class Counsel only, Class Counsel shall provide any such objections to all counsel in the WARN Action. Class Counsel shall also provide all objections to the Court in the final approval process.

2.5.3 Class Members who, for future reference and mailings from the Court, Class Counsel or Claims Administrator, if any, wish to change the name or address listed on the envelope in which the Notice Re: Pendency of Class Action was first mailed to them, must fully complete, execute and mail, per the instructions therein, the form

entitled “Change of Name and/or Address Information” attached to the Notice Re: Pendency of Class Action as Form A no later than the Notice Response Deadline.

2.5.4 Class Members may elect to “opt out” of the Settlement Class and thus exclude themselves from the WARN Action and the Settlement Class. Class Members who wish to exercise this option must execute and mail, per the instructions in the Notice Re: Pendency of Class Action, a written request to opt out. If a fully completed and properly executed Opt Out is not received by Class Counsel from a Class Member postmarked on or before the Notice Response Deadline, then that Class Member will be deemed to have forever waived his or her right to opt out of the Settlement Class. Class Members who do not properly submit Opt Outs shall be Members of the Settlement Class. Class Members who do properly submit Opt Outs shall have no further role in the WARN Action, and for all purposes they shall be regarded as if they never were a party to this WARN Action.

2.5.5 Class Members who do not opt out of the Settlement Class will be deemed Participating Claimants. Only Participating Claimants shall be entitled to payment pursuant to the Judgment.

2.5.6 Prior to the Settlement Hearing and by the Settlement Hearing Motion Date, if feasible, the Settling Parties shall move the Court for entry of the Order of Final Approval (and the associated or eventual entry of Judgment). Through this motion, the Class Representatives shall advise the Court of the agreements in Paragraphs 2.8.1 and 2.8.2 of this Stipulation. Class Counsel shall be responsible for justifying the agreed upon payments set forth in Paragraphs 2.8.1 and 2.8.2 of this Stipulation, but Defendants’ counsel will not oppose the agreed upon payments per the terms of Paragraphs 2.8.1 and 2.8.2 of this Stipulation. To the extent possible, the motion seeking entry of the Order of

Final Approval shall be noticed for the same day as the Settlement Hearing, *i.e.*, the Settlement Hearing Date. The Settling Parties shall take all reasonable efforts to secure entry of the Order of Final Approval and Judgment. If, even after such efforts, the Court ultimately rejects the Stipulation, fails to approve the Notice of Final Approval, or fails to enter the Order of Final Approval, or if the Court fails to enter the Judgment, this Stipulation shall be void *ab initio*, and there shall be no obligation to make any payments under the Stipulation.

2.5.7 None of the deadlines for Class Member responses set forth in Paragraphs 2.5.2, 2.5.3, 2.5.4, and 2.5.5 can be modified or extended by the Court, absent the express agreement of Defendants.

2.6 *Timing of Payment to Participating Claimants and Notice of Final Approval to Settlement Class Members.*

2.6.1 Within ten (10) days of, and only after Debtors receive their recovery from prosecution of the Avoidance Actions in the Maximum Settlement Amount, the Maximum Settlement Amount shall be transferred to the Claims Administrator, who within ten (10) days shall make payment to each Participating Claimant in the amount of his or her Settlement Sum. Class Counsel shall provide the Claims Administrator with the gross Settlement Sum for each Class Member, with a copy to counsel for all Defendants.

2.6.2 In accordance with the terms of Paragraphs 2.1.1 and 2.1.2, the Claims Administrator shall send each Participating Claimant one check payable to the Participating Claimant for the gross amount of the Settlement Sum (this gross amount shall be subject to withholdings and adjustment in accordance with Paragraph 2.2.1).



Each check shall be mailed to each Participating Claimant at his or her Last Known Address.

2.6.3 Checks issued to Participating Claimants pursuant to this Agreement shall remain negotiable for a period of at least ninety (90) days from the date of mailing, and the funds associated with any checks which are not properly or timely negotiated shall not be paid and shall be paid out in the same manner as proceeds from the Avoidance Actions beyond the Maximum Settlement Amount. The Settling Parties hereby agree that such funds represent settlement payments for matters in dispute, not uncontested Wage payments, and they shall not be subject to escheat rules, *cy pres*, or other distribution not provided for in this Stipulation. Participating Claimants who fail to negotiate their settlement checks in a timely fashion shall remain subject to the terms of the Judgment.

2.7 *Releases.*

2.7.1 Upon the Effective Date, the Class Representative and each of the Settlement Class Members shall be deemed to have, and by operation of the Judgment shall have, fully, finally and forever released, relinquished and discharged all Sanchez Released Claims, the consideration for which is hereby acknowledged as to each Sanchez Released Parties.

2.8 *Costs, Attorney Fees and Class Representative Enhancements.*

2.8.1 Class Counsel shall be entitled, subject to the approval of the Court and the occurrence of the Effective Date, to recover their reasonable litigation costs, associated expenses and attorney fees. Subject to Court approval and the occurrence of the Effective Date, Class Counsel will be paid from the Maximum Settlement Amount a total amount up to, but not to exceed, one-third of the Maximum Settlement Amount (up

to a maximum of \$550,000) for all attorneys' fees as well as an additional amount for reasonable, allowable litigation costs and associated expenses. Class Counsel and the Class Representative will not seek to recover more than one-third of the Maximum Settlement Amount for fees. The Class Representative and Class Counsel agree that they shall be responsible for seeking and justifying their fee and cost awards to the Court, and they agree to submit the necessary materials to justify the requested award along with the motion for final approval of the Stipulation pursuant to Paragraph 2.5.6. Other than any reporting of this fee payment as required by this Stipulation or law, which shall be made, Class Counsel and the Class Representative and the Settlement Class Members shall be responsible for the reporting and payment of any federal, state and/or local income or other form of tax on any payment made pursuant to this paragraph. The payment awarded and made pursuant to this paragraph shall constitute full satisfaction of any claim for fees or costs or any other expenses, and the Class Representative and Class Counsel, on behalf of themselves and all Settlement Class Members, agree that they shall neither seek nor be entitled to any additional attorney fees. Not more than twenty (20) days after Debtors receive their recovery from prosecution of the Avoidance Actions, and only in the event that such recovery occurs, the fee and cost awards approved by the Court shall be paid directly to Class Counsel pursuant to this Paragraph 2.8.1 by the Claims Administrator. Other than as provided in this Paragraph 2.8.1 for the limited purpose discussed herein, no party shall be deemed the prevailing party for any other purposes of the WARN Action, and all parties shall bear their own costs.

