



(A) establishing procedures substantially in the form attached to the Sale Procedures Order as Annex 1 (collectively, the "Sale Procedures") for the sale of substantially all of the Debtors' assets (collectively, as may be further defined in any applicable asset purchase agreement(s), the "Assets") in one or more transactions;

(B) authorizing the Debtors to enter into one or more asset purchase agreements (any such agreement, an "Asset Purchase Agreement") with one or more potential bidders, including one or more Asset Purchase Agreements with one or more "stalking horse" bidders (each such Asset Purchase Agreement a "Stalking Horse Agreement" and each such bidder, a "Stalking Horse Bidder"), and to provide certain bid protections (the "Bid Protections") to any Stalking Horse Bidder in connection therewith;

(C) scheduling an auction of the Assets (the "Auction") and a final hearing for approval of the sale(s) of the Assets (the "Sale Hearing");

(D) approving the form and manner of notice of the Sale Procedures, the Auction and the Sale Hearing;

(E) establishing procedures (the "Contract Procedures") for any assumption and assignment of executory contracts and unexpired leases (collectively, the "Executory Contracts") in connection with the sale; and

(F) granting other related relief; and

(II) **For sale approval** — upon the conclusion of the Sale Hearing, one or more orders (each, a "Sale Order") —

(A) approving the sale(s) of the Assets, or any combination thereof, to one or more Successful Bidders (as defined below) free and clear of liens, claims, interests and encumbrances (the "Sale");

(B) approving the assumption and assignment by the Debtors of the Executory Contracts to the Successful Bidder(s); and

(C) granting other related relief.

In support of this Motion, the Debtors (a) rely upon the Declaration of Ron Allen in Support of First-Day Pleadings (Docket No. 8) (the "First Day Declaration")<sup>2</sup> and (b) respectfully represent as follows:

### **Background**

1. On April 2, 2012 (the "Petition Date"), each of the Debtors commenced a case under chapter 11 of the Bankruptcy Code. By an order of the Court (Docket No. 35), the Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being administered jointly.

2. 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.

3. The Debtors are among the largest ground beef processing enterprises in the United States. At their active facilities, the Debtors produce case-ready ground beef and individually quick frozen hamburger patties for sale to customers across a national retail and foodservice market. Annually, the Debtors process more than 500 million pounds of ground beef products, which are distributed primarily to restaurants and retail grocery stores across the United States. As of the Petition Date, the Debtors operated beef processing facilities in California,<sup>3</sup> Georgia, New York, Pennsylvania and Texas and maintain their headquarters in King of Prussia, Pennsylvania.

4. As of the Petition Date, the Debtors employed approximately 850 full time employees. As of December 31, 2012, the Debtors' books and records reflected approximately

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<sup>2</sup> The Debtors reserve the right to file one or more additional supporting declarations in connection with the hearing to consider the Sale Procedures (the "Sale Procedures Hearing") and the Sale Hearing.

<sup>3</sup> Effective April 7, 2012, the Debtors suspended most of their operations at their California facility.

\$958 million in annual revenues on a consolidated basis. 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.

5. On April 12, 2012, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed an official committee of unsecured creditors (the "Creditors' Committee") in these chapter 11 cases, pursuant to section 1102 of the Bankruptcy Code.

### **Jurisdiction**

6. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue for this matter is proper in this district pursuant to 28 U.S.C. § 1409.

### **The Proposed Sale of the Assets**

#### ***The Need to Sell the Assets***

7. As described in the First Day Declaration, the Debtors commenced these cases to conduct a prompt sale of their business assets with the goal of maximizing value for stakeholders and preserving as many jobs and customer and vendor relationships as possible.<sup>4</sup> As discussed below, consummation of the Sale by June 28, 2012 is a condition of the Debtors' DIP Facility (defined below) and in the best interests of the Debtors' estates. In any event, it is imperative given the reality of the market conditions the Debtors face to complete the Sale as expeditiously as possible.

8. The Debtors began to face increasing financial challenges in the past two years as a result of various factors, including, among other things: (a) decreasing retail demand; (b) costly, customer specified requirements for finished product testing; and (c) lower sales in

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<sup>4</sup> Additional facts about the Debtors, their business, the reasons for the commencement of the Debtors' chapter 11 cases and the need for the sale are set forth in detail in the First Day Declaration.

certain foodservice outlets due to the diversification into competing proteins. Under these and other conditions, the Debtors struggled to increase their market share, improve profitability and adequately service their debt. As conditions became increasingly difficult, the Debtors aggressively worked to increase productivity and decrease costs, and worked with their prepetition secured lenders to attempt to address potential defaults and provide for the liquidity needs of the business.

9. Despite these efforts (and as further described in the First Day Declaration), unanticipated market events beyond the Debtors' control hampered the Debtors' ability to implement their out-of-court restructuring strategy. Ultimately, obtaining additional funding for a sale process outside of bankruptcy became impossible. Faced with an immediate and unanticipated liquidity crisis, the Debtors determined during the week of March 26, 2012, that they could not pay vendors absent an additional infusion of liquidity. When it became apparent that additional lending was not available outside of bankruptcy, the Debtors promptly explored the possibility of bankruptcy financing and initiated preparations for an emergency chapter 11 filing.

10. The lenders under the Debtors' prepetition first lien credit facility have provided a postpetition debtor in possession financing facility (the "DIP Facility" and, the lenders thereunder the "DIP Lenders") to allow the Debtors to pursue the Sale in a manner that will maximize asset value and preserve as many employee, vendor and customer relationships as possible. By an order entered on April 3, 2012 (Docket No. 42) (the "Interim Financing Order"), the Court granted interim approval of the DIP Facility and scheduled a hearing for April 24, 2012 at 2:00 p.m., Eastern Time ("ET"), to consider final approval of the DIP Facility.

11. The Interim Financing Order establishes, among other things, several milestones for the Debtors' sale process, including requirements that the Debtors: (a) file this Motion by April 16, 2012, (b) obtain approval of bid procedures by May 14, 2012, (c) obtain one or more executed letters of intent to purchase the Assets by no later than May 17, 2012,<sup>5</sup> (d) conduct the Auction by no later than June 17, 2012, (e) seek to have the Sale Hearing occur and the Sale Order(s) entered no later than five business days after the Auction and (f) consummate any sale(s) of the Assets by no later than June 28, 2012.

***The Debtors' Marketing Efforts Thus Far***

12. The Debtors commenced their marketing efforts in the period immediately before the Petition Date. Specifically, on or about March 23, 2012, the Debtors retained Imperial Capital, LLC ("Imperial") to identify potential buyers and to assist in completing a Sale of the Assets as a single lot to one buyer, or in discrete lots to multiple buyers. Imperial immediately began a process to aggressively market the Debtors' assets toward that goal.

13. To date, Imperial has contacted approximately 98 potential buyers, of which no fewer than 52 are strategic buyers that conduct business in or related to the Debtor's industry, with several having expressed at least a preliminary interest in purchasing the Assets. As part of this process, Imperial sent "teasers" and confidentiality and nondisclosure agreements ("NDAs") to potential buyers, Imperial is in the process of finalizing a more detailed marketing book and establishing a "digital data room" and other means of facilitating potential buyers' due diligence. So far, approximately 36 parties have executed, or are in the process of executing, NDAs. Of this number, approximately 17 are strategic buyers.

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<sup>5</sup> The DIP Lenders have since consented to an extension of this milestone to May 29, 2012, which will be reflected in the final order approving the DIP Facility.

14. Despite these efforts, the Debtors have not yet designated a Stalking Horse Bidder or entered into a Stalking Horse Agreement or other Asset Purchase Agreement.

The Debtors nevertheless have proceeded with this Motion while their marketing process continues, in compliance with the DIP Facility and the Interim Financing Order and to ensure that the Sale process can be completed expeditiously and maximum value can be achieved for the Debtors' stakeholders.

### ***The Sale Procedures***

15. The Sale Procedures are attached as Annex 1 to the Sale Procedures Order and incorporated herein by reference. The Debtors developed the Sale Procedures with the assistance of their professionals to permit the Sale to be completed in an orderly, expeditious and efficient manner, and to ensure that the Debtors receive the highest and best possible price for the Assets. The Sale Procedures provide a familiar, time-tested framework for a competitive chapter 11 bidding process to sell the Assets.

16. In general, the Sale Procedures will permit the Debtors, as they deem necessary and appropriate in the prudent exercise of their business judgment in consultation with certain key interested parties in these cases, to enter into one or more typical agreements with, and to grant certain typical Bid Protections to, one or more Stalking Horse Bidders. Moreover, the Sale Procedures are designed to provide the Debtors with the flexibility to sell their Assets to a single purchaser, or to multiple purchasers in segregated lots.

17. The Debtors have structured the Sale Procedures in a manner that complies with the Local Rules and the Interim Financing Order, and toward the goal of efficiently consummating a Sale that maximizes value and provides an opportunity to preserve jobs and other commercial relationships. These procedures provide that framework, and will enable the Debtors to review, compare and determine which bid or bids are in the best interests

of the Debtors' estates and creditors. The Debtors respectfully submit that the Sale Procedures are necessary to, and will assist them in and promote, their efforts to complete a sale of their Assets.

18. In addition to the deadlines associated with the potential assumption and assignment of Executory Contracts as outlined below, the key milestones proposed under the Sale Procedures are as follows:<sup>6</sup>

(a) until 11:59 p.m. (ET) on May 29, 2012, the Debtors will seek to obtain one or more executed letters of intent to purchase the Assets (each, a "Letter of Intent");

(b) until 24 hours before the commencement of the Auction, the Debtors may select one or more Stalking Horse Bidders and enter into Stalking Horse Agreements with and provide Bid Protections to such Stalking Horse Bidders and

(i) promptly will file with the Court and provide a copy of any such Stalking Horse Agreement(s), by electronic mail, to (A) counsel to the agent for the Debtors' postpetition financing facility (the "DIP Agent"); (B) counsel to the agent (the "First Lien Agent") for the Debtors' prepetition first lien lenders (collectively, the "First Lien Lenders"); (C) counsel to the agent (the "Second Lien Agent") for the Debtors' prepetition second lien lenders (collectively, the "Second Lien Lenders"); (D) counsel to the Creditors' Committee; and (E) any other parties that, by that time, either (1) have submitted a Letter of Intent, (2) are, in the determination of the Debtors, otherwise engaged in active due diligence or negotiations with the Debtors or (3) have been identified by the Debtors, in their discretion, as a party who should receive such notice; and

(ii) if the Debtors enter into any such Stalking Horse Agreement(s) not later than 5:00 p.m. (ET) on June 8, 2012 (which is four calendar days before the Auction), the Debtors will in addition serve a copy of any such Stalking Horse Agreement(s), by overnight delivery, on: (A) all parties that have filed a request for notice in these chapter 11 cases pursuant to Bankruptcy Rule 2002; and (B) any other parties that have been identified by the Debtors, in their discretion, as a party who should receive such notice; and

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<sup>6</sup> The brief description of the key milestones in the Sale Procedures described herein is for the convenience of the Court and parties in interest. The full copy of the Sale Procedures, which are annexed to the proposed Sale Procedures Order, should be reviewed in their entirety and will control in the event of any inconsistency or ambiguity in any descriptions of them herein.



