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**Hearing Date: November 13, 2018**  
**Hearing Time: 10:00 a.m.**

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

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In re:

Chapter 11

BENJYS KOSHER PIZZA & DAIRY,  
RESTAURANT INC. d/b/a BENJYS

Case No.: 18-41353 (ESS)

Debtor.

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**NOTICE OF DEBTOR’S MOTION FOR (I) AN ORDER (A) APPROVING  
BIDDING PROCEDURES; (B) SCHEDULING BID DEADLINE,  
AUCTION DATE, AND SALE HEARING AND APPROVING NOTICE  
THEREOF; AND (II) AN ORDER APPROVING THE SALE OF  
SUBSTANTIALLY ALL OF THE DEBTOR’S ASSETS FREE AND  
CLEAR OF LIENS, CLAIMS, INTERESTS AND LIABILITIES**

**PLEASE TAKE NOTICE**, that upon the annexed motion (the “Motion”) dated October 9, 2018, Benjys Kosher Pizza & Dairy Restaurant Inc. d/b/a Benjys (the “Debtor”), by and through their undersigned attorneys Morrison Tenenbaum PLLC, will move this court before the Honorable Elizabeth S. Stong, United States Bankruptcy Judge, at 271-C Cadman Plaza East, Suite 1595, Brooklyn, New York 11201 on the 13<sup>th</sup> day of November, 2018, at 10:00 a.m. (prevailing Eastern Time) (the “Hearing Date”), or as soon thereafter as counsel may be heard, for an entry of an Order (a) approving bidding procedures (the “Bidding Procedures”), to be used for the sale (the “Sale”) of substantially all of the Debtor’s assets and related personal property (the “Purchased Assets”) to Diana Nisanova for the sum of \$40,000.00 subject to higher and

better offers,<sup>1</sup> and the proposed Asset Purchase Agreement (the “Purchase Agreement”) in conjunction therewith, (b) scheduling the bid deadline, auction date, and sale hearing and approving the form and manner of notice thereof, and following a subsequent hearing (the “Sale Hearing”), entry of an order (the “Sale Order”) approving (a) the sale of the Purchased Assets under the Purchase Agreement to the prevailing bidder (the “Prevailing Bidder”) to be determined at the Auction, free and clear of liens, claims and interests, except for Assumed Liabilities and Permitted Encumbrances, (b) the Purchase Agreement and the obligations incurred by the Debtor and the Prevailing Bidder thereunder, and (c) granting related relief.

**PLEASE TAKE FURTHER NOTICE** that all response or objections, if any, to the Motion shall (i) be made in writing, (ii) conform to the Bankruptcy Rules and the Local Bankruptcy Rules for the Eastern District of New York, (iii) set forth the basis for the objection and the specific grounds therefore, (iv) be filed with the Court with a copy delivered directly to the Chambers of the Honorable Elizabeth S. Stong, together with proof of service thereof, and (v) shall be served in a manner so as to be received not later than 5:00 p.m. on November 6, 2018 by Morrison Tenenbaum PLLC, 87 Walker Street, Floor 2, New York, NY 10013 (Attn: Brian J. Hufnagel, Esq.)

Dated: New York, New York  
October 9, 2018

MORRISON TENENBAUM PLLC

By: /s/ Brian J. Hufnagel  
Lawrence F. Morrison  
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<sup>1</sup> Any capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Bidding Procedures.

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UNITED STATES BANKRUPTCY COURT  
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**MOTION OF THE DEBTOR FOR (I) AN ORDER (A) APPROVING  
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THEREOF; AND (II) AN ORDER APPROVING THE SALE OF  
SUBSTANTIALLY ALL OF THE DEBTOR’S ASSETS FREE AND  
CLEAR OF LIENS, CLAIMS, INTERESTS AND LIABILITIES**

Benjys Kosher Pizza & Dairy Restaurant Inc. d/b/a Benjys (the “Debtor”), the debtor and debtor-in-possession, by and through its attorneys Morrison Tenenbaum PLLC, files this motion (the “Motion”) for: entry of an order, in substantially the form attached as Exhibit 1 hereto (the “Bidding Procedures Order”), (a) approving bidding procedures (the “Bidding Procedures”), to be used for the sale (the “Sale”) of substantially all of the Debtor’s assets and related personal property (the “Purchased Assets”) to Diana Nisanova for the sum of \$40,000.00 subject to higher and better offers,<sup>1</sup> and the proposed Asset Purchase Agreement (the “Purchase Agreement”) in conjunction therewith, (b) scheduling the bid deadline, auction date, and sale hearing and approving the form and manner of notice thereof, and following a subsequent hearing (the “Sale

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<sup>1</sup> Any capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Bidding Procedures.