2.8.2 No more than twenty (20) days after Debtors receive their recovery from prosecution of the Avoidance Actions, and only in the event that such recovery occurs, and following the execution of the sort of release discussed below, Nadia Sanchez, in her

personal capacity only and via Class Counsel, will receive recovery from prosecution of the Avoidance Actions in the gross amount of five thousand United States dollars (\$5,000). This payment shall be made by the Claims Administrator and be in compensation and consideration for: (i) Sanchez's efforts as a class representative in the WARN Action. This payment shall be reported via a Form 1099, and Sanchez will agree to take full responsibility for the payment of any and all taxes due in respect of such payment. Sanchez is hereby deemed a Participating Claimant and so she shall also be entitled to receive her Settlement Sum under this Stipulation. .

2.9 Class Counsel shall be wholly responsible for defining the population of employees entitled to receive payments from the Maximum Settlement Amount and, with the Claims Administrator, for calculating payments to individual Class Members and for calculating attorney fees and taxes attributable to individual Class Members. Class Counsel or its designee shall also handle all inquiries or objections pertaining to the amounts received by any individual. *Claims Administrator.*

2.9.1 The fees and expenses reasonably incurred by the Claims Administrator as a result of procedures and processes expressly required by this Stipulation shall be paid from the Maximum Settlement Amount. In the event of any dispute concerning these payments, Class Representative and Class Counsel shall bear responsibility for such fees or expenses. Based on current estimates and for purposes of setting the Maximum Settlement Amount, the Settling Parties anticipate that the total fees and expenses incurred by the Claims Administrator will be approximately \$10,000 (ten thousand United States dollars), but the Settling Parties understand and agree that this figure represents just an estimate, and the sum charged by the Claims Administrator may be different and thus may be adjusted.

2.9.2 The actions of the Claims Administrator shall be governed by the terms of this Stipulation. When communicating with the Claims Administrator, the Settling Parties shall take good faith effort to provide copies of such communications to the counsel for the other Settling Parties.

2.9.3 In the event that any of the Settling Parties take the position that the Claims Administrator has not acted in accordance with the terms of the Stipulation, that party's counsel shall meet and confer with counsel for the other Settling Party prior to raising any such issue with the Claims Administrator or the Court.

2.10 *Termination of Settlement.*

2.10.1 In the event that the settlement set forth in this Stipulation shall not be approved in its entirety by the Court, or in the event that the Effective Date does not occur, either Settling Party shall have the option to void the settlement, and in such case, no payments shall be made to anyone in accordance with the terms of this Stipulation, and this Stipulation shall be deemed null and void with no effect on the Lawsuit whatsoever. In the event that ten (10) percent or more of the Class Members opt out of the Settlement Class by submitting Opt Outs pursuant to Paragraph 2.5.4, the Defendants shall have the right to terminate and void this settlement and Stipulation pursuant to Paragraph 2.11.4, but will not be required to do so.

2.11 *Miscellaneous Provisions.*

2.11.1 No Person shall have any claim against Class Counsel, the Claims Administrator or any of the Sanchez Released Parties based on the payments made or other actions taken substantially in accordance with the Stipulation and the settlement contained therein or further orders of the Court.

2.11.2 The only Class Members entitled to any payment under this Stipulation and the associated Judgment are Participating Claimants, and they shall be entitled to their respective Settlement Sums only.

2.11.3 In the event that the Stipulation is not substantially approved by the Court or the settlement set forth in the Stipulation is terminated, cancelled, declared void or fails to become effective in accordance with its terms, or if the Judgment does not become Final, or to the extent cancellation is otherwise provided for in this Stipulation, the Settling Parties shall resume the WARN Action at that time as if no Stipulation had been entered and all deadlines including the time to amend the Complaint, shall be extended nunc pro tunc to sixty (60) days after the later of the cancellation, or the Court not approving the Stipulation or the Judgment not becoming Final. In such event, the terms and provisions of the Stipulation shall have no further force and effect with respect to the Settling Parties and shall not be used in this WARN Action or in any other proceeding for any purpose, and any Judgment or order entered by the Court in accordance with the terms of the Stipulation shall be treated as vacated, *nunc pro tunc*. Notwithstanding any other provision of this Stipulation, no order of the Court or modification or reversal on appeal of any order of the Court concerning the amount of any attorney fees and/or costs to be paid to Class Counsel shall constitute grounds for cancellation or termination of the Stipulation or grounds for limiting any other provision of the Judgment, *provided that* no such payment shall ever be required in excess of the Maximum Settlement Amount generally.

2.11.4 The Settling Parties: (a) acknowledge that it is their intent to consummate this agreement; (b) agree to cooperate to effectuate and implement all terms and conditions of the Stipulation and to exercise their best efforts to accomplish the foregoing

terms and conditions of the Stipulation; and (c) agree to seek and to attempt to obtain Court approval for the Stipulation.

2.11.5 The Stipulation compromises claims that were contested and the subject of a good faith dispute, and it shall not be deemed an admission by any of the Settling Parties or any Sanchez Release Party as to the merits of any claim or defense. The the amounts paid in Settlement and the other terms of the settlement were negotiated at arm's length and in good faith with sufficient information by the Settling Parties and the Sanchez Release Parties and reflect a settlement that was reached voluntarily after consultation with competent legal counsel.

2.11.6 The Settling Parties agree that the Notice Response Deadline shall not be extended, and no untimely submissions or claims will be honored, other than by the Settling Parties' mutual agreement. Notwithstanding the forgoing, a Class Member will be allowed to extend the Notice Response Deadline for him or herself if and only if he or she can make a showing of legal incapacity (*i.e.*, hospitalization, mental incapacity, military service or incarceration) during the Notice Period. The Settling Parties agree that the establishment and enforcement of the Notice Response Deadline is valuable consideration to Defendants, and the finality provided thereby is a material aspect of this agreement. Neither the Stipulation nor the settlement, nor any act performed or document executed pursuant to, or in furtherance of, the Stipulation or the settlement: (a) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any Sanchez Released Claim, or of any wrongdoing or liability of the Sanchez Released Parties, or any of them; or (b) is or may be deemed to be or *may* be used as an admission of, or evidence of, any fault or omission of the Sanchez Released Parties, or

any of them, in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal.