(iii) at any time before the Debtors enter into any such Stalking Horse Agreement(s), the Debtors may file a proposed form of Asset Purchase Agreement with the Court and serve such Asset Purchase Agreement as set forth in subparagraphs (i) and (ii) above, which form Asset Purchase Agreement may serve as the form agreement for bidding on certain Assets in the absence of a Stalking Horse Agreement (each, a "Form Asset Purchase Agreement");<sup>7</sup>

(c) continue soliciting interest from and assisting Potential Bidders (as defined in the Sale Procedures) in conducting their respective due diligence investigations and accept bids seeking qualification as Qualified Bids (as defined in the Sale Procedures) until 12:00 noon (ET) on June 11, 2012 (the "Bid Deadline") or thereafter as permitted in the Sale Procedures; and

(d) also do the following if they receive more than one Qualified Bid — (i) negotiate with the Qualified Bidders (as defined below) in preparation for the Auction, (ii) conduct the Auction, beginning at 10:00 a.m. (ET) on June 12, 2012, at the offices of the Debtors' Delaware bankruptcy counsel, Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, P.O. Box. 8705, Wilmington, Delaware 19899 and (iii) select, at the conclusion of the Auction, in their sole discretion, but after consultation with the DIP Agent, the First Lien Agent, the Creditors' Committee and the Second Lien Agent (collectively, the "Consultation Parties"), which bidder or bidders have provided the highest and best offer(s) for the Assets in a single or multiple lots (each, a "Successful Bidder").

**19. The Debtors, in the exercise of their discretion after consultation with the Consultation Parties, expressly reserve and will have the right under the Sale Procedures to modify or waive any of the Sale Procedures, including, without limitation, any deadlines thereunder, if such modification is determined by the Debtors, after consultation with the Consultation Parties, to be in the best interests of the estates and to enhance the likelihood of the Sale process to maximize the sale value of the Assets; provided, however, that any such modification or waiver shall require the written consent of the First Lien Agent (provided that the First Lien Agent has not submitted a bid for any of the Assets affected by such modification or waiver).**

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<sup>7</sup> Any Stalking Horse Agreement or Form Asset Purchase Agreement will have appended to it a proposed form of Sale Order for the relevant Assets.

***Ability to Select One or More Stalking Horse Bidders***

20. To incentivize potential bidders and thereby maximize the potential value of their Assets for the benefit of their estates and various stakeholders, the Debtors request that they be authorized, upon their receipt of any bid (or bids, if for less than substantially all Assets) that the Debtors deem, in an exercise of their sound business judgment to be acceptable, to designate one or more bids as a stalking horse bid (each, a "Stalking Horse Bid") and to execute a Stalking Horse Agreement with such Stalking Horse Bidder in connection with the proposed sale of the Assets, at any time up to 24 hours before the commencement of the Auction.

21. Upon execution of a Stalking Horse Agreement with any Stalking Horse Bidder, such Stalking Horse Agreement will be a Qualified Bid and the Debtors will provide notice of such Stalking Horse Bidder and Stalking Horse Agreement as outlined above and in the Sale Procedures.

***Potential Bid Protections if Any Stalking Horse Bidders Are Designated***

22. The Debtors request that they be authorized, if they execute any Stalking Horse Agreement with any Stalking Horse Bidder(s), to provide thereunder or otherwise to provide such Stalking Horse Bidder(s) with the following typical Bid Protections:

- (a) a Topping Fee (a "Topping Fee"), in an amount to be negotiated by the Debtors, but which will be subject to approval by the Bankruptcy Court, based on the totality of the circumstances, including, without limitation, the purchase price (the "Purchase Price") and other terms and conditions of the Stalking Horse Agreement;
- (b) the requirement that other Qualified Bidders for substantially the same Assets be obligated to agree to a form of Asset Purchase Agreement no less favorable to the Debtors than the Stalking Horse Agreement; and
- (c) the establishment, by the commencement of the Auction, of minimum initial and overbid increments in appropriate amounts, in the Debtors' discretion, subject to consultation with the Consultation Parties.

### ***Credit Bidding***

23. In approving the DIP Facility on an interim basis, the Interim Financing Order preserves, among other things, credit bidding rights for the Debtors' secured lenders. Specifically, the Interim Financing Order provides that:

(a) the DIP Agent "shall have the unqualified right to credit bid up to the full amount of the DIP Loans in any sale of the DIP Collateral under or pursuant to . . . section 363 of the Bankruptcy Code;"

(b) the First Lien Agent "shall have the unqualified right to credit bid up to the full amount of any remaining First Lien Obligations in any sale of the DIP Collateral or Collateral, as applicable, subject to the satisfaction of the DIP Loans, or as otherwise consented to by the requisite DIP Lenders, under or pursuant to . . . section 363 of the Bankruptcy Code;" and

(c) "In addition to any rights it might have under the Bankruptcy Code, the Second Lien Agent shall retain any and all rights it may have with respect to credit bidding on behalf of the Second Lien Lenders as set forth in the Intercreditor Agreement."

Interim Financing Order at 40-41 (undefined terms have the meanings given to them in the Interim Financing Order).

24. Consistent with the Interim Financing Order, the Debtors request that credit bidding be permitted with respect to the Sale as follows:

(a) For purposes of the Sale Procedures, the DIP Agent shall be deemed a Qualified Bidder. The DIP Agent, at the direction of the requisite DIP Lenders, shall have the unqualified right to credit bid, whether as the Stalking Horse Bidder or otherwise, up to the full amount of the DIP Obligations, at any time prior the conclusion of the Auction.

(b) For purposes of the Sale Procedures, the First Lien Agent shall be deemed a Qualified Bidder. The First Lien Agent, at the direction of the requisite First Lien Lenders, shall have the unqualified right to credit bid, whether as the Stalking Horse Bidder or otherwise, up to the full amount of any remaining First Lien Obligations, at any time prior to the conclusion of the Auction.

(c) The Second Lien Agent, at the direction of the requisite Second Lien Lenders, shall have the right to credit bid, whether as the Stalking Horse Bidder or otherwise, up to the full amount of any remaining Second Lien Obligations, subject to the indefeasible payment in full in cash of all outstanding DIP Obligations and First Lien

Obligations, or as otherwise consented to in writing by the DIP Agent and requisite DIP Lenders and the First Lien Agent and the requisite First Lien Lenders.

(d) Upon submitting a credit bid, or any bid for some or all of the Assets, the DIP Agent, the First Lien Agent and the Second Lien Agent (as applicable) shall cease to be a Consultation Party.

Undefined terms in this paragraph 24 have the meanings given to them in the Interim Financing Order.

***The Proposed Notice of the Sale Hearing***

25. Pursuant to Bankruptcy Rule 2002(a) and Local Bankruptcy Rule 2002-1, the Debtors are required to provide the U.S. Trustee and all of the Debtors' creditors with 21 days' notice of the Sale Hearing. Pursuant to Bankruptcy Rule 2002(c), such notice must include the time and place of the Auction and the Sale Hearing as well as the deadline for filing any objections to the relief requested herein. As set forth below, the Debtors' proposed form and manner of notice will satisfy these obligations.

26. Within three business days after entry of the Sale Procedures Order (the "Mailing Deadline"), the Debtors will:

(a) serve, by first class mail, postage prepaid, a copy of the Sale Procedures Order upon (i) the U.S. Trustee, (ii) counsel to the DIP Agent, (iii) counsel to the First Lien Agent, (iv) counsel to the Second Lien Agent, (v) counsel to the Creditors' Committee and (vi) all entities who have requested service in these cases pursuant to Bankruptcy Rule 2002;

(b) serve, by first class mail, postage prepaid, a notice of the Sale, the Auction, the Sale Hearing and related information in substantially the form annexed to the Sale Procedures Order as Annex 2 (the "Sale Notice") upon: (i) all of the parties listed above in paragraph 26(a); (ii) all parties on the Debtors' creditor matrix; (iii) all parties that, in the past year, have expressed in writing to the Debtors an interest in purchasing some or all of the Assets; (iv) all nondebtor parties to the Executory Contracts; (v) all parties who are known or reasonably believed to have asserted a lien, encumbrance, claim or other interest in the Assets or any claims against the Debtors; (vi) the Internal Revenue Service and applicable state and local taxing authorities; (vii) the United States Environmental Protection Agency and applicable equivalent state environmental regulatory agencies; (viii) the United States Department of Agriculture; and (ix) all applicable state attorneys general.

In addition, no later than the Mailing Deadline, the Debtors will publish notice of the Sale, substantially in the form attached as Annex 2 to the Sale Procedures Order (modified as necessary or appropriate for publication), in the national editions of *The Wall Street Journal* and *USA Today*.

27. The Sale Notice provides that any party that wishes to obtain a copy of this Motion, including all exhibits and annexes thereto, or the Sale Procedures Order, may do so, free of charge, by written request to Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, P.O. Box. 8705, Wilmington, Delaware 19899 (courier 19801) (Attn: Laura Davis Jones, Esq.) or by accessing the website maintained by the Debtors' claims and noticing agent, Kurtzman Carson Consultants LLC, at <http://www.kccllc.net/afa> (the "AFA Bankruptcy Website"). The Sale Notice and the Sale Procedures Order will be posted on the AFA Bankruptcy Website.

28. The Debtors propose that, to be timely and otherwise eligible for consideration by the Court, objections to the Sale and/or any component thereof (except with respect to issues concerning Executory Contracts, as provided further below) must: (a) be in writing; (b) clearly specify the grounds for the objection; (c) conform to the Bankruptcy Rules and the Local Rules; and (d) be filed with the Court and served so as to be received by the following parties (collectively, the "Objection Notice Parties") by no later than 12:00 noon (ET) on June 14, 2012 (the "Sale Objection Deadline"): (i) counsel to the Debtors, (A) Jones Day, 555 California Street, 26th Floor, San Francisco, California 94104 (Attn: Tobias S. Keller, Esq. and Robert A. Trodella, 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 Creditors' 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 (courier 19801) (Attn: Jeremy W. Ryan, Esq.); and (v) the U.S. Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801 (Attn: Mark Kenney, Esq.).

29. The Debtors submit that the proposed Sale Notice, and providing notice of the Motion, the Auction and the Sale Hearing as described herein, complies fully with Bankruptcy Rule 2002 and Local Bankruptcy Rule 2002-1 and constitutes good and adequate notice of the Sale and the proceedings with respect thereto.<sup>8</sup> Therefore, the Debtors respectfully request that this Court approve the form of the Sale Notice and the notice procedures proposed above.

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<sup>8</sup> For example, the Sale Procedures Hearing is set for May 8, 2012, and the Sale Hearing is anticipated to be held on June 15, 2012. Assuming that the Sale Procedures Order is entered within two business days of the Sale Procedures Hearing and the Sale Notice is served three business days thereafter, parties in interest will have more than 30 days' notice of the Sale Hearing.

***Request for Procedures for the Assumption and Assignment of Executory Contracts***

30. In connection with the possible assumption and assignment of Executory Contracts pursuant to any Sale, the Debtors believe that it is necessary to establish Contract Procedures by which the Debtors and the counterparties to the Executory Contracts that may be assumed and assigned to the Successful Bidder(s) (collectively, the "Contract Counterparties") can promptly: (a) establish the cure obligations, if any, to be paid in accordance with section 365 of the Bankruptcy Code or resolve any disputes concerning cure issues; and (b) resolve any other objections the Contract Counterparties may assert against the assumption and assignment of their Executory Contracts. Accordingly, by no later than 4:00 p.m. (ET) on June 1, 2012, the Debtors will file with the Court, post on the AFA Bankruptcy Website and serve on all Contract Counterparties a schedule of cure obligations (the "Contract and Cure Schedule") concerning the applicable Executory Contracts, which schedule shall: (a) identify, with reasonable specificity within the limits of information contained within the Debtors' books and records, each Executory Contract potentially to be assumed and assigned in connection with the Sale and the amount, if any, that the Debtors maintain would be necessary pursuant to section 365 of the Bankruptcy Code to cure any monetary defaults under such Executory Contracts; and (b) set forth the procedures and deadlines for asserting Cure Objections and Adequate Assurance Objections (as such terms are defined below).