Hearing”), entry of an order (the “Sale Order”) approving (a) the sale of the Purchased Assets under the Purchase Agreement to the prevailing bidder (the “Prevailing Bidder”) to be determined at the Auction, free and clear of liens, claims and interests, except for Assumed Liabilities and Permitted Encumbrances, (b) the Purchase Agreement and the obligations incurred by the Debtor and the Prevailing Bidder thereunder, and (c) granting related relief. In support of the Motion, the Debtor respectfully states as follows:

### **I. JURISDICTION & VENUE**

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

2. Venue of this proceeding and this Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicates for the relief requested in this Motion are 11 U.S.C. §§ 105(a), 363(b), 363(f), 363(k), 363(m), 365, 503 and 507, Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) 2002, 6004, 6006 and 9014, and Rule 6004-1 of the E.D.N.Y. Local Bankruptcy Rules (the “Local Rules”).

### **II. BACKGROUND**

4. On March 12, 2018 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor is operating its business and managing its property as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. No trustee, examiner or committee of creditors has been appointed in this case.

6. The Debtor operates a pizza and pasta restaurant under the name Benjys located at 72-72 Main Street, Flushing, NY 11367.

7. The bankruptcy filing was necessitated by a fair labor standards act case pending in the United States District Court for the Eastern District of New York, 17-cv-00682, *Rogelio Ayala-Zacarias v. Benjys Kosher Pizza & Dairy Restaurant Inc., et al.* (the “FLSA Action”). The Debtor filed this chapter 11 case to resolve this litigation and to resolve claims of all creditors in one forum. The FLSA Action has been stayed due to the bankruptcy filing.

8. The Debtor filed this chapter 11 case so that it could continue to operate while pursuing a reorganization. The Debtor intends to reorganize by selling its business as a going concern through an auction process under the supervision of the Bankruptcy Court.

9. The Debtor has been marketing the Purchased Assets since the Petition Date and has received an offer from Diana Nisanova, the wife of the Debtor’s principle Eved Nisanov, to buy the assets for \$40,000.00. The offer of Diana Nisanova was the highest offer that the Debtor could obtain because the Debtor does not have a lease and is a month to month tenant.

10. The Sale of the Purchased Assets contemplated herein is subject to a competitive Auction process that will assure that the maximum value for the Purchased Assets will be realized for the Debtor’s estate and its creditors. Accordingly, the Debtor has filed this Motion seeking the approval of the Bidding Procedures and, following a subsequent hearing (i.e., the Sale Hearing), approval of the Sale of the Purchased Assets.

### **III. RELIEF REQUESTED**

11. This Motion seeks relief in two parts. First, the Motion seeks approval of various procedures relating to the proposed sale and the scheduling of a second hearing. Second, the Motion seeks approval of the proposed sale and related transactions following the conclusion of the second hearing.

**A. Bidding Procedures & Purchase Agreement**

12. The hearing to seek approval of the order approving the Bidding Procedures is intended to, among other things, establish the form and manner of notice of the Sale and establish the Bidding Procedures by which parties may participate in the Auction. A copy of the proposed Bidding Procedures the Debtor seeks to have approved is set forth in Exhibit A to the Bidding Procedures Order, which is attached hereto as Exhibit 1.

13. The proposed Sale to the Prevailing Bidder shall be under the Purchase Agreement attached to the Bidding Procedures Order as Exhibit B, will set forth the terms and conditions the Sale transaction shall be consummated, and the form that Potential Bidders will use to submit Qualified Bids marked to show any changes in such bidder's proposed bid. Accordingly, utilizing the proposed Purchase Agreement will provide a uniform basis for Potential Bidders to bid and the Debtor to analyze Qualified Bids.