2.11.7 All of the exhibits to the Stipulation are material and integral parts hereof and are fully incorporated herein by this reference.

2.11.8 The Stipulation may be amended or modified only by a written instrument signed by or on behalf of all Settling Parties and ACAS or each of the foregoing's respective successors-in-interest.

2.11.9 The Stipulation (and the Global Settlement agreement to the extent it bears on this Stipulation) constitutes the entire agreement among the Settling Parties hereto and no representations, warranties or inducements have been made to any party concerning the Stipulation or its exhibits other than the representations, warranties and covenants contained and memorialized in such documents. Except as otherwise provided herein, each party shall bear its own costs.

2.11.10 Class Counsel, on behalf of the Class, are expressly authorized by the Class Representatives to take all appropriate action required or permitted to be taken by the Class pursuant to the Stipulation to effect its terms and also are expressly authorized to enter into any modifications or amendments to the Stipulation on behalf of the Class which they deem appropriate.

2.11.11 Each counsel or other Person executing the Stipulation or any of its exhibits on behalf of any party hereto hereby warrants that such Person has full and express authority to do so.

2.11.12 The Stipulation may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. A complete set of executed counterparts shall be filed with the Court.

2.11.13 The Stipulation shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto, and shall also be binding on any trustee subsequently appointed in the Debtors' chapter 11 cases or upon their conversion to Chapter 7; however, this Stipulation is not designed to and does not create any third party beneficiaries unless otherwise specifically provided herein.

2.11.14 The Court shall retain jurisdiction with respect to implementation and enforcement of the terms of the Stipulation, and all parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in the Stipulation.

2.11.15 The Stipulation and the exhibits hereto shall be considered to have been negotiated, executed and delivered, and to have been wholly performed, in the State of California, and the rights and obligations of the parties to the Stipulation shall be construed and enforced in accordance with, and governed by, the internal, substantive laws of the State of California without giving effect to that State's choice of law principles.

2.11.16 The language of all parts of this Stipulation shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against either party. No party shall be deemed the drafter of this Stipulation. The parties acknowledge that the terms of the Stipulation are contractual and are the product of negotiations between the parties and their counsel. Each Party and her/its counsel cooperated in the drafting and preparation of the Stipulation. In any construction to be made of the Stipulation, the Stipulation shall not be construed against any party and the canon of contract interpretation set forth in California Civil Code section 1654 or any similar law shall not be applied.



2.11.17 Prior to the joint submission of the settlement agreement to the Court for preliminary approval, neither Class Representatives nor Class Counsel shall communicate any terms of this settlement to any third parties, except that Class Counsel may respond to individual class members who inquire about the settlement. This shall not prohibit Class Counsel from discussing this case or any aspect of this settlement with the Class Representative, any Class Member (absent or otherwise) in this case, or any court or opposing counsel, or from responding to any inquiring class members following preliminary approval. Also, this shall not prohibit Class Counsel from in any way disclosing their status as counsel in the case nor shall it prohibit Class Counsel from stating that the case settled or the nature of the settlement on any of their own firm promotional materials following final approval of the settlement.

2.11.18 In the event that it is otherwise not feasible to calculate the Maximum Settlement Amount as of the time any payments are otherwise due under this Stipulation, then deadline to make such payment(s) shall be continued until ten (10) days after it is feasible to calculate the Maximum Settlement Amount. No payments shall be made under this Stipulation until the Maximum Settlement Amount can be and has been certainly determined.

2.11.19 The Defendants agree to take all reasonable steps to comply with the requirements of the Class Action Fairness Act of 2005, including the notice requirement, and Class Counsel agrees to cooperate. It is the intent of the parties that the Judgment be binding on all Settlement Class Members. No more than ten (10) days after this Stipulation and the joint motion for preliminary approval of this Stipulation or through the Claims is filed with the Court, Defendants, themselves or through the Claims Administrator at Defendants' sole expense, shall provide notice of this Stipulation as set

forth below to the Attorney General of the United States, the Attorney Generals of each state in which Class Members reside. Said notice shall be mailed, can be in an electronic or disc format, and shall include to the extent then available and feasible: (1) the current complaint in the Litigation; (2) the notice of motion and motion for preliminary approval of the settlement, which shall include the proposed final approval hearing date and shall confirm that there are no additional agreements among the Settling Parties not reflected in the Stipulation; (3) the Class Notice; (4) this Stipulation, which shall include the proposed Judgment; and (5) the names of each Class Member residing in each state and that state's percentage share of the Maximum Settlement Amount of \$1,650,000, which Class Counsel shall provide to Defendants sufficiently in advance of the filing of this Stipulation with the Court to allow for the pertinent CAFA disclosure. The Settling Parties agree that this notice shall be sufficient to satisfy the terms of 28 U.S.C. § 1715.

2.11.20           The parties to this agreement recognize and acknowledge that at the time of the execution of the settlement, there are unsettled issues of law and fact which may have a material impact on the claims at issue in the WARN Action, and further that the Avoidance Actions are speculative. The parties further recognize that they are reaching this settlement in light of the risks created by these and other unresolved issues and that the parties will take all efforts to enforce their settlement agreement and obtain court approval for their settlement regardless of developments in the future on these issues. Class Counsel agree that the proposed class is receiving benefit from this settlement by obtaining a settlement (and associated consideration) prior to the resolution of these issues, and the Settling Parties agree not to argue otherwise or seek to void this settlement or prevent, hinder or delay court approval on the basis of new developments on these issues. The Settling Parties further recognize that they are

reaching this settlement in light of the risks created by these unresolved issues, and that all Settling Parties will make all efforts to enforce this Agreement and obtain Court approval for this settlement regardless of how any issues of law are decided after this Agreement is executed. Class Counsel agree that the Class Representatives and proposed class are receiving benefit from this settlement by obtaining a settlement (and associated consideration) prior to any subsequent change or development in any applicable law, and Class Counsel agree not to argue otherwise or seek to void this settlement or prevent Court approval on the basis of any subsequent change or development in the applicable law.

2.11.21 Notwithstanding the allegations in the complaint in the Litigation, Plaintiff and Class Counsel represent that (a) they have now researched the pertinent facts further, and (b) determined that the Debtor's employees did not suffer any WARN Act or other termination-related violations in Georgia, Pennsylvania and/or Texas; and (c) as a result, no defendant in the WARN Litigation are liable for any WARN Act or other termination-related violations in Georgia, Pennsylvania and/or Texas. The Judgment will reflect that Plaintiff has foregone these claims.