31. The Debtors propose that, to be timely and eligible for consideration by the Court, any objections to any cure amount(s) set forth on the Contract and Cure Schedule (any such objection, a "Cure Objection," and any such disputed amounts, "Disputed Cure Amounts") must be made in writing, must clearly specify the ground(s) for the objection and must be filed

with the Court by, and served so as to be received by the Objection Notice Parties by, no later than 4:00 p.m. (ET) on June 8, 2012 (the "Cure Objection Deadline").<sup>9</sup>

32. If no timely Cure Objection with respect to an Executory Contract is filed and served on the Objection Notice Parties by the Cure Objection Deadline, then (a) the cure amount(s) identified in the Contract and Cure Schedule with respect to the applicable Executory Contract will become liquidated and established on a final basis as the only amount(s) necessary under section 365(b) of the Bankruptcy Code to cure any and all monetary defaults under such Executory Contract and (b) the payment of the identified cure amount by the Successful Bidder shall be a full, final and complete cure of any defaults under the Executory Contract in satisfaction of section 365(b) of the Bankruptcy Code.

33. Separately, the Debtors propose that, to be timely and eligible for consideration by the Court, any objections either: (a) to the ability and qualifications of a Successful Bidder to provide adequate assurance of future performance under any Executory Contract identified on the Contract and Cure Schedule; or (b) raising any other objection to the assumption and assignment of any Executory Contract (other than a Cure Objection) (any such objection, whether under (a) or (b) above, an "Adequate Assurance Objection"), must be made in writing, must clearly specify the grounds for the objection and must be filed with the Court by, and served so as to be received by the Objection Notice Parties by, no later than the Sale Objection Deadline.

34. If no timely Adequate Assurance Objection with respect to an Executory Contract is filed and served on the Objection Notice Parties by the Sale Objection Deadline,

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The Debtors reserve the right to amend and/or supplement the Contract and Cure Schedule if necessary by no later than the Cure Objection Deadline and, if appropriate, to establish a reasonable additional and/or modified Cure Objection Deadline in connection therewith.



(a) the applicable Executory Contract will be deemed subject to assumption and assignment as proposed by the Debtors and the Successful Bidder and (b) the Successful Bidder will be deemed to have provided or to be able to provide adequate assurance of future performance of the applicable Executory Contract in satisfaction of section 365(f)(2)(B) of the Bankruptcy Code.

35. The Debtors intend to cooperate, and will expect any Successful Bidder to cooperate, as much as reasonably possible with any applicable Contract Counterparties to attempt to reconcile and resolve any Cure Objections, Disputed Cure Amounts and Adequate Assurance Objections before the Sale Hearing, if possible. If any timely Cure Objections or Adequate Assurance Objections cannot be resolved by the parties, the Debtors request that the Court address such Cure Objections or Adequate Assurance Objections at the Sale Hearing and either resolve them on a final basis in connection therewith or, if necessary based on the facts and circumstances of each such matter, hear such matters as a status conference in conjunction with the Sale Hearing and establish an appropriate procedural course for the prompt resolution of the matters thereafter.

36. Finally, the Debtors request that any Contract Counterparty that does not timely assert a Cure Objection and/or an Adequate Assurance Objection be deemed to have consented to the Sale and the treatment of its Executory Contract under section 365 of the Bankruptcy Code and this Motion. See, e.g., Hargrave v. Twp. of Pemberton (In re Tabone, Inc.), 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (finding that creditor deemed to consent to the sale by not objecting to the sale motion); Pelican Homestead v. Wooten (In re Gabel), 61 B.R. 661, 667 (Bankr. W.D. La. 1985) (same). Moreover, the Debtors request that each Contract Counterparty be deemed to have consented to the assumption and assignment of its Executory

Contract notwithstanding any anti-alienation provision or other restriction on assignment contained therein. See 11 U.S.C. §§ 365(c)(1)(B), (e)(2)(A)(ii) and (f).

### **Legal Basis for Relief Requested**

#### ***Approval of the Sale Under Section 363 of the Bankruptcy Code***

37. Section 363(b) of the Bankruptcy Code provides that a debtor "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). A debtor must demonstrate a sound business justification for a sale or use of assets outside the ordinary course of business. See, e.g., In re Martin, 91 F.3d 389 (3d Cir. 1996) (citing In re Schipper, 933 F.2d 513 (7th Cir. 1991)); In re Chateaugay Corp., 973 F.2d 141, 143 (2d Cir. 1992); Stephens Indus., Inc. v. McClung, 789 F.2d 386 (6th Cir. 1986); In re Lionel Corp., 722 F.2d 1063 (2d Cir. 1983).

38. Courts typically consider the following factors in determining whether a proposed sale meets this standard:

- (a) whether a sound business justification exists for the sale;
- (b) whether adequate and reasonable notice of the sale was given to interested parties;
- (c) whether the sale will produce a fair and reasonable price for the property; and
- (d) whether the parties have acted in good faith.

In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991).

#### **Sound Business Reasons**

39. As set forth in the First Day Declaration, the Debtors possess ample and sound business reasons for selling the Assets at this time. After considering potential alternatives and in consultation with the Debtors' prepetition secured lenders and the DIP Lenders, the Debtors have determined that a prompt sale of the Assets is the best — and quite

likely the only — course to preserve and maximize value (including going concern value, if possible) and preserve as many employee, customer and vendor relationships as possible. In particular, the high leverage of the Debtors' prepetition secured debt makes a recapitalization of their business without the Sale infeasible if not impossible (particularly under current market conditions). Any extended delay in selling the Assets could have a severe detrimental effect on the Debtors' ability to continue operations and preserve going concern value to the fullest extent possible. Indeed, under the terms of the DIP Facility and the Interim Financing Order, the Debtors' postpetition financing and continued ability to use cash collateral are conditioned on, among other things, the Debtors' pursuit of the Sale on the expedited timetable outlined herein and set forth in greater detail in the Sale Procedures. The Debtors have no alternative financing. Accordingly, if the Debtors fail to pursue the Sale, they risk losing the funds they require to operate and administer these chapter 11 cases and undermining their ability to maximize value for stakeholders. If the Debtors cease operating, it may result in not only a loss of going concern value and the attendant possibility of preserving commercial relationships, but the loss of employment for most if not all of the Debtors' employees.

*Accurate and Reasonable Notice*

40. The proposed Sale Notice and the Sale Procedures described in this Motion will ensure that there is accurate and reasonable notice of the Sale. First and foremost, the form of the Sale Notice that will be provided to parties in interest will be approved by this Court in advance. As described above, Imperial has been in contact with potential purchasers of the Assets over the past several weeks. Under the terms of the Sale Procedures, all potential purchasers of the Assets will have ample opportunity to participate in the Sale process. Likewise, all Contract Counterparties and other parties in interest in these cases will have ample notice of and opportunity to object to the Sale and the possible assumption and assignment of

Executory Contracts. Accordingly, the Debtors will have provided fair, accurate and reasonable notice of the Sale.

*Adequate Price*

41. By utilizing the Sale Procedures, any sale of the Assets will be for a fair and adequate price, reflecting fair market value. As described above, Imperial will continue to market the Assets up until the deadline to submit Qualified Bids, which is still nearly two months from the filing of this Motion. In this way, the Debtors intend to maximize the number of potential purchasers who may participate at the Auction and thereby maximize and establish the fairness and adequacy of the Purchase Price. Under these circumstances, the Purchase Price is expected to exceed the value the Debtors would receive if the Assets were merely sold in a piecemeal liquidation to multiple purchasers or through some other process less orderly, competitive and efficient than provided for by the Sale Procedures. Nonetheless, the Sale Procedures provide the Debtors with the flexibility to sell the Assets separately if doing so would provide the highest and best price for the Assets.

*Good Faith*

42. The Sale is being conducted in good faith. Courts in the Third Circuit generally have considered three factors when assessing good faith in connection with the sale of a Debtors' assets pursuant to section 363 of the Bankruptcy Code: (a) whether the sale was negotiated at arms' length; (b) whether any officer or director holds an interest in or is otherwise related to the potential purchaser; and (c) whether fraud or collusion exists among the prospective purchaser, any other bidders or the debtor. In re Abbotts Dairies of Pa., Inc., 788 F.2d 143, 147-50 (3d Cir. 1986).

43. In this instance, the Debtors will negotiate the sale of the Assets at arms' length, and in accordance with the Sale Procedures. The Debtors submit that the Successful

Bidder at the conclusion of the Auction should be entitled to the protections of section 363(m) of the Bankruptcy Code. Section 363(m) of the Bankruptcy Code provides:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m).

44. As set forth above, the Sale Procedures ensure that the Sale will be conducted in good faith and, therefore, that the Successful Bidder will be a "good faith purchaser" under section 363(m) of the Bankruptcy Code and entitled to the full protection thereof.

45. In summary, all of the factors for establishing a sound business purpose for the sale of the Assets have been satisfied, and the Court should approve the proposed Sale Procedures, as well as the Sale to the eventual Successful Bidder.

***Authority to Enter Into One or More Stalking Horse Agreements and the Provision of Bid Protections***

46. To the extent the Debtors enter into a Stalking Horse Agreement, it is appropriate to provide the Stalking Horse Bidder with the proposed Bid Protections. The proposed Bid Protections, including without limitation the Topping Fee, are appropriate in these cases because the Debtors will enter into a Stalking Horse Agreement with a Stalking Horse Bidder only if they believe it will maximize the ultimate sale price for their Assets, and the Topping Fee remains subject to approval by the Court. Under Third Circuit precedent, topping fees constitute administrative expenses, and therefore, the payment of such fees must provide a postpetition benefit to the bankruptcy estate. Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re

O'Brien Envtl. Energy, Inc.), 181 F.3d 527, 533 (3d Cir. 1999). In O'Brien, the Third Circuit provided two examples of a potential benefit accruing from the payment of a termination fee. Id. First, a benefit to the estate may arise if, "assurance of a breakup fee promoted [a] more competitive bidding [process], such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited." Id. at 537. Second, a topping fee encourages potential bidders to evaluate thoroughly a debtor's value, thereby "increasing the likelihood that the price at which the debtor is sold will reflect its true worth." Id.

47. As noted above, the Debtors intend to negotiate any Stalking Horse Agreement at arms' length and in good faith and will enter into a Stalking Horse Agreement with a Stalking Horse Bidder only if the Debtors believe it will maximize the return for the sale of the Assets. Thus, the authorization for the Debtors to offer the Topping Fee and other Bid Protections to a Stalking Horse Bidder is justified.

48. Courts have recognized that topping fees may be used to protect bidders in connection with a sale of assets pursuant to section 363 of the Bankruptcy Code and that such fees can be "important tools to encourage bidding and to maximize the value of the Debtors' assets." Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650, 659 (S.D.N.Y. 1992), appeal dismissed, 3 F.3d 49 (2d Cir. 1993). Such protections enable a debtor to assure a sale to a contractually-committed bidder at a price the debtor believes is fair and reasonable, while providing the debtor with the opportunity of obtaining even greater benefits for the estate through an auction process. See In re 995 Fifth Ave. Assocs., L.P., 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (stating that bidding incentives may be "legitimately necessary to convince a white knight to enter the bidding by providing some form of compensation for the risks it is undertaking.") (citation omitted).

### ***Approval of the Sale Free and Clear***

49. The Debtors request approval to sell the Assets free and clear of any and all liens, claims, interests and encumbrances (except for assumed liabilities) in accordance with section 363(f) of the Bankruptcy Code. Pursuant to section 363(f), a debtor in possession may sell estate property "free and clear of any interest in such property of an entity other than the estate" if any one of the following conditions is satisfied:

- (a) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (b) such entity consents;
- (c) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (d) such interest is in bona fide dispute; or
- (e) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f); see Citicorp Homeowners Serv., Inc. v. Elliot (In re Elliot), 94 B.R. 343, 345 (Bankr. E.D. Pa. 1988) (because section 363(f) is written in the disjunctive, a court may approve a "free and clear" sale even if only one of the subsections is met).