**B. Proposed Notice Procedures**

14. The Debtor will cause to be served, within five (5) business days after issuance of the Bidding Procedures Order, by first-class mail, postage prepaid, (i) notice of the Bid Deadline, Auction, and Sale Hearing substantially in the form annexed to the Bidding Procedures Order as Exhibit C (the "Notice of Bid Deadline, Auction, and Sale Hearing"), (ii) the Bidding Procedures Order including the Bidding Procedures attached thereto and (iii) the Motion (the Notice of Bid Deadline, Auction and Sale Hearing, this Order and the Bidding Procedures, the Motion, collectively, the "Sale Package"), upon: (a) all potential buyers previously identified or solicited by the Debtor and any additional parties who have previously expressed an interest in potentially acquiring the Purchased Assets, (b) all other potentially interested parties identified by the Debtor or their professionals; (c) the Office of the United States Trustee for the Eastern District

of New York (the “U.S. Trustee”), (d) all parties in interest who have requested notice in the Case under Bankruptcy Rule 2002, (e) all parties who are known to possess or assert a lien, claim, encumbrance or interest in or upon any of the Purchased Assets, (f) the Internal Revenue Service, and (g) all applicable federal, state and local regulatory or taxing authorities or recording offices which have a reasonably known interest in the relief requested in the Motion. The Debtor will also publish the Notice of Bid Deadline, Auction, and Sale Hearing in the classified section of the New York Daily News.

15. To be considered by the Court, any objections to the Sale of the Purchased Assets to Diana Nisanova or the Prevailing Bidder shall (a) be in writing, (b) conform to the Bankruptcy Rules and the Local Rules, (c) set forth the name of the objecting party, the nature and amount of any claims or interest held or asserted against the Debtor’s estate or its properties, the basis for the objection and the specific grounds therefor and (d) be filed with the Court and served on the following (collectively, the “Objection Notice Parties”): (i) the Office of the United States Trustee, 201 Varick Street, Suite 1006, New York, New York 10014, attn: William E. Curtin, Esq., (ii) Debtor’s counsel, Morrison Tenenbaum PLLC, 87 Walker Street, Floor 2, New York, New York 10013, attn: Brian J. Hufnagel, Esq., and (iii) counsel for the Prevailing Bidder.

16. The Debtor requests that any party failing to timely file and serve an objection on the Objection Notice Parties shall be barred from asserting an objection to the Motion, the Sale to the Prevailing Bidder (including any objection to the Debtor’s ability to transfer the Purchased Assets free and clear of all liens, claims, encumbrances and interests (“Liabilities”) (other than any Liabilities assumed under the Purchase Agreement submitted by the Prevailing Bidder).

### **C. Approval of Sale**

17. The Debtor requests that at the conclusion of the Sale Hearing, that the Court

enter the Sale Order approving the proposed sale of the Purchased Assets, free and clear of Liabilities (except for Liabilities assumed by the Prevailing Bidder) in accordance with the terms and conditions contained in the Purchase Agreement to the Prevailing Bidder, authorizing the assumption and assignment of the Lease in accordance with the Purchase Agreement, and granting such other relief as is necessary to effectuate the transactions contemplated by the Purchase Agreement.

18. The Debtor also requests that the Court waive the fourteen (14) day stay that otherwise may be applicable under Bankruptcy Rules 6004(h) and 6006(d), so that each of the Bidding Procedures Order and the Sale Order is effective immediately upon entry.

#### **IV. BASIS FOR RELIEF REQUESTED**

19. In accordance with Bankruptcy Rule 6004, sales of property outside the ordinary course of business may be by private sale or public auction. The Debtor has determined that a sale of the Purchased Assets to Diana Nisanova subject to higher and better offers, through a process in which parties may make qualifying bids and participate in an open auction, will enable the Debtor to obtain the most consideration possible for the Debtor's assets, for the benefit of all parties in interest. The proposed Bidding Procedures will facilitate that objective.

##### **A. The Proposed Bidding Procedures and Proposed Purchase Agreement are Reasonable and Appropriate**

20. Courts have made clear that a trustee or debtor's business judgment is entitled to substantial deference with respect to the procedures to be used in selling assets from the estate. *See, e.g., In re Integrated Resources, Inc.*, 147 B.R. 650, 656-57 (Bankr. S.D.N.Y. 1992). The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *In re Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997) (in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at



hand.”); *Integrated Resources*, 147 B.R. at 659 (same); *In re Atlanta Packaging Products, Inc.*, 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988) (same). In that regard, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and therefore are appropriate in the context of bankruptcy sales. *Integrated Resources*, 147 B.R. at 659.