IN WITNESS WHEREOF, the parties hereto have caused the Stipulation to be executed, and this Stipulation is AGREED TO.

DATED: \_\_\_\_\_, 2013

By: \_\_\_\_\_  
NADIA SANCHEZ

Class Representative

DATED: \_\_\_\_\_, 2013

Yucaipa Corporate Initiatives Fund II, LLC

By: \_\_\_\_\_

DATED: \_\_\_\_\_, 2013

AFA Investment, Inc.

By: \_\_\_\_\_

DATED: \_\_\_\_\_, 2013

AFA Foods, Inc.

By: \_\_\_\_\_

APPROVED AS TO FORM:

DATED: \_\_\_\_\_, 2013

THE ROSNER LAW GROUP LLC  
OUTTEN & GOLDEN LLP

By: \_\_\_\_\_

JACK A. RAISNER

Attorneys for Plaintiffs and Class Counsel

DATED: \_\_\_\_\_, 2013

MORRIS, NICHOLS, ARSHT & TUNNELL LLP  
MUNGER, TOLLES & OLSON LLP

By: \_\_\_\_\_  
THOMAS B. WALPER

Attorneys for Yucaipa Corporate Initiatives Fund II,  
LLC

DATED: \_\_\_\_\_, 2013

PACHULSKI STANG ZIEHL & JONES LLP  
JONES DAY

By: \_\_\_\_\_  
TOBIAS KELLER

Attorneys for Yucaipa Corporate Initiatives Fund II,  
LLC

19755766.1

**EXHIBIT D**

**[Third Amendment]**

### THIRD AMENDMENT TO CREDIT AGREEMENT

This THIRD AMENDMENT TO CREDIT AGREEMENT (this "*Amendment*") is made as of [\_\_\_\_], 2013 by and among AFA Foods, Inc., a Delaware corporation ("*AFA Inc.*"), American Foodservice Corporation, a Delaware corporation ("*AFS*"), Fairbank Reconstruction Corporation, a New York corporation ("*FRC*"), American Fresh Foods, L.P., a Delaware limited partnership ("*AFF*"), and United Food Group LLC, a California limited liability company ("*UFG*"; AFA Inc., AFS, FRC, AFF, and UFG are sometimes referred to herein collectively as the "*Borrowers*"), AFA Investment Inc., a Delaware corporation ("*Holdings*"), as a Guarantor, the other Persons party hereto that are designated as a "*Credit Party*", Yucaipa Corporate Initiatives Fund II, LLC, a Delaware limited liability company, as Agent for the several lenders from time to time party to the Credit Agreement (as defined below) (in such capacity, the "*Agent*"), American Capital, Ltd., a Delaware limited liability company and lender under the Credit Agreement ("*ACAS*"), YCIF II Second Lien Holdings LLC, a Delaware limited liability company and lender under the Credit Agreement (the "*SPV*"), and the members of the SPV party hereto (the "*SPV Members*").

#### RECITALS:

A. The Borrowers, Holdings, the other Credit Parties, the Agent and the Lenders signatory thereto have entered into that certain Second Lien Credit Agreement, dated as of February 9, 2010, as amended by (i) a Waiver and First Amendment to Credit Agreement, dated April 5, 2011, and (ii) a Waiver and Second Amendment to Credit Agreement and Ratification of Guaranty and Security Agreement, dated December 7, 2011, in each case by and among the Borrowers, Holdings, the other Credit Parties party thereto, the Required Lenders and the Agent (as amended from time to time, the "*Credit Agreement*").

B. On April 2, 2012, the Borrowers, Holdings and the other Credit Parties (collectively, the "*Debtors*") each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532, in the United States Bankruptcy Court for the District of Delaware (the "*Bankruptcy Court*").

C. The Agent, for the benefit of itself and the Lenders, asserts (a) liens and security interests on all of the Debtors' assets, including, but not limited to, the Debtors' cash; and (b) adequate protection claims and liens on all assets of each Debtor's estate, including, but not limited to, the Debtors' cash, to secure the diminution in the value of the collateral securing its prepetition liens, granted pursuant to the Credit Agreement, the Final DIP Order, the Interim Cash Collateral Order, and the Global Settlement Order (in each case, as such Orders are defined below).

D. On April 30, 2012, the Bankruptcy Court entered the Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 363(c), 363(e), 364(c), 364(d)(1) and 364(e) and (B) Utilize Cash Collateral of Prepetition Secured Entities, (II) Granting Adequate Protection to Prepetition Secured Entities, and (III) Granting Related Relief [D.I. 199] (the "*Final DIP Order*").

E. On September 19, 2012, the Bankruptcy Court entered the Interim Order (i) Authorizing the Debtors to Use Cash Collateral of the Second Lien Secured Parties and (ii) Providing Adequate Protection to the Second Lien Secured Parties [D.I. 662] (the “*Interim Cash Collateral Order*”).

F. On [\_\_\_\_\_], 2013, the Bankruptcy Court entered the [Order Authorizing the Global Settlement of Chapter 11 Cases among the Debtors, the Official Committee of Unsecured Creditors, the Agent, ACAS, the SPV, the SPV Members, Beef Products, Inc., and Sanchez] (the “*Global Settlement Order*”) approving the terms of a settlement (the “*Global Settlement*”) pursuant to the terms of a term sheet attached to the Global Settlement Order as [Annex A] (the “*Global Settlement Term Sheet*”). Capitalized terms not otherwise defined herein have the meanings given to them in the Global Settlement Term Sheet or, if not defined herein or therein, in the Credit Agreement.

G. The Global Settlement Order, among other things, provides that the ACAS Second Lien Note is deemed an allowed secured claim for all purposes in the amount of Three Million One Hundred Thousand Dollars (\$3,100,000), and shall be paid as and when set forth herein, in full satisfaction of all of the claims that ACAS or any ACAS Lender may have against the Debtors, and the parties hereto desire to modify and amend the Credit Agreement and other Loan Documents to reflect certain of the terms and conditions of or related to the Global Settlement among ACAS, the Debtors, the Agent, the SPV and the SPV Members.