50. Section 363(f) is supplemented by section 105(a) of the Bankruptcy Code, which provides that "[t]he 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); see In re Trans World Airlines, Inc., 2001 WL 1820325, at \*3, 6 (Bankr. D. Del. March 27, 2001); Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.), 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) ("Authority to conduct such sales [free and clear of claims] is within the court's equitable powers when necessary to carry out the provisions of Title 11.").

51. The Debtors submit that the Sale will satisfy the requirements of section 363(f) of the Bankruptcy Code. For example, the Debtors will provide all parties holding liens in the Assets with notice of, and an opportunity to object to, the Sale. Absent objection, each such party will be deemed to have consented to the sale of the Assets. In addition, the Debtors believe that certain of the parties holding liens in the Assets could be compelled to accept a monetary satisfaction of such interests. Finally, any lien, claim, interest or encumbrance in the Assets will attach to the net proceeds of the Sale with the same validity and in the relative priorities established under the Interim Financing Order, the Intercreditor Agreement and applicable nonbankruptcy law.

52. Accordingly, the Debtors believe that the Sale (a) will satisfy the statutory prerequisites of section 363(f) of the Bankruptcy Code and (b) should be approved free and clear of all liens, claims, interests and encumbrances.

***Approval of the Assumption of Contracts***

53. The standard for a debtor to assume and assign or reject an executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code is whether the Debtors' decision is made within its sound business judgment. See Sharon Steel Corp. v. National Fuel Gas Dist. Corp. (In re Sharon Steel Corp.), 872 F.2d 36, 39-40 (3d Cir. 1989); In re AbitibiBowater, Inc., 418 B.R. 815, 831 (Bankr. D. Del. 2009); In re Nickels Midway Pier, LLC, 341 B.R. 486, 493 (D.N.J. 2006).

54. The Debtors seek authority to assume and assign the Executory Contracts in accordance with the Contract Procedures. The Debtors assert that, upon compliance with the Contract Procedures outlined herein, including the filing and service of the Contract and Cure Notice on all Contract Counterparties, the Debtors will have met all requirements of sections 365(b) and 365(f) of the Bankruptcy Code and should be permitted to assume the



Executory Contracts and assign them to the applicable Successful Bidder(s). Further, to the extent a Contract Counterparty is concerned the Successful Bidder cannot provide the necessary adequate assurance of future performance, the Sale Procedures require that any Qualified Bidder demonstrate why it meets the adequate assurance requirement. As a safeguard, any counterparty to an Executory Contract may challenge the Successful Bidder's ability to provide the necessary assurances by filing an Adequate Assurance Objection.

55. The assumption and assignment of Executory Contracts is a necessary part of almost any going concern sale under section 363 of the Bankruptcy Code. In light of the proposed Sale, the Executory Contracts at issue will no longer be necessary to the Debtors' estates. In contrast, certain Executory Contracts are expected to be critical to potential bidders in pricing their bid, and their ability to seamlessly operate the Debtors' businesses post-closing. Accordingly, the assumption and assignment of the Executory Contracts is warranted, in the Debtors' business judgment, to eliminate the ongoing liabilities associated therewith and to complete (and maximize the value of) the Sale. Assumption and assignment of the Executory Contracts, thus, represents a sound and reasonable exercise of the Debtors' business judgment and should be approved.

***Waiver of the Certain Requirements of Local Rule 6004-1(b)***

56. Local Rule 6004-1(b) requires, among other things, that any motion to sell property of the estate pursuant to section 363 of the Bankruptcy Code attach "[a] copy of the proposed purchase agreement, or a form of such agreement substantially similar to the one the debtor reasonably believes it will execute in connection with the proposed sale [and a] copy of a proposed form of sale order." Local Rule 6004-1(b). As set forth above, the Debtors and their professionals have commenced an aggressive marketing of the Assets. Nevertheless, the terms of the Sale, including, in particular, the potential distribution of Assets among lots, potential

bases to calculate the Purchase Price, and the extent of assumed liabilities, are uncertain to the Debtors as of the date hereof. Any such forms the Debtors might submit at this time would be merely generic in nature, rather than based on any actual transaction or terms being proposed. Ultimately, the transaction(s) and term(s) proposed could differ materially from any speculative forms presented at this time. Consequently, submitting these forms now would be counterproductive and could confuse potential bidders and other interested parties and could have a chilling effect on bidding.<sup>10</sup> Accordingly, the Debtors request a waiver of the provisions of Local Rule 6004-1 to the extent applicable.

***Waiver of the 14-Day Stay***

57. Finally, the Debtors request a waiver of the 14-day stay that would otherwise apply to the Sale and the assumption and assignment of the Executory Contracts pursuant to Bankruptcy Rules 6004(h) and 6006(d). Any Asset Purchase Agreement likely will contemplate a closing of the Sale as soon as possible after the Court's approval of the Sale. Indeed, the Interim Financing Order provides a narrow five-day window for doing so. Moreover, a prompt closing of the Sale will allow the Debtors to proceed expeditiously with concluding their bankruptcy cases, thus preserving estate assets for the benefit of all constituencies. Therefore, the Court should approve the waiver of the 14-day stay under Bankruptcy Rules 6004(h) and 6006(d).

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<sup>10</sup> As set forth above, pursuant to the Sale Procedures, the Debtors intend to file with the Court and serve on interested parties any Stalking Horse Agreement(s) and, prior to entering into a Stalking Horse Agreement for certain Assets, may file and serve a Form Asset Purchase Agreement. In addition, following any designation of a Successful Bid, such bid (including the applicable Asset Purchase Agreement) will be filed with the Court and served on interested parties. As such, notice of the terms of any Asset Purchase Agreement will be provided to interested parties prior to approval of any Sale.

**No Prior Request**

58. No prior request for the relief sought in this Motion has been made to this or any other Court in connection with these chapter 11 cases.

**Notice**

59. Notice of this Motion shall be provided to the following parties consistent with the terms hereof: (a) the U.S. Trustee; (b) counsel to the DIP Agent; (c) counsel to the First Lien Agent; (d) counsel to the Second Lien Agent; (e) counsel to the Creditors' Committee; (f) all parties that have filed a request for notice pursuant to Bankruptcy Rule 2002; (g) all parties who are known by the Debtors to assert liens with respect to the Assets; (h) the United States Attorney's office; (i) all state attorneys general in states in which the Assets are located; (j) the Internal Revenue Service; and (k) for each state in which the Assets are located, the applicable taxing authorities. The Debtors respectfully submit that no further notice of the Motion is necessary.

WHEREFORE, the Debtors respectfully request that the Court: (a) enter the Sale Procedures Order in substantially the form attached hereto as Exhibit A, approving the Sale Procedures; (b) enter a Sale Order (or Sale Orders) in a form to be determined, authorizing the sale of the Assets to the Successful Bidder(s) at the Auction; and (c) grant such other and further relief to the Debtors as the Court may deem proper.

Dated: April 16, 2012  
Wilmington, Delaware

Respectfully submitted,

PACHULSKI STANG ZIEHL & JONES LLP

/s/ *Timothy P. Cairns*

Laura Davis Jones (No. 2436)  
Timothy P. Cairns (Bar No. 4228)  
Peter J. Keane (Bar No. 5503)  
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-and-

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PROPOSED ATTORNEYS FOR DEBTORS  
AND DEBTORS IN POSSESSION

**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
	:	
	:	
-----	X	

Hrg. Date for Sale Procedures: May 8, 2012 at 2:00 p.m. (ET)  
Deadline to Object to Sale Procedures: April 30, 2012 at 4:00 p.m. (ET)  
[Proposed] Hrg. Date for Sale Approval: June 15, 2012 at 11:30 a.m. (ET)  
[Proposed] Deadline to Object to Sale Approval: June 14, 2012 at 12:00 noon (ET)

**NOTICE OF DEBTORS' MOTION FOR (I) AN ORDER (A) ESTABLISHING  
PROCEDURES FOR THE SALE OF SUBSTANTIALLY ALL OF THEIR ASSETS  
AND AUTHORIZING THEM TO ENTER INTO ONE OR MORE STALKING HORSE  
AGREEMENTS AND TO PROVIDE BID PROTECTIONS, (B) SCHEDULING AN  
AUCTION AND SALE HEARING AND APPROVING THE FORM AND MANNER OF  
NOTICE THEREOF AND (C) GRANTING RELATED RELIEF; AND (II) AN ORDER  
(A) AUTHORIZING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS  
FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES TO ONE  
OR MORE SUCCESSFUL BIDDERS, (B) AUTHORIZING THE ASSUMPTION AND  
ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN  
CONNECTION THEREWITH AND (C) GRANTING RELATED RELIEF**

TO: (a) the U.S. Trustee; (b) counsel to the DIP Agent; (c) counsel to the First Lien Agent; (d) counsel to the Second Lien Agent; (e) counsel to the Creditors' Committee; (f) all parties that have filed a request for notice pursuant to Bankruptcy Rule 2002; (g) all parties who are known by the Debtors to assert liens with respect to the assets; (h) the United States Attorney's office; (i) all state attorneys general in states in which the assets are located; (j) the Internal Revenue Service; and (k) for each state in which the assets are located, the applicable taxing authorities.

**PLEASE TAKE NOTICE** that on April 16, 2012, the above-captioned debtors and debtors in possession (the "Debtors") filed the *Debtors' Motion for (I) An Order (A) Establishing Procedures for the Sale of Substantially All of Their Assets and Authorizing*

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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.

*Them to Enter Into One or More Stalking Horse Agreements and to Provide Bid Protections, (B) Scheduling an Auction and Sale Hearing and Approving the Form and Manner of Notice Thereof and (C) Granting Related Relief; and (II) An Order (A) Authorizing the Sale of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances to One or More Successful Bidders, (B) Authorizing the Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection Therewith and (C) Granting Related Relief* (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.

**PLEASE TAKE FURTHER NOTICE** that any response or objection to the relief sought in the Motion with respect only to the Sale Procedures must be filed with the Bankruptcy Court on or before **April 30, 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) [proposed] 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, 40th 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, 18th 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 WITH RESPECT TO THE SALE PROCEDURES WITHOUT FURTHER NOTICE OR HEARING.**

**PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER THE RELIEF SOUGHT IN THE MOTION WITH RESPECT TO THE SALE PROCEDURES 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 MAY 8, 2012 AT 2:00 P.M. (PREVAILING EASTERN TIME).**

**PLEASE TAKE FURTHER NOTICE** that you will receive further notice regarding the scheduling of a hearing to approve the sale of the Debtors' assets and a deadline to

file an objection to such sale.

Dated: April 16, 2012  
Wilmington, Delaware

PACHULSKI STANG ZIEHL & JONES LLP

/s/ Timothy P. Cairns

Laura Davis Jones (Bar No. 2436)  
Timothy P. Cairns (Bar No. 4228)  
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-and-

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bjberlin@jonesday.com

Proposed Counsel to the Debtors and Debtors in  
Possession



**EXHIBIT A**

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

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

**ORDER (A) ESTABLISHING PROCEDURES FOR  
THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS,  
(B) AUTHORIZING THE DEBTORS TO ENTER INTO ONE OR MORE STALKING  
HORSE AGREEMENTS AND TO PROVIDE BID PROTECTIONS, (C) SCHEDULING  
AN AUCTION AND SALE HEARING AND APPROVING THE FORM  
AND MANNER OF NOTICE THEREOF AND (D) GRANTING RELATED RELIEF**

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This matter comes before the Court on the Debtors' Motion for (I) an Order (A) Establishing Procedures for the Sale of Substantially All of Their Assets and Authorizing Them to Enter Into One or More Stalking Horse Agreements and to Provide Bid Protections, (B) Approving Certain Bidder Protections, (C) Scheduling Auction and Sale Hearing and Approving the Form and Manner of Notice Thereof and (D) Granting Related Relief; and (II) an Order (A) Authorizing the Sale of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances to One or More Successful Bidders, (B) Authorizing the Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection Therewith and (C) Granting Related Relief (the "Motion");<sup>2</sup> the Court having reviewed the

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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 used but not defined herein shall have the meanings given to them in the Motion.

Motion and the First Day Declaration and having heard the statements of counsel and evidence adduced with respect to the Motion at a hearing before the Court to consider the relief requested therein with respect to a Sale Procedures Order (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) venue is proper in this district pursuant to 28 U.S.C. § 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b) and (d) notice of the Motion and the Hearing was sufficient under the circumstances; after due deliberation the Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their estates and their creditors; and good and sufficient cause having been shown;

IT IS HEREBY FURTHER FOUND AND DETERMINED THAT:

A. The Debtors have demonstrated that, under the circumstances of these chapter 11 cases, the Sale Procedures, as set forth in Annex 1 attached hereto, (1) provide an appropriate process and timetable for the Debtors to utilize in pursuing sales of their Assets and (2) will promote the Debtors' efforts to maximize the value of their estates, and (3) are in the best interests of the Debtors' and their estates, creditors and other stakeholders.

B. A prompt sale of the Assets, as requested in the Motion, will maximize the value of the Debtors' estates and is in the best interests of creditors.

C. The Sale Procedures are reasonably designed to maximize the value to be achieved for the Assets.

D. The Debtors have articulated good and sufficient reasons for, and the best interests of their estates will be served by, this Court granting the relief requested in the Motion for a Sale Procedures Order, including approval of: (1) the Sale Procedures; (2) the discretion of the Debtors to select one or more Stalking Horse Bidders and enter into one or more Stalking

Horse Agreements; (3) the Bid Protections; (4) the Contract Procedures; and (5) the form and manner of serving the Sale Notice.

E. The Debtors have articulated good and sufficient reasons for, and the best interests of their estates will be served by, this Court scheduling the Sale Hearing to consider granting the other relief requested in the Motion, including approval of the Sale and the transfer of the Assets to the Successful Bidder(s) free and clear of all liens, claims, interests and encumbrances pursuant to section 363(f) of the Bankruptcy Code.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED with respect to the request for a Sale Procedures Order, as set forth herein.
2. All objections to the Sale Procedures that have not otherwise been withdrawn, waived or settled are OVERRULED.
3. The Sale Procedures, as set forth in Annex 1 attached hereto and incorporated herein, are hereby approved in their entirety and shall govern all bids and other activities relating to the Sale of the Assets. The Debtors are authorized to take any and all actions necessary or appropriate to implement the Sale Procedures. In accordance with the Sale Procedures, the Debtors (after consultation with the Consultation Parties) may determine, in the exercise of their business judgment, to sell the Assets as a group, in some combination or individually. The failure to specifically include or reference any particular provision of the Sale Procedures in this Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court that the Sale Procedures be authorized and approved in their entirety.
4. As further described in the Sale Procedures, the deadline for submitting a Qualified Bid (as such term is defined in the Sale Procedures) shall be 12:00 noon (ET) on June 11, 2012 (the "Bid Deadline").

5. If more than one Qualified Bid is received for the Assets, the Debtors shall conduct the Auction; provided, however, that the Debtors may hold an Auction even if only one Qualified Bid is received by the Bid Deadline and thereafter may qualify other Qualified Bids in advance of the commencement of the Auction, as further described in the Sale Procedures.

6. The Debtors shall conduct the Auction at 10:00 a.m. (ET) on June 12, 2012 at the offices of the Debtors' Delaware bankruptcy counsel, Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, P.O. Box. 8705, Wilmington, Delaware 19899-8705, or such other time or such other place as the Debtors (after consultation with the First Lien Agent) shall notify all Qualified Bidders, the Consultation Parties and any other parties invited by the Debtors after consultation with the First Lien Agent.

7. Except as provided in paragraphs 11 and 12 below, to be timely and eligible for consideration by the Court, any objections to the Sale and/or any component thereof (except with respect to issues concerning Executory Contracts, as provided further below) (any such objection, a "Sale Objection") must: (a) be in writing; (b) clearly specify the grounds for the objection; (c) conform to the Bankruptcy Rules and the Local Rules; and (d) be filed with the Court and served so as to be received by the following parties (collectively, the "Objection Notice Parties") by no later than 12:00 noon (ET) on June 14, 2012 (the "Sale Objection Deadline"): (i) counsel to the Debtors, (A) Jones Day, 555 California Street, 26th Floor, San Francisco, California 94104 (Attn: Tobias S. Keller, Esq. and Robert A. Trodella, 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 Creditors' 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 U.S. Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801 (Attn: Mark Kenney, Esq.).

8. The Court shall conduct the Sale Hearing at 11:30 a.m. on June 15, 2012, at which hearing the Court will consider (a) approval of the Sale to the Successful Bidder(s) and (b) any unresolved Cure Objections, Disputed Cure Amounts and Adequate Assurance Objections. The Sale Hearing may be adjourned or rescheduled without notice other than as stated on the record in Court or in an appropriate agenda letter.

9. The Contract Procedures, as described in the Motion and further described herein, are approved in all respects.

10. The Debtors shall file, post on the AFA Bankruptcy Website and serve on all Contract Counterparties, by 4:00 p.m. (ET) on June 1, 2012 a schedule of proposed cure obligations for the Executory Contracts that potentially may be assumed and assigned to the Successful Bidder (the "Contract and Cure Schedule"). The Contract and Cure Schedule shall:

(a) identify, with reasonable specificity within the limits of information contained within the Debtors' books and records, each Executory Contract potentially to be assumed and assigned in connection with the Sale and the amount, if any, that the Debtors maintain would be necessary pursuant to section 365 of the Bankruptcy Code to cure any monetary defaults under such Executory Contracts; and (b) set forth the procedures and deadlines for asserting Cure Objections and Adequate Assurance Objections. The Debtors may amend and/or supplement the Contract and Cure Schedule if necessary by no later than the Cure Objection Deadline and, if appropriate, may establish a reasonable additional and/or modified Cure Objection Deadline in connection therewith.

11. Any Cure Objections must be made in writing, must clearly specify the grounds for the objection and must be filed with the Court by, and served so as to be received by the Objection Notice Parties by, no later than 4:00 p.m. (ET) on June 8, 2012 (the "Cure Objection Deadline"). If no timely Cure Objection with respect to an Executory Contract is filed and served on the Objection Notice Parties by the Cure Objection Deadline, then (a) the cure amounts identified on the Contract and Cure Schedule with respect to the applicable Executory Contract will become liquidated and established on a final basis as the only amounts necessary under section 365(b) of the Bankruptcy Code to cure any and all monetary defaults under such Executory Contract and (b) the payment of the identified cure amount by the Successful Bidder shall be a full, final and complete cure of any defaults under the Executory Contract in satisfaction of section 365(b) of the Bankruptcy Code. Any party failing to timely file a Cure Objection shall be forever barred from objecting to the cure amount identified on the Contract and Cure Schedule with respect to the applicable Executory Contract and from asserting any additional cure or other amounts against the Debtors, their estates or the Successful Bidder.

12. Any Adequate Assurance Objections must be made in writing, must clearly specify the grounds for the objection and must be filed with the Court by, and served so as to be received by the Objection Notice Parties by, no later than the Sale Objection Deadline. If no timely Adequate Assurance Objection with respect to an Executory Contract is filed and served on the Objection Notice Parties by the Sale Objection Deadline, (a) the applicable Executory Contract will be deemed subject to assumption and assignment as proposed by the Debtors and the Successful Bidder and (b) the Successful Bidder will be deemed to have provided or to be able to provide adequate assurance of future performance of the applicable Executory Contract in satisfaction of section 365(f)(2)(B) of the Bankruptcy Code.

13. If a timely Cure Objection or Adequate Assurance Objection is received and any such objection cannot otherwise be resolved by the parties, such objection shall be addressed at the Sale Hearing. The closing of any Sale of the Assets may proceed notwithstanding the pendency of disputes relating to the assumption and assignment of Executory Contracts, and any such disputes may be deferred by the Debtors to be resolved or adjudicated post-closing.

14. Except as otherwise may be agreed to by the parties to an Executory Contract, any and all defaults under the Executory Contracts that need to be cured in accordance with section 365(b) of the Bankruptcy Code shall be cured by the Successful Bidder in accordance with the terms of the Asset Purchase Agreement governing the Sale of the Assets.

15. Notwithstanding any provision in this Order, any Asset Purchase Agreement or the Sale Procedures, this Order does not satisfy, and the Court has not determined that the Debtors have satisfied, the requirements of section 365 of the Bankruptcy Code, including requirements relating to the cure of any existing default or providing adequate



assurance of future performance. No Executory Contract will be deemed assumed and assigned until the later of (a) the date the Court has entered an order authorizing the assumption and assignment of a particular Executory Contract and (b) the date the Debtors and the Successful Bidder(s) close the Sale. The Successful Bidder(s) shall have no rights in and to any particular Executory Contract until such time as the Debtors assume and assign the applicable Executory Contract to the Successful Bidder(s) with Court approval.

16. Providing the proposed Bid Protections to any Stalking Horse Bidder, including without limitation the Topping Fee, substantially as proposed in the Motion, is hereby approved. Any agreement to provide a Topping Fee shall be expressly conditioned on the consummation of the sale of the Assets to another party, and shall be subject to approval by the Court based on evidence presented that the Topping Fee is appropriate under applicable law.

17. The form of the Sale Notice attached hereto as Annex 2 is hereby approved in all respects. All parties in interest shall receive or be deemed to have received good and sufficient notice of all remaining relief sought in the Motion, including but not limited to the Sale Hearing, the proposed Sale Order, the proposed Sale of the Assets and the Cure Costs and proposed assumption and assignment of the Executory Contracts if, within three business days of the entry of this Order (the "Mailing Deadline"), the Debtors serve the Sale Notice, together with a copy of the Sale Procedures Order, by first class mail, postage prepaid upon: (a) the U.S. Trustee; (b) counsel to the DIP Agent; (c) counsel to the First Lien Agent; (d) counsel to the Second Lien Agent; (e) counsel for the Creditors' Committee; (f) all entities who have requested service in these cases pursuant to Bankruptcy Rule 2002; (g) all parties on the Debtors' creditor matrix; (h) all parties that, in the past year, have expressed in writing to the Debtors an interest in purchasing some or all of the Assets; (i) all nondebtor parties to the Executory Contracts; (j) all

parties who are known or reasonably believed to have asserted a lien, encumbrance, claim or other interest in the Assets or any claims against the Debtors; (k) the Internal Revenue Service and applicable state and local taxing authorities; (l) the United States Environmental Protection Agency and applicable equivalent state environmental regulatory agencies; (m) the United States Department of Agriculture; and (n) all applicable state attorneys general. No later than the Mailing Deadline, the Debtors also shall publish notice of the Sale, substantially in the form of Annex 2 (modified as necessary or appropriate for publication), in the national editions of *The Wall Street Journal* and *USA Today*.

18. The failure of any objecting person or entity to timely file and serve a Sale Objection as set forth herein shall be a bar to the assertion of any objection to the consummation and performance of any Sale contemplated by any Asset Purchase Agreement, including the transfer free and clear of all liens, claims, interests and encumbrances of each of the Assets transferred as part of the Sale.