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein, the parties hereto hereby agree as follows:

1. AMENDMENT OF CREDIT AGREEMENT AND LOAN DOCUMENTS

(a) Notwithstanding any provision of the Credit Agreement or any other Loan Document, effective upon the Global Settlement Order becoming a final and non-appealable order and the Global Settlement becoming effective in accordance with its terms (such date, the “*Amendment Effective Date*”), the rights and obligations of the ACAS Lenders under the Credit Agreement and the Loan Documents shall be amended, modified and replaced as follows:

(i) the ACAS Offset Note is hereby terminated and cancelled in its entirety and is of no further force or effect, subject to payment of the ACAS Lenders Claim (as defined below) as provided for in this Amendment;

(ii) the aggregate amount of all of the Obligations owed to the ACAS Lenders (including, without limitation, the ACAS Second Lien Note and all interest and other fees, expenses or amounts owed thereon or with respect thereto) shall be fixed, determined, and allowed in the total amount of Three Million One Hundred Thousand Dollars (\$3,100,000) (the “*ACAS Lenders Claim*”), which shall be paid, without offset or deduction of any sort, as follows:

(1) on the second business day following the Amendment Effective Date, the Debtors’ estates shall pay to ACAS the amount of Two Million Four Hundred Thousand Dollars (\$2,400,000), by wire transfer of immediately available funds to the account of ACAS set forth below:



|               |  |
|---------------|--|
| Bank:         | The Bank of New York Mellon,<br>Brooklyn, NY |
| ABA#:         | 21000018                                     |
| SWIFT Code:   | IRVTUS3N                                     |
| Account Name: | American Capital Ltd.                        |
| Account #:    | 8900700815                                   |
| Reference:    | AFA  |

(2) on the first date on which the Debtors make a payment to the SPV (or any transferee, successor or assign of the SPV), pursuant to the terms of the Global Settlement Order (such date, the “*Initial SPV Distribution Date*”), the Debtors’ estates shall pay to ACAS the amount of Three Hundred Fifty Thousand Dollars (\$350,000), by wire transfer of immediately available funds to the account of ACAS set forth above in clause (1); and

(3) on the Initial SPV Distribution Date, the Debtors’ estates shall also pay directly to Yucaipa on behalf of ACAS, the amount of Three Hundred Fifty Thousand Dollars (\$350,000), by wire transfer of immediately available funds to the account of Yucaipa set forth below:

[insert Yucaipa wire transfer instructions].

(iii) as of and following the payment to ACAS of the amounts contemplated in clauses (1) and (2) above, and the payment to Yucaipa of the amount contemplated in clause (3) above, (such amounts totaling \$3,100,000 in the aggregate), (A) the ACAS Lenders Claim shall be deemed fully and finally satisfied and extinguished, and (B) neither ACAS nor any ACAS Lender shall have any additional or further claims against the Debtors or their estates, or against any other party hereto (including the Second Lien Agent), and, similarly, no such party shall have any claim against ACAS or any ACAS Lender, related to assets of the Debtors or to the Credit Agreement, the Second Lien Obligations or the Loan Documents, nor shall ACAS or any ACAS Lender be, or be deemed to be, a Lender under or other party to the Credit Agreement or any other Loan Document, and all of the rights and obligations of ACAS and any other ACAS Lender under the Credit Agreement and the Loan Documents shall be deemed terminated and replaced in their entirety with the rights and obligations of ACAS set forth in the Global Settlement Term Sheet, the Global Settlement Order, and this Amendment. For the avoidance of doubt, as of the Amendment Effective Date, the rights of ACAS and any ACAS Lender to receive payments or any other amounts from the Debtors or their estates, or from any other party hereto (including the Second Lien Agent), or from any affiliate, transferee, successor or assign thereof, from or related to assets of the Debtors, shall be limited to the rights to the payments to ACAS set forth in clauses (1) and (2) above and in the Global Settlement Term Sheet and the Global Settlement Order on account of the ACAS Lenders Claim. Nothing in this paragraph shall limit any rights of ACAS to enforce the provisions of and obligations under this Amendment, the Global Settlement Order, or the Global Settlement Term Sheet, including without limitation ACAS’s right to receive payments specified in clauses (1) and (2) above.

## 2. MUTUAL RELEASE OF LENDERS AND SECOND LIEN AGENT

(a) On the Amendment Effective Date, each of ACAS, all ACAS Lenders, the SPV, the SPV Members and the Agent, for and on behalf of itself and each of their respective parents, subsidiaries and affiliates (other than, for the avoidance of doubt, any Debtor), and each of their respective directors, managing directors, officers, trusts, trustees, members, attorneys, consultants, other professionals, partners, associates, principals, divisions, employers, employees, insurers, agents, representatives, consultants, guarantors, indemnitors, indemnitees, sureties, heirs, assigns, and successors (collectively, the “*Release Parties*”, and each, a “*Release Party*”), does hereby irrevocably remise, release, and forever discharge each other Release Party, and each of their respective heirs, executors, administrators, trustees and personal representatives, of and from all, and all manner of, actions and causes of action, proceedings, orders, obligations, suits, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, claims, demands, and liabilities (whether liquidated, contingent, or otherwise) whatsoever, whether known or unknown, suspected or unsuspected, both at law or in equity (individually and collectively, a “*Claim*” or “*Claims*”), that any Release Party now has, has ever had or may hereafter have against any other Release Party, in each case in any way arising out of or related to the Credit Agreement, the Second Lien Obligations, the Loan Documents, the Debtors or the Debtors’ chapter 11 cases. Notwithstanding the foregoing, nothing in this Section 2 shall release (i) any Release Party of its obligations under this Amendment, the Global Settlement Term Sheet or the Global Settlement Order, or (ii) any Debtor of any of its obligations under this Amendment, the Credit Agreement, the Loan Documents, the Global Settlement Term Sheet, the Global Settlement Order, the Debtors’ chapter 11 cases or otherwise.

(b) Each Release Party represents and warrants to each of the other Release Parties that it (i) is aware of no other Person having any interest in any Claim or Claims that are the subject of the releases and waivers by such party set forth in Section 2(a) of this Amendment, (ii) has not sold, transferred, pledged, collateralized, hypothecated, or assigned or attempted to sell, transfer, pledge, collateralize, hypothecate, or assign any right, title, or interest in any such Claims to any Person that is not both a Release Party and a party to this Amendment, (iii) has full authority to enter into this Amendment and by its signature hereto binds itself and the other Release Parties on whose behalf it has signed this Amendment, and (iv) has not, in executing this Amendment, and does not rely upon any representation or statement not contained in this Amendment made by any other party to this Amendment or others released herein, or by any of their representatives with regard to the subject matter, basis or effect of this Section 2, or otherwise.