19. Notwithstanding anything to the contrary herein, the Debtors, in the exercise of their discretion (after consultation with the Consultation Parties), shall retain the right under the Sale Procedures to modify the Sale Procedures, including without limitation any deadlines thereunder, if such modification is determined by the Debtors, after consultation with the Consultation Parties, to be in the best interests of the estates and to enhance the likelihood of the Sale process to maximize the sale value of the Assets; provided, however, that any such modification shall require the written consent of the First Lien Agent (provided that the First Lien Agent has not submitted a bid for any of the Assets).

20. The stays provided for in Bankruptcy Rules 6004(h) and 6006(d) are waived and this Order shall be effective immediately upon its entry.

21. The requirements of Local Rule 6004-1 are waived with respect to the Motion to the extent applicable.

22. For purposes of the Sale Procedures, the DIP Agent shall be deemed a Qualified Bidder. The DIP Agent, at the direction of the requisite DIP Lenders, shall have the unqualified right to credit bid, whether as the Stalking Horse Bidder or otherwise, up to the full amount of the DIP Obligations, at any time prior the conclusion of the Auction.

23. For purposes of the Sale Procedures, the First Lien Agent shall be deemed a Qualified Bidder. The First Lien Agent, at the direction of the requisite First Lien Lenders, shall have the unqualified right to credit bid, whether as the Stalking Horse Bidder or otherwise, up to the full amount of any remaining First Lien Obligations, at any time prior to the conclusion of the Auction.

24. The Second Lien Agent, at the direction of the requisite Second Lien Lenders, shall have the right to credit bid, whether as the Stalking Horse Bidder or otherwise, up to the full amount of any remaining Second Lien Obligations, subject to the indefeasible payment in full in cash of all outstanding DIP Obligations and First Lien Obligations, or as otherwise consented to in writing by the DIP Agent and requisite DIP Lenders and the First Lien Agent and the requisite First Lien Lenders.

25. Upon submitting a credit bid, or any bid for some or all of the Assets, the DIP Agent, the First Lien Agent and the Second Lien Agent (as applicable) shall cease to be a Consultation Party.

26. Subject to the terms of the DIP Facility, the Interim Financing Order and any order granting final approval of the DIP Facility, the Debtors are authorized and empowered

to take such steps, expend such sums of money and do such other things as may be necessary or appropriate to implement the relief granted herein.

27. The Court shall retain jurisdiction over any matter or disputes arising from or relating to the interpretation, implementation, or enforcement of this Order.

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

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

## **ANNEX 1**

## **SALE PROCEDURES**

By a motion dated April 16, 2012 (the "Motion"),<sup>1</sup> AFA Investment Inc. and its affiliated debtors (collectively, the "Debtors") requested approval of a process and procedures for, and authority to implement, (a) a sale of substantially all of their assets (collectively, as may be further defined in any applicable asset purchase agreement(s), the "Assets") in one or more lots to one or more successful bidders, free and clear of all liens, claims, interests and encumbrances, with all such interests in the Assets to be transferred, and to attach, to the proceeds of the sale(s) with the same validity and priority (except for any assumed liabilities as may be specifically described in the agreement(s) governing the sale of the Assets); and (b) an assumption and assignment of executory contracts and unexpired leases of the Debtors to the successful bidder(s).

On \_\_\_\_\_, 2012 the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") entered an order (the "Sale Procedures Order"), which, among other things, authorized the Debtors to market and sell the Assets pursuant to the Sale Procedures (the "Sale Procedures") set forth below.

The Bankruptcy Court has scheduled a hearing to approve the sale of the Assets for June 15, 2012 at 11:30 a.m. (ET) (the "Sale Hearing").

### **I. Important Dates**

The Debtors will:

- (A) have until 11:59 p.m. (ET) on May 29, 2012 to obtain one or more executed Letters of Intent;
- (B) have until 24 hours before the commencement of the Auction to select one or more Stalking Horse Bidders and enter into Asset Purchase Agreement(s) with and provide Bid Protections to such Stalking Horse Bidder(s) (each, a "Stalking Horse Agreement") and
  - (1) promptly will file with the Bankruptcy Court and provide a copy of any such Stalking Horse Agreement(s), by electronic mail, to: (a) counsel to the agent for the Debtors' postpetition financing facility (the "DIP Agent"); (b) counsel to the agent for the Debtors' prepetition first lien lenders (the "First Lien Agent"); (c) counsel to the agent for the Debtors' prepetition second lien lenders (the "Second Lien Agent"); (d) counsel to the Creditors' Committee; and (e) any other parties that, by that time, either (i) have submitted a Letter of Intent, (ii) are otherwise engaged in active due diligence or negotiations with the Debtors or (iii) have been identified by the Debtors, in their discretion, as a party who should receive such notice;

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings given to them in the Motion.

- (2) if the Debtors enter into any such Stalking Horse Agreement(s) not later than 5:00 p.m. (ET) on June 8, 2012 (which is four calendar days before the Auction), the Debtors will in addition serve a copy of any such Stalking Horse Agreement(s), by overnight delivery, on: (a) all parties that have filed a request for notice in these chapter 11 cases pursuant to Bankruptcy Rule 2002; and (b) any other parties that have been identified by the Debtors, in their discretion, as a party who should receive such notice; and
- (3) at any time before the Debtors enter into any such Stalking Horse Agreement(s), the Debtors may file a proposed form of Asset Purchase Agreement with the Bankruptcy Court and serve such Asset Purchase Agreement as set forth in subparagraphs (1) and (2) above, which form Asset Purchase Agreement may serve as the form agreement for bidding on certain Assets in the absence of a Stalking Horse Agreement (each, a "Form Asset Purchase Agreement");
- (C) continue soliciting interest from and assisting Potential Bidders (as defined below) in conducting their respective due diligence investigations and accept bids seeking qualification as Qualified Bids (as defined below) until 12:00 noon (ET) on June 11, 2012 (the "Bid Deadline") or thereafter as permitted herein; and
- (D) also do the following if they receive more than one Qualified Bid — (1) negotiate with the Qualified Bidders (as defined below) in preparation for the Auction; (2) conduct the Auction, beginning at 10:00 a.m. (ET) on June 12, 2012, at the offices of the Debtors' Delaware bankruptcy counsel, Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, P.O. Box. 8705, Wilmington, Delaware 19899-8705; and (3) select, at the conclusion of the Auction, in their sole discretion, but after consultation with the DIP Agent, the First Lien Agent, the Creditors' Committee and the Second Lien Agent (collectively, the "Consultation Parties"), which bidder or bidders have provided the highest and best offer(s) for the Assets in a single or multiple lots (each, a "Successful Bidder").

## **II. Authority to Enter Into Stalking Horse Agreement(s)**

The Sale Procedures Order provides the Debtors with the authority to accept one or more stalking horse bids (the "Stalking Horse Bid(s)") and execute one or more Stalking Horse Agreements with Stalking Horse Bidders in connection with the proposed sale of the Assets at any time up to 24 hours before the commencement of the Auction.

Upon the mutual execution and delivery of a Stalking Horse Agreement with any Stalking Horse Bidder, such Stalking Horse Agreement will be a Qualified Bid and the Stalking Horse Bidder will be a Qualified Bidder. The Debtors will provide notice of such Stalking Horse Bidder and Stalking Horse Agreement as described above.

### **III. Potential Bid Protections if Any Stalking Horse Bidders Are Designated**

The Sale Procedures Order provides the Debtors with the authority, if they execute any Stalking Horse Agreement(s), to provide thereunder or otherwise to provide such Stalking Horse Bidder(s) with the following typical Bid Protections:

- (A) a Topping Fee (a "Topping Fee"), in an amount to be negotiated by the Debtors, but which will be subject to approval by the Bankruptcy Court, based on the totality of the circumstances, including, without limitation, the purchase price (the "Purchase Price") and other terms and conditions of the Stalking Horse Agreement;
- (B) the requirement that other Qualified Bidders for substantially the same Assets be obligated to agree to a form of Asset Purchase Agreement no less favorable to the Debtors than the Stalking Horse Agreement; and/or
- (C) the establishment, by the commencement of the Auction, of minimum initial and overbid increments in appropriate amounts, in the Debtors' discretion, subject to consultation with the Consultation Parties.

### **IV. Determination by the Debtor**

The Debtors will (with the assistance of Imperial Capital and their other professional advisors): (A) coordinate the efforts of Potential Bidders in conducting their respective due diligence investigations regarding the Assets; (B) determine whether any person or entity is a Qualified Bidder; (C) receive bids from Qualified Bidders; (D) negotiate any bids; and (E) conduct, if necessary, the Auction (collectively, the "Bidding Process"). The Debtors also shall consult with the Consultation Parties with respect to items (B), (D) and (E) of the prior sentence. Any person or entity who wishes to participate in the Bidding Process must be a Qualified Bidder. Except as provided by applicable law or court order, neither the Debtors nor any of their representatives shall be obligated to furnish any information of any kind whatsoever relating to the Assets to any person or entity who is not a Potential Bidder and who does not comply with the participation requirements below.

### **V. Participation Requirements**

Unless otherwise ordered by the Bankruptcy Court for cause shown, to participate in the Bidding Process, each interested person or entity (a "Potential Bidder") must deliver (unless previously delivered) the items listed below to: (A) counsel for the Debtors, (1) Jones Day, 555 California Street, 26th Floor, San Francisco, California 94104 (Attn: Tobias S. Keller, Esq. and Robert A. Trodella, Esq.), (2) Jones Day, 1480 Peachtree Street, N.E., Suite 800, Atlanta, Georgia 30309 (Attn: Jeffrey B. Ellman, Esq. and Brett J. Berlin, Esq.) and (3) Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, Wilmington, Delaware 19899 (courier 19801) (Attn: Laura Davis Jones, Esq.); and (B) Imperial Capital, LLC, 2000 Avenue of the Stars, 9th Floor, South Tower, Los Angeles, California 90067 (Attn: Marc A. Bilbao) (collectively, the "Sale Professionals");

- (A) an executed NDA in form and substance satisfactory to the Debtors; and



- (B) proof of financial wherewithal to consummate a sale transaction, which shall be reasonably satisfactory to the Debtors.

## **VI. Due Diligence**

Until the Bid Deadline the Debtors will provide any Potential Bidder such due diligence access or additional information as may be reasonably requested by the Potential Bidder that the Debtors, in their business judgment, determines to be reasonable and appropriate under the circumstances. All additional due diligence requests shall be directed to Marc A. Bilbao of Imperial Capital, LLC at 2000 Avenue of the Stars, 9th Floor, South Tower, Los Angeles, California 90067. The Debtors will have no obligation to furnish any due diligence information after the Bid Deadline.

Unless otherwise determined by the Debtors, the availability of additional due diligence to a Potential Bidder will cease (A) if the Potential Bidder does not become a Qualified Bidder, (B) from and after the Bid Deadline or (C) if the Bidding Process is terminated in accordance with its terms.