(c) ACAS represents, warrants and covenants to each of the other Release Parties and to the Debtor Releasing Parties (as defined below) that it (i) is aware of no other ACAS Lender other than ACAS, (ii) has not sold, transferred, pledged, collateralized, hypothecated, or assigned to any Person any right, title, or interest in the ACAS Lender Claim, the ACAS Second Lien Note, the ACAS Offset Note, or any other Obligations owing by any Debtor Releasing Party to ACAS, and (iii) will not, at any time on or prior to the Initial SPV Distribution Date, sell, transfer, pledge, collateralize, hypothecate, or assign to any Person any right, title, or interest in the ACAS Lender Claim, the ACAS Second Lien Note, the ACAS Offset Note, or any other Obligations owing by any Debtor Releasing Party to ACAS.

(d) Each Release Party hereby acknowledges that it is aware of the following provision of Section 1542 of the California Civil Code:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.”

Each Release Party further acknowledges that the releases given herein are certain releases of unknown claims. Accordingly, each Release Party hereby expressly and voluntarily waives each claim, right or benefit it has or may have under Section 1542 of the California Civil Code, or any other similar law of any other jurisdiction, to the full extent that it may lawfully waive such claims, rights and benefits in connection with this Amendment.

### 3. MUTUAL RELEASE BY DEBTORS OF LENDERS AND SECOND LIEN AGENT

(a) On the Amendment Effective Date, the Debtors, each of their respective bankruptcy estates and the Committee, on behalf of themselves, their parents, subsidiaries and affiliates, and, in their capacity as such, each of their respective directors, managing directors, officers, trusts, trustees, members, attorneys, consultants, other professionals, partners, associates, principals, divisions, employers, employees, insurers, agents, representatives, consultants, guarantors, indemnitors, indemnitees, sureties, heirs, assigns, successors, and any person claiming, or who could claim, by, through, or on behalf of any of them (collectively, the “*Debtor Releasing Parties*” and each, a “*Debtor Releasing Party*”) will, and as of the Amendment Effective Date, hereby do irrevocably and unconditionally waive, release and discharge with prejudice Yucaipa, ACAS, any ACAS Lenders, BPI, NBPCo, the SPV, the First Lien Agent, the Second Lien Agent and the Second Lien Lenders and their parents, subsidiaries and affiliates, and each of their respective directors, managing directors, officers, trusts, trustees, members, attorneys, consultants, other professionals, partners, associates, principals, divisions, employers, employees, insurers, agents, representatives, consultants, guarantors, indemnitors, indemnitees, sureties, heirs, assigns, and successors (collectively, the “*Debtor Released Parties*” and each, a “*Debtor Released Party*”) from any and all claims, liens, causes of action or suits at law or in equity (including, but not limited to, any and all causes of action arising under sections 502(d), 544, 545, 547, 548, 550 and 553 of the Bankruptcy Code), damages, liabilities, demands, grievances, rights of setoff or recoupment, indemnification obligations, losses and costs (including costs of suit and attorneys’ fees and expenses), existing or contingent, known or unknown, and whether arising by contract, statute, common law or otherwise, of whatsoever kind or nature, that the Debtor Releasing Parties have or might have from the beginning of time to the date of this Amendment, in any way arising out of or related to the Debtors or the Debtors’ chapter 11 cases; *provided, however*, the obligations under this Amendment, the Global Settlement Term Sheet, the Global Settlement Order, or other orders of the Bankruptcy Court and claims for the enforcement thereof are not released hereby. Any Creditor that accepts a distribution from the Creditor Recovery Pool under the Global Settlement Term Sheet or the Global Settlement Order shall be deemed a Debtor Releasing Party. The Debtor Released Parties and Debtor Releasing Parties intend that this Section 3 effectuate a mutual release and, on the Amendment Effective Date, the Debtor Released Parties will irrevocably and unconditionally waive, release, and discharge with prejudice the Debtor Releasing Parties to the same extent, and subject to the same proviso set forth in the first sentence of this Section 3(a), that the Debtor Releasing Parties released the Debtor Released Parties.

(b) Each Debtor Releasing Party represents and warrants to each Debtor Released Parties that it (i) is aware of no other Person having any interest in any Claim or Claims that are the subject of the releases and waivers by such party set forth in Section 3(a) of this Amendment, (ii) has not sold, transferred, pledged, collateralized, hypothecated, or assigned or attempted to sell, transfer, pledge, collateralize, hypothecate, or assign any right, title, or interest in any such Claims to any Person that is not both a Debtor Releasing Party and a party to this Amendment, (iii) subject to the approval of the Bankruptcy Court, has full authority to enter into this Amendment and by its signature hereto binds itself, and (iv) has not, in executing this Amendment, and does not rely upon any representation or statement not contained in this Amendment made by any other party to this Amendment or others released herein, or by any of their representatives with regard to the subject matter, basis or effect of this Section 3, or otherwise.

(c) Each Debtor Releasing Party hereby acknowledges that it is aware of the following provision of Section 1542 of the California Civil Code:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.”

Each Debtor Releasing Party further acknowledges that the releases given herein are certain releases of unknown claims. Accordingly, each Debtor Releasing Party hereby expressly and voluntarily waives each claim, right or benefit it has or may have under Section 1542 of the California Civil Code, or any other similar law of any other jurisdiction, to the full extent that it may lawfully waive such claims, rights and benefits in connection with this Amendment.

#### 4. REFERENCE TO AND EFFECT ON LOAN DOCUMENTS

Except as specifically provided in this Amendment, the Global Settlement Order or the Global Settlement Term Sheet, the Credit Agreement and the other Loan Documents shall remain in full force and effect and each Credit Party hereby ratifies and reaffirms each term and condition set forth in the Credit Agreement as amended hereby, and in the other Loan Documents, effective as of the date hereof. Upon the effectiveness of this Amendment, each reference (i) in the Credit Agreement to “this Agreement”, “hereunder”, “hereof”, or words of similar import and (ii) in any other Loan Document to the “Credit Agreement” shall, in each case and except as otherwise specifically stated herein, mean and be a reference to the Credit Agreement as amended hereby.

#### 5. MISCELLANEOUS

(a) *Successors and Assigns; Binding Effect.* This Amendment shall be binding on and shall inure to the benefit of the Debtors, the Agent, ACAS, the SPV, the SPV Members, and their respective successors and assigns, including without limitation any trustee appointed in the Debtors’ cases and/or any post-confirmation Debtor-related entity, except as otherwise provided herein. The provisions of this Amendment and any actions taken pursuant to this Amendment

shall survive entry of any order that may be entered: (a) confirming any plan of reorganization or liquidation in the Debtors' cases; (b) converting any of the Debtors' cases to a case under chapter 7 of the Bankruptcy Code; (c) dismissing any of the Debtors' cases; (d) discharging any Debtor; or (e) pursuant to which the Bankruptcy Court abstains from hearing any of the Debtors' cases. The terms and provisions of this Amendment are for the purpose of defining the relative rights and obligations of the Debtors, the Agent, ACAS, the SPV, and the SPV Members with respect to the transactions contemplated hereby and, except as expressly provided in Sections 2 and 3 hereof, there shall be no third party beneficiaries of any of the terms and provisions of this Amendment.

(b) *Entire Agreement.* This Amendment, the Global Settlement Order and the Global Settlement Term Sheet constitute the entire agreement of the parties with respect to the subject matter hereof and supersede all other understandings, oral or written, with respect to the subject matter hereof.

(c) *Headings.* Section heading in this Amendment are included herein for convenience of reference only and shall not constitute a part of this Amendment for any other purpose.

(d) *Severability.* Wherever possible, each provision of this Amendment shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this Amendment shall be prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Amendment.

(e) *Conflict of Terms.* Except as otherwise provided in this Amendment, if any provision contained in this Amendment is in conflict with, or inconsistent with, any provision in any of the Loan Documents, the provision contained in this Amendment shall govern and control. In the event of any conflict between this Amendment and the Global Settlement Order (including the attached Global Settlement Term Sheet), the Global Settlement Order shall govern.

(f) *Counterparts.* This Amendment may be executed in any number of separate counterparts, each of which shall collectively and separately constitute one agreement. Delivery of an executed signature page to this Amendment by facsimile or electronic transmission shall be effective as delivery of a manually executed signature page to this Amendment.

(g) *Incorporation of Credit Agreement.* The provisions contained in Sections 9.18 and 9.19 of the Credit Agreement are incorporated herein by reference to the same extent as if reproduced herein in their entirety, except with reference to this Amendment rather than the Credit Agreement.

[Signature Pages Follow]

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be duly executed and delivered by their duly authorized officers as of the day and year first above written.

**BORROWERS:**

**AFA FOODS, INC.**

By: \_\_\_\_\_  
Name:  
Title:

**AMERICAN FOODSERVICE  
CORPORATION**

By: \_\_\_\_\_  
Name:  
Title:

**FAIRBANK RECONSTRUCTION  
CORPORATION**

By: \_\_\_\_\_  
Name:  
Title:

**AMERICAN FRESH FOODS, L.P.**

By: American Fresh Foods, LLC  
Its: General Partner

By: \_\_\_\_\_  
Name:  
Title:

**UNITED FOOD GROUP LLC**

By: \_\_\_\_\_

Name:

Title:

**BORROWER REPRESENTATIVE:**

**AFA FOODS, INC.**

By: \_\_\_\_\_

Name:

Title:

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be duly executed and delivered by their duly authorized officers as of the day and year first above written.

CREDIT PARTIES:

AFA INVESTMENT INC.

By: \_\_\_\_\_

Name:

Title:

AMERICAN FOODSERVICE  
INVESTMENT COMPANY, LLC

By: American Foodservice Corporation

Its: Managing Member

By: \_\_\_\_\_

Name:

Title:

AMERICAN FRESH FOODS, LLC

By: \_\_\_\_\_

Name:

Title:

AMERICAN FRESH FOODS, INC.

By: \_\_\_\_\_

Name:

Title:



IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be duly executed and delivered by their duly authorized officers as of the day and year first above written.

YUCAIPA CORPORATE INITIATIVES  
FUND II, LLC, as the Agent

By: \_\_\_\_\_

Name: Robert P. Bermingham

Title: Vice President and Secretary

YCIF II SECOND LIEN HOLDINGS LLC,  
as a Lender

By: Yucaipa Corporate Initiatives Fund  
II, L.P., its Managing Member

By: Yucaipa Corporate Initiatives Fund  
II, LLC, its General Partner

By: \_\_\_\_\_

Name: Robert P. Bermingham

Title: Vice President and Secretary

AMERICAN CAPITAL, LTD., as a Lender

By: \_\_\_\_\_

Name:

Title:

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be duly executed and delivered by their duly authorized officers as of the day and year first above written

YUCAIPA CORPORATE INITIATIVES  
FUND II, L.P., as a SPV Member

By: Yucaipa Corporate Initiatives Fund  
II, LLC, its General Partner

By: \_\_\_\_\_  
Name: Robert P. Bermingham  
Title: Vice President and Secretary

YUCAIPA CORPORATE INITIATIVES  
(PARALLEL) FUND II, L.P., as a SPV  
Member

By: Yucaipa Corporate Initiatives Fund  
II, LLC, its General Partner

By: \_\_\_\_\_  
Name: Robert P. Bermingham  
Title: Vice President and Secretary

NBPCO HOLDINGS, LLC, as a SPV  
Member

By: \_\_\_\_\_  
Name:  
Title:

**EXHIBIT E**

**[Proposed Order]**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

-----X  
:
  
In re : Chapter 11
  
:
  
AFA INVESTMENT INC., *et al.*,<sup>1</sup> : Case No. 12-11127 (MFW)
  
:
  
Debtors. : Jointly Administered
  
:
  
: **Re: Docket No. \_\_**
  
-----X

**ORDER APPROVING REVISED GLOBAL SETTLEMENT**

This matter coming before the Court on the Amended Joint Motion of:

(A) Debtors; (B) Official Committee of Unsecured Creditors; (C) Term B Loan Lenders;  
(D) Second Lien Agent; (E) Beef Products Inc.; (F) American Capital Limited; (G) the Other  
Prepetition Second Lien Lenders; and (H) Nadia Sanchez, on Behalf of Herself and Others  
Similarly Situated, Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule  
9019 for an Order Authorizing Global Settlement (the "Amended Motion"),<sup>2</sup> filed by the  
Settlement Parties; the Court having reviewed the Amended Motion and the Revised Term Sheet  
attached thereto as Exhibit A and having considered the statements of counsel and the evidence  
adduced with respect to the Amended Motion and Revised Term Sheet at a hearing before the  
Court (the "Hearing"); the Court having found that (a) the Court has jurisdiction over this matter  
pursuant to 28 U.S.C. §§ 157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C.