## **VII. Bid Requirements**

A Potential Bidder that desires to make a bid shall deliver written and electronic copies of its bid materials to the Sale Professionals so as to be received not later than the Bid Deadline. A bid is a signed document or documents from a Potential Bidder that provide(s), at a minimum, the following:

- (A) the Potential Bidder offers to purchase substantially all or some combination of the Assets. The Debtors, subject to consultation with the Consultation Parties, reserve the right to consider bids for combinations of the Assets, but have no obligation to consider such bids;
- (B) the Potential Bidder offers to purchase the applicable Assets: (1) on terms and conditions acceptable to the Debtors (subject to consultation with the Consultation Parties); or (2) if there is a Stalking Horse Agreement or a Form Asset Purchase Agreement for the Assets at issue, marked to show any proposed amendments or modifications to the applicable Stalking Horse Agreement or Form Asset Purchase Agreement (the "Marked Agreement");
- (C) the bid is not subject to any due diligence or financing contingency and is irrevocable until the earlier of (1) July 25, 2012 and (2) two business days following the closing of the Sale;
- (D) the bid does not entitle a bidder to any break-up fee, topping fee, termination fee, expense reimbursement or similar type of payment or reimbursement (unless it is a Stalking Horse Bid);
- (E) the bid constitutes a higher and better offer for the Assets than that described in the Stalking Horse Bid, if any, as determined by the Debtors in their discretion, subject to consultation with the Consultation Parties;

- (F) acknowledgements and representations that the Potential Bidder — (1) has had an opportunity to conduct any and all required due diligence regarding the Assets prior to making its offer; (2) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Assets in making its bid; (3) has prepared its bid, and will participate in the Auction, without collusion with any other party; and (4) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the Assets or the completeness of any information provided in connection therewith, except as expressly stated in the Marked Agreement;
- (G) the bid contains a commitment to close the sale transaction by June 22, 2012;
- (H) the bid contains a commitment by the buyer to be prepared to provide admissible evidence in the form of affidavits or declarations establishing the Potential Bidder's good faith and lack of collusion, within the meaning of section 363(m) of the Bankruptcy Code; and
- (I) the bid contains information sufficient to demonstrate the Potential Bidder's ability to provide adequate assurance of future performance with respect to the assumption of any executory contracts and unexpired leases.

In addition, a Potential Bidder must accompany its bid with: (A) a deposit made with an escrow agent selected by the Debtor (the "Deposit Agent") equal to 10% of the Purchase Price (any such deposit, a "Good Faith Deposit"), which Good Faith Deposit must be made by certified check or wire transfer and will be held by the Deposit Agent in accordance with the terms of the escrow agreement to be provided by the Debtors; (B) written evidence of available cash or a commitment for financing and such other evidence of ability to consummate the transaction contemplated by the applicable Marked Agreement as the Debtors may reasonably request; (C) a copy of a board resolution or similar document demonstrating the authority of the Potential Bidder to make a binding and irrevocable bid on the terms proposed; (D) any pertinent factual information regarding the Potential Bidder's operations that would assist the Debtors in their analysis of issues arising with respect to any applicable antitrust laws; (E) any pertinent factual information regarding the Potential Bidder's operations that would assist the Debtors in their analysis of the bid; and (F) any pertinent factual information regarding the Potential Bidder's ability to obtain necessary permits and licenses for the operation of the Assets.

Any bid received from a Potential Bidder that, in the Debtors' reasonable discretion, after Consultation with the Consultation Parties, meets the above requirements will be considered a "Qualified Bid," and each Potential Bidder that submits a Qualified Bid will be considered a "Qualified Bidder." For purposes of the Sale Procedures, a Stalking Horse Bidder, if any, is a Qualified Bidder, and any Stalking Horse Agreement executed by a Stalking Horse Bidder is a Qualified Bid. In addition, for purposes of the Sale Procedures the First Lien Agent and the DIP Agent are each a Qualified Bidder.

Within one business day after receipt of a Qualified Bid from a Qualified Bidder, and, in any event prior to the Auction, the Debtors shall distribute a copy of each Qualified Bid to counsel to each Qualified Bidder and counsel to each of the Consultation Parties.

The Debtors, subject to consultation with the Consultation Parties, reserve the right to reject any bid, if, among other reasons as may be considered by the Debtors in their reasonable business judgment and in accordance with their fiduciary duties, such bid:

- (A) is on terms that are materially more burdensome or conditional than the terms of any applicable Stalking Horse Agreement;
- (B) does not provide for the complete assumption of all liabilities proposed to be assumed under any applicable Stalking Horse Agreement; or
- (C) does not provide sufficient cash consideration to pay transfer taxes, cure costs, other cash costs of the transaction and the indefeasible payment in full of the First Lien Obligations and the DIP Obligations (as those terms are defined in the Interim Financing Order).

#### **VIII. Baseline Bid**

Only Qualified Bidders and their authorized representatives are eligible to participate in the Auction. The Debtor, after consultation with the Consultation Parties, will select the highest and best Qualified Bid for the Assets (the "Baseline Bid") to serve as the starting point at the Auction. As soon as practicable, the Debtor shall provide all Qualified Bidders with a copy of the Baseline Bid.

#### **IX. Credit Bidding**

The DIP Agent, at the direction of the requisite DIP Lenders, shall have the unqualified right to credit bid, whether as the Stalking Horse or otherwise, up to the full amount of the DIP Obligations at any time prior to the conclusion of the Auction.

The First Lien Agent, at the direction of the requisite First Lien Lenders, shall have the unqualified right to credit bid up to the full amount of any remaining First Lien Obligations, at any time prior to the conclusion of the Auction.

The Second Lien Agent, at the direction of the requisite Second Lien Lenders, shall have the right to credit bid, whether as the Stalking Horse or otherwise, up to the full amount of any remaining Second Lien Obligations, subject to the indefeasible payment in full in cash of all outstanding DIP Obligations and First Lien Obligations, or as otherwise consented to in writing by the DIP Agent and requisite DIP Lenders and the First Lien Agent and the requisite First Lien Lenders.

Upon submitting a credit bid, or any other bid for some or all of the Assets the DIP Agent, the First Lien Agent or the Second Lien Agent (as applicable) shall cease to be a Consultation Party.

## **X. "As Is, Where Is"**

The Sale shall be on an "as is, where is" basis and without representations or warranties of any kind, nature or description by the Debtors, their agents or the Debtors' chapter 11 estate, except as is customary for chapter 11 debtors and to the extent expressly set forth in the applicable Asset Purchase Agreement (including in any Stalking Horse Agreement or Marked Agreement that has been designated as the Baseline Bid, as the case may be). Except as otherwise provided in the Successful Bid (or such other bid which may ultimately be consummated), all of the Debtors' rights, title and interests in and to the Assets shall be sold free and clear of all options, pledges, security interests, setoff rights, voting trusts or similar arrangements, liens, charges, claims or other encumbrances or restrictions on voting or transfer thereon and there against (collectively, "Encumbrances"), with such Encumbrances, if any, to attach to the net proceeds of the Sale.

## **XI. Auction**

If more than one Qualified Bid is received by the Bid Deadline, the Debtor will conduct the Auction, provided, however, that the Debtors reserve the right to hold an Auction even if only one Qualified Bid is received by the Bid Deadline and to qualify other Qualified Bids in advance of the commencement of the Auction. The Auction shall take place at 10:00 a.m. (ET) on June 12, 2012, at the offices of the Debtors' Delaware bankruptcy counsel, Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, P.O. Box. 8705, Wilmington, Delaware 19899-8705, or such other time or such other place as the Debtor shall notify all Qualified Bidders.

Only Qualified Bidders and their authorized representatives will be eligible to participate at the Auction. Participation must occur in person. The Consultation Parties and their professionals shall be permitted to attend the Auction.

At the Auction, participants will be permitted to increase their bids and will be permitted to bid based only upon the terms of the Baseline Bid (except to the extent otherwise authorized by the Debtors). Subsequent bidding will proceed in increments to be announced upon the commencement of the Auction.

At any time, the Debtor may modify the rules, or adopt additional rules, for the Auction, with the written consent of the First Lien Agent (unless the First Lien Agent submits a credit bid or other bid for any of the Assets) and after consultation with the other Consultation Parties, that will best promote the goals of the Bidding Process and that are not inconsistent with any provisions of any applicable Stalking Horse Agreement. Any such rules will provide that: (A) the procedures must be fair and open, with no participating Qualified Bidder disadvantaged in any material way as compared to any other Qualified Bidder; (B) all bids will be received and shared by the Sale Professionals in one location, on an open basis, and all other bidders and parties permitted to attend the Auction in accordance with these Sale Procedures will be entitled to be present for all bidding with the understanding that the true identity of each bidder will be fully disclosed to all other bidders and that all material terms of each Qualified Bid will be fully disclosed to all other bidders throughout the entire Auction; and (C) each Qualified Bidder will be permitted a fair, but limited, amount of time to respond to the previous bid at the Auction.

Qualified Bidders shall have the right to submit additional bids and make additional modifications to their respective Asset Purchase Agreements at the Auction, provided that any such modifications, on an aggregate basis and viewed in whole, shall not be less favorable to the Debtors than any prior bid by such Qualified Bidder. Each Qualified Bidder participating at the Auction will be required to confirm that it has not engaged in any collusion with respect to the bidding or the Sale.

The Auction may be adjourned as the Debtors deem appropriate after consultation with the Consultation Parties. Immediately prior to the conclusion of the Auction, the Debtors, after consultation with the Consultation Parties, will: (A) review and evaluate each bid made at the Auction on the basis of financial and contractual terms and other factors relevant to the sale process, including those factors affecting the speed and certainty of consummating the Sale; (B) identify the successful bid or bids (any or each, the "Successful Bid(s)"); and (C) notify all Qualified Bidders participating in the Auction, prior to its adjournment, of the successful bidder or bidders (the "Successful Bidder"), and the amount and other material terms of the Successful Bid(s). Promptly following the designation of a Successful Bid, the Debtors will file a notice of such bid (including the applicable Asset Purchase Agreement) with the Bankruptcy Court and serve such notice on the parties identified in Section I(B)(1) above. At the Sale Hearing, the Debtor shall present the Successful Bid(s) to the Bankruptcy Court for approval. The Successful Bidder and its counsel shall be required to appear at the Sale Hearing in person.

## **XII. Next Highest Bid**

The Debtors, after consultation with the Consultation Parties, will (A) determine, in their reasonable business judgment, which Qualified Bid is the next highest or otherwise best bid (the "Next Highest Bid") for the applicable Assets in comparison to the Successful Bid; and (B) reject at any time before entry of the relevant Sale Order any bid that, in the Debtors' reasonable judgment, is (1) inadequate or insufficient, (2) not in conformity with the requirements of the Bankruptcy Code, these Sale Procedures or the terms and conditions of the Sale or (3) contrary to the best interests of the Debtors or their estates. The Next Highest Bid shall be irrevocable until the earlier of (i) two business days after the closing of the Sale and (ii) July 25, 2012.

The Debtors presently intend to consummate the Sale(s) with the Successful Bidder(s). However, the Debtors' presentation of the Successful Bid(s) to the Bankruptcy Court for approval does not constitute the Debtors' acceptance of the bid(s). The Debtor will be deemed to have accepted the Successful Bid(s) only when such bid(s) has been approved by the Bankruptcy Court. The Debtors and the Successful Bidder(s) shall close the Sale(s) on or before June 22, 2012 unless extended by mutual agreement of the Debtors, the Successful Bidder(s) and the DIP Agent. If the Successful Bidder(s) fails to close the Sale by such date, then the Debtors will be authorized, but not required, to close with the party that submitted the Next Highest Bid(s) (the "Next Highest Bidder(s)") without further order of the Bankruptcy Court. If the Debtors determine to close a transaction with the Next Highest Bidder, such bidder shall become the Successful Bidder for the applicable Assets for purposes hereunder.

### **XIII. The Sale Hearing**

At the Sale Hearing, the Debtors intend to seek the entry of an order, in form and substance acceptable to DIP Agent, authorizing and approving, among other things, the Sale to such Qualified Bidder (or Qualified Bidders) as the Debtors, in the exercise of their reasonable business judgment and after consultation with the Consultation Parties, determine to have made the highest or otherwise best offer to purchase the Assets, consistent with the Sale Procedures. The Sale Hearing may be adjourned or rescheduled without notice other than as stated on the record in the Bankruptcy Court or in an appropriate agenda letter.

### **XIV. Modification of Procedures**

The Debtors, in the exercise of their discretion after consultation with the Consultation Parties, expressly reserve the right to modify or waive any of these Sale Procedures, including without limitation any deadlines hereunder, if such modification is determined by the Debtors, after discussions with the Consultation Parties, to be in the best interests of the estates and to enhance the likelihood of the Sale process to maximize the sale value of the Assets; provided, however, that any such modification or waiver shall require the written consent of the First Lien Agent.

### **XV. Return of Good Faith Deposit**

The Good Faith Deposits of all Qualified Bidders shall be held in escrow by the Deposit Agent and shall not become property of the Debtors' bankruptcy estate absent further order of the Bankruptcy Court or as set forth herein. The Deposit Agent shall retain the Good Faith Deposits of the Successful Bidder and the Next Highest Bidder until the earlier of the closing of the Sale and the termination or the expiration of the applicable Marked Agreement or the Purchase Agreement. The Good Faith Deposits of the other Qualified Bidders shall be returned on or before July 25, 2012. At the closing of the Sale contemplated by the Successful Bid, a Successful Bidder will be entitled to a credit for the amount of its Good Faith Deposit. Upon the return of the Good Faith Deposits, their respective owners shall receive any and all interest that accrued thereon.

If the Successful Bidder fails to consummate the Sale because of a breach or failure to perform on the part of the Successful Bidder, the Successful Bidder's Good Faith Deposit shall be forfeited to the Debtors, and the Debtors shall have the right to seek any and all other remedies and damages from the defaulting Successful Bidder.

## **ANNEX 2**

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

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

**NOTICE OF SALE AND SOLICITATION OF BIDS TO  
PURCHASE SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS,  
TERMS AND CONDITIONS OF ASSET SALE PROCEDURES AND ASSUMPTION  
AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

**PLEASE TAKE NOTICE OF THE FOLLOWING:**

**The Sale Motion**

1. AFA Investment Inc. and its affiliates, the above-captioned debtors, (the "Debtors"), filed a motion (Docket No. \_\_\_\_ ) (the "Sale Motion") with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") on April 16, 2012, requesting authority to: (a) sell in one or more lots (each such sale, a "Sale") substantially all of their assets (the "Assets") to one or more successful bidder(s) (each, a "Successful Bidder"), pursuant to sections 363 and 105 of title 11 of the United States Code (the "Bankruptcy Code"), free and clear of all liens, claims, interests and encumbrances, with all such interests in the Assets to be transferred, and to attach, to the proceeds of the Sale(s) with the same validity and priority, except for any liabilities as may be specifically assumed by the Successful Bidder as set

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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.



forth in the agreement(s) governing the Sale of the Assets (each, an "Asset Purchase Agreement"); and (b) assume designated executory contracts and unexpired leases of the Debtors (collectively, the "Executory Contracts") and assign these Executory Contracts to the Successful Bidder(s), pursuant to section 365 of the Bankruptcy Code.

### **The Sale Procedures Order**

2. The Debtors are soliciting offers for the purchase of the Assets, and the Bankruptcy Court has entered an order (the "Sale Procedures Order") approving auction and sale procedures (the "Sale Procedures") for the Assets. The Sale Procedures are set forth in detail in Annex 1 to the Sale Procedures Order.<sup>2</sup>

### **Obtaining Copies of Papers**

3. You may obtain a copy of the Sale Motion, the Sale Procedures Order and any Asset Purchase Agreement (once available) 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: (i) 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.

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<sup>2</sup> Capitalized terms not otherwise defined herein have the meanings given to them in the Sale Procedures Order or the Sale Procedures.

**Free and Clear Nature of the Sale**

4. In connection with any Asset Purchase Agreement, the Debtors and the applicable Successful Bidder will seek an order or orders from the Bankruptcy Court approving the sale (a "Sale Order"). Please note that a Sale Order is expected to provide that the Successful Bidder is not liable for certain claims, liens and other interests related to or connected with the Assets that could have arisen prior to closing, potentially including but not limited to any claims against the Debtors or any of their predecessors or affiliates, or any claims for successor or vicarious liability of any kind or character, whether known or unknown as of the closing of the applicable Sale, whether now existing or hereafter arising, or whether fixed or contingent, with respect to the Assets or any obligations of the Debtors arising prior to the closing of the Sale (including liabilities for taxes arising, accruing or payable under, out of, in connection with or in any way related to the operation of the Assets prior to the Sale), except for such liabilities expressly assumed by the Successful Bidder as provided for in the Asset Purchase Agreement and the Sale Order. See, e.g., sections 105(a) and 363(f) of the Bankruptcy Code. ***The specific terms of sale will be provided in the applicable Asset Purchase Agreement and the proposed Sale Order (expected to be appended thereto).*** These materials will be filed with the Bankruptcy Court and available on the AFA Bankruptcy Website for review in advance of the Sale Hearing (as defined below). Specifically, at any time up to 24 hours prior to the Auction, the Debtors may file one or more "stalking horse" Asset Purchase Agreements with the Bankruptcy Court (any such agreement, a "Stalking Horse Agreement"). In addition, at any time prior to the filing of a Stalking Horse Agreement, the Debtors may file an unexecuted proposed form of Asset Purchase Agreement with the Bankruptcy Court. Finally, promptly following the

designation of the bid of a Successful Bidder as the "Successful Bid," the Debtors will file such bid (including the applicable Asset Purchase Agreement) with the Bankruptcy Court.

**Credit Bidding**

5. Credit bidding by the agent for the Debtors' debtor in possession lenders (the "DIP Agent"), the agent for the Debtors' prepetition first lien lenders (the "First Lien Agent") and/or the agent for the Debtors' prepetition second lien lenders (the "Second Lien Agent") is permitted pursuant to the terms of the Sale Procedures Order.

**Certain Key Dates in the Sale Process**

6. The Sale Procedures describe certain requirements for interested parties to participate in the bidding for the Assets. Interested bidders are encouraged to review these requirements carefully and, for further information, are invited to contact Marc A. Bilbao, Managing Director of Imperial Capital, LLC, the Debtors' proposed investment banker, at (310) 246-3700.

7. Under the Sale Procedures, the Debtors are seeking letters of intent from interested bidders for the Assets by **May 29, 2012 at 11:59 p.m., Eastern Time**.

8. Bids for some or all of the Assets meeting certain requirements set forth in the Sale Procedures ("Qualifying Bids") are due by **June 11, 2012 at 12:00 noon, Eastern Time** (or as otherwise permitted by the Sale Procedures).

9. Consistent with the Sale Procedures Order, an auction of the Assets (the "Auction") is scheduled to be conducted on **June 12, 2012 at 10:00 a.m., Eastern Time**, at the offices of the Debtors' Delaware bankruptcy counsel, Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, P.O. Box. 8705, Wilmington, Delaware 19899. All interested parties are invited to submit a Qualifying Bid to purchase the Assets, pursuant to the

Sale Procedures. Only Qualified Bidders and certain other invited parties identified in the Sale Procedures are permitted to attend the Auction, the time and place of which may change with notice only to the relevant invited parties.

10. Additional details about these matters, and other deadlines relevant to bidding on the Assets, are contained in the Sale Procedures.

**Sale Hearing**

11. A hearing to approve the Asset Purchase Agreement(s) and the sale of the Assets to the Successful Bidder(s) is scheduled to be conducted on **June 15, 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.

12. The Sale 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.

**Deadline and Procedures for Objecting to the Sale**

13. Except as provided in paragraphs 15 and 16 below, to be timely and otherwise eligible for consideration by the Bankruptcy Court, objections to the Sale and/or any component thereof 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 (collectively, the "Objection Notice Parties") by, no later than **12:00 noon, Eastern Time, on June 14, 2012** (the "Sale Objection Deadline"): (i) counsel to the Debtors, (A) Jones Day, 555 California Street, 26th Floor, San Francisco, California 94104 (Attn: Tobias S. Keller, Esq. and Robert A. Trodella, 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 official committee of unsecured creditors appointed in these chapter 11 cases (the "Creditors' 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 U.S. Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801 (Attn: Mark Kenney, Esq.).

### **Contract Procedures**

14. A list (the "Contract and Cure Schedule") will be filed with the Bankruptcy Court, posted on the AFA Bankruptcy Website and served on all counterparties to the applicable Executory Contracts by no later than **June 1, 2012 at 4:00 p.m., Eastern Time**. The Contract and Cure Schedule will set forth: (a) the Debtors' Executory Contracts that are subject to potential assumption and assignment in connection with the Sale; (b) the proposed amounts necessary to cure monetary defaults in connection with the assumption of such

Executory Contracts; and (c) the procedures and deadlines for: (i) asserting objections to any cure amount(s) set forth on the Contract and Cure Schedule (any such objection, a "Cure Objection"); and (ii) either (A) asserting objections to the ability and qualifications of a Successful Bidder to provide adequate assurance of future performance under any Executory Contract identified on the Contract and Cure Schedule or (B) raising any other objection to the assumption and assignment of any Executory Contract (other than a Cure Objection) (any such objection, whether under (A) or (B) above, an "Adequate Assurance Objection"),

15. Any Cure Objections must be made in writing, must clearly specify the grounds for the objection and must be filed with the Bankruptcy Court by, and served so as to be received by the Objection Notice Parties by, no later than **June 8, 2012 at 4:00 p.m., Eastern Time** (the "Cure Objection Deadline"). If no timely Cure Objection with respect to an Executory Contract is filed and served on the Objection Notice Parties by the Cure Objection Deadline, then (a) the cure amounts identified on the Contract and Cure Schedule with respect to the applicable Executory Contract will become liquidated and established on a final basis as the only amounts necessary under section 365(b) of the Bankruptcy Code to cure any and all monetary defaults under such Executory Contract and (b) the payment of the identified cure amount by the Successful Bidder shall be a full, final and complete cure of any defaults under the Executory Contract in satisfaction of section 365(b) of the Bankruptcy Code. Any party failing to timely file a Cure Objection shall be forever barred from objecting to the cure amounts identified on the Contract and Cure Schedule with respect to the applicable Executory Contract and from asserting any additional cure or other amounts against the Debtors, their estates or the Successful Bidder.

16. Any Adequate Assurance Objections must be made in writing, must clearly specify the grounds for the objection and must be filed with the Bankruptcy Court by, and

served so as to be received by the Objection Notice Parties by, no later than the Sale Objection Deadline. If no timely Adequate Assurance Objection with respect to an Executory Contract is filed and served on the Objection Notice Parties by the Sale Objection Deadline, (a) the applicable Executory Contract will be deemed subject to assumption and assignment as proposed by the Debtors and the Successful Bidder and (b) the Successful Bidder will be deemed to have provided or to be able to provide adequate assurance of future performance of the applicable Executory Contract in satisfaction of section 365(f)(2)(B) of the Bankruptcy Code.

17. Executory Contracts will not be deemed assumed or assigned to a Successful Bidder until the later of (a) the resolution of any Cure Objections and Adequate Assurance Objections and (b) the closing of the Sale to the Successful Bidder.

**Debtors' Reservation of Rights to Modify Procedures**

18. **Notwithstanding anything to the contrary herein, the Debtors, in the exercise of their discretion after consultation with (a) the agent for the Debtors' postpetition financing facility, (b) the First Lien Agent, (c) the Second Lien Agent and (d) the Creditors' Committee (collectively, the "Consultation Parties"), expressly reserve and will have the right under the Sale Procedures to modify the Sale Procedures, including, without limitation, any deadlines thereunder, if such modification is determined by the Debtors and the Consultation Parties to be in the best interests of the Debtors' estates and to enhance the likelihood of the Sale process to maximize the sale value of the Assets.**

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

PACHULSKI STANG ZIEHL & JONES LLP

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PROPOSED ATTORNEYS FOR DEBTORS  
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