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<sup>1</sup> The Debtors are the following nine entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): AFA Investment Inc. (0331); American Foodservice Corporation (1780); American Fresh Foods, Inc. (7389); American Fresh Foods, L.P. (7302); AFA Foods, Inc. (0429); American Fresh Foods, LLC (7301); Fairbank Reconstruction Corporation (2405); American Foodservice Investment Company, LLC (9525); and United Food Group LLC (7584). The address of each of the Debtors is 860 First Avenue, Suite 9A, King of Prussia, Pennsylvania 19406.

<sup>2</sup> Capitalized terms not otherwise defined herein have the meanings given to them in the Amended Motion.

§ 157(b), (c) notice of the Amended Motion and the Hearing was sufficient under the circumstances and in full compliance with Bankruptcy Rule 2002 and the Local Rules of this Court, (d) the Revised Settlement (including the WARN Settlement) (i) is the product of good faith, arms' length negotiations among the Settlement Parties, without collusion, (ii) is fair, reasonable, appropriate and in the best interests of the Debtors' estates and (iii) represents a sound exercise of the Debtors' business judgment and (e) each of the Settlement Parties provides sufficient consideration for the transactions contemplated by the Revised Settlement (including the WARN Settlement); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein;

IT IS HEREBY ORDERED THAT:

1. The Amended Motion is GRANTED.
2. The terms of the Revised Settlement as set forth in the Revised Term Sheet are APPROVED in their entirety, pursuant to Bankruptcy Rule 9019. All of the terms set forth in the Revised Term Sheet are approved whether or not restated below in this Order. The Revised Term Sheet and the Third Amendment are binding upon and enforceable against each of the parties thereto according to their terms. In the event of a conflict between the terms of the Revised Term Sheet and this Order, the terms of this Order shall govern.
3. The Term B Loan Claim and the Second Lien Claim are deemed allowed secured claims against the Debtors' estates in an amount no less than \$1,400,000 and \$71,595,210, respectively, pursuant to section 502 of the Bankruptcy Code, and shall not be subject to reduction, disallowance, objection, set-off, recoupment, or reconsideration pursuant to

section 502(j) of the Bankruptcy Code or otherwise. The Second Lien Claim shall be paid on the terms set forth in the Revised Term Sheet and the Third Amendment.<sup>3</sup>

4. The ACAS Claims are deemed an allowed secured Second Lien Claim against the Debtors' estates in the amount of \$3,100,000 — which claim is part of the \$71,595,210 in Second Lien Obligations — pursuant to section 502 of the Bankruptcy Code, and shall not be subject to reduction, disallowance, objection, set-off, recoupment or reconsideration pursuant to section 502(j) of the Bankruptcy Code or otherwise. The ACAS Claims shall be paid on the terms set forth in the Revised Term Sheet and the Third Amendment.

5. The Second Lien Agent is awarded a superpriority adequate protection claim in the amount of \$2,250,000 as adequate protection for the diminution in value of its security interest consistent with paragraph 6(ii) of the Interim Cash Collateral Order, provided, however, that (a) the Adequate Protection Claim shall be paid solely from the proceeds of Avoidance Actions and (b) the Second Lien Agent agrees to gift the first \$1,650,000 of any recovery on the Adequate Protection Claim to the WARN Claimants on the terms and conditions set forth in the Revised Term Sheet.

6. As of the Settlement Effective Date, the Releases contained in the Revised Settlement shall become binding on and enforceable.

7. This Court's approval of the Revised Settlement pursuant to Bankruptcy Rule 9019 authorizes the Debtors to enter into the WARN Settlement as part of the Revised Settlement, subject only to approval of the WARN Settlement in the WARN Action pursuant to Civil Rule 23(e), as made applicable in the WARN Action by Bankruptcy Rule 7023.

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<sup>3</sup> Yucaipa previously received payment on the Term B Loan Claim.

8. Without further order of the Court, the Debtors are authorized to enter into: (a) the Third Amendment and (b) a Settlement Document — on terms consistent with those of the Amended Motion and the Revised Term Sheet — provided that any such Settlement Document is filed with the Court and served on the Bankruptcy Rule 2002 service list at least three business days prior to its execution by the Debtors. If no objections to the Settlement Document are filed with the Court during this three business day notice period, the Debtors shall be authorized to enter into the Settlement Document. If no Settlement Document is entered into, the Revised Term Sheet and the Third Amendment shall nevertheless be binding upon and enforceable against the parties.

9. The Debtors and the Second Lien Agent will work in good faith to reach agreement on a modification to FTI's engagement, and its compensation, to address the additional responsibilities relating to Avoidance Actions called for under the Revised Settlement. The revised terms of engagement for FTI, and related compensation, must be acceptable to FTI and the Avoidance Action Committee and approved on motion to and order of this Court. In the absence of an order approving a modification of FTI's engagement, FTI's role with respect to the Avoidance Actions shall be limited to facilitating the Avoidance Action Counsel's access to the Debtors' books and records, including any analysis of Preference Claims previously performed by FTI.

10. The Debtors are hereby authorized to take such additional actions or execute such additional documents as are necessary or appropriate to implement the terms of the Revised Settlement.

11. The provisions of this Order and the Revised Term Sheet (a) shall be binding on all successors and assigns of any of the Settlement Parties, all creditors and interest

holders and other entities, including, without limitation, any chapter 11 or chapter 7 trustee, responsible officer, examiner, estate administrator or representative, plan administrator, or similar person to any of the foregoing, whether existing in this chapter 11 case or any chapter 7 case or otherwise, and pursuant to a chapter 11 plan or otherwise; and (b) shall survive entry of any order that may be entered: (i) confirming any plan of reorganization or liquidation in the Debtors' cases; (ii) converting any of the Debtors' cases to a case under chapter 7 of the Bankruptcy Code; (iii) dismissing any of the Debtors' cases; (iv) discharging any Debtor; or (v) pursuant to which the Bankruptcy Court abstains from hearing any of the Debtors' cases.

12. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, enforcement or interpretation of this Order.

Dated: \_\_\_\_\_, 2013  
Wilmington, Delaware

\_\_\_\_\_  
THE HONORABLE MARY F. WALRATH  
UNITED STATES BANKRUPTCY JUDGE