21. The proposed Bidding Procedures will allow the Debtor to consider Qualified Bids for the Purchased Assets and, if the Debtor receives such Qualified Bids that are above the offer of Diana Nisanova, to conduct the Auction in a controlled, fair and open fashion that will encourage participation by financially able bidders who demonstrate the ability to close a transaction. This will increase the likelihood that the Debtor will receive the greatest possible consideration for the Purchased Assets. The Bidding Procedures also set forth a schedule for achieving these objectives in an expeditious manner, balancing the Debtor’s desire to maximize recovery for the benefit of the Debtor’s estate, with the need to move quickly to preserve the value of the Debtor’s business as a going concern. Moreover, the proposed Purchase Agreement will also promote these objectives by providing a uniform basis for Potential Bidders to bid and the Debtor to analyze Qualified Bids.

22. For these reasons, the Debtor requests that the Court authorize the Bidding Procedures and the proposed Purchase Agreement.

**B. The Sale of Assets Pursuant to the Purchase Agreement is Authorized by Section 363(b) of the Bankruptcy Code**

23. Section 363(b)(1) of the Bankruptcy Code provides that a trustee, “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)(1). Although section 363 of the Bankruptcy Code does not specify a standard for determining when it is appropriate for a court to authorize the use, sale or

lease of property of the estate, courts require that such use, sale or lease be based upon a debtor's sound business judgment of the debtor. *See In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983).

24. The business judgment rule shields a trustee or debtor's management from judicial second-guessing. *See In re Johns-Manville Corp.*, 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) ("a presumption of reasonableness attaches to a debtor's management decisions"). Once a debtor articulates a valid business justification, "[t]he business judgment rule 'is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.'" *Integrated Resources*, 147 B.R. at 656 (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)). Thus, if a debtor's actions satisfy the business judgment rule, then the transaction in question should be approved under section 363(b)(1) of the Bankruptcy Code.

25. The prompt sale of the Purchased Assets is the best opportunity to maximize the value for the Debtor's estate. Pursuant to the Purchase Agreement, Diana Nisanova or the Prevailing Bidder will provide substantial consideration to the Debtor's estate. Namely, \$40,000.00 or such higher and better price after the auction. Accordingly, the value to be obtained for the Debtor's estate through this process is significant and should bring about a meaningful result for the Debtor's creditors. The Debtor submits that the proposed Sale will satisfy the business judgment test.

26. In addition, based on the Debtor's marketing efforts since the Petition Date, the Debtor submits that the consideration to be paid by the Prevailing Bidder under the Purchase Agreement with such bidder will be fair and reasonable. Accordingly, as a result of the Auction

process it will be clear that the consideration being paid by the Prevailing Bidder is the best available.

27. For all of these reasons, the Debtor has determined that the best if not only viable opportunity to maximize value for the Debtor's estate is to sell the Purchased Assets as set forth in this Motion. Accordingly, it is a valid exercise of the Debtor's business judgment to seek approval of the Bidding Procedures and the Sale.

**C. Approval of Sale Free and Clear of All Liens, Claims, Interests, Encumbrances & Liabilities**

28. The Debtor respectfully submits that it is appropriate to sell the Purchased Assets free and clear of Liabilities (except for Liabilities assumed by the Prevailing Bidder) pursuant to section 363(f) of the Bankruptcy Code, with any such liens, claims, encumbrances or interests attaching to the net sale proceeds of the Purchased Assets to the extent applicable. Section 363(f) of the Bankruptcy Code authorizes a trustee or debtor to sell assets free and clear of liens, claims, interests and encumbrances if:

- A. applicable nonbankruptcy law permits sale of such property free and clear of such interests;
- 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 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.

*See* 11 U.S.C. § 363(f). This provision 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).

29. Because section 363(f) of the Bankruptcy Code is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to permit the sale of the Purchased Assets “free and clear” of liens and interests. *In re Dundee Equity Corp.*, 1992 Bankr. LEXIS 436, \*12 (Bankr. S.D.N.Y. Mar. 6, 1992) (“Section 363(f) is in the disjunctive, such that the sale free of the interest concerned may occur if any one of the conditions of § 363(f) have been met.”); *In re Wolverine Radio Co.*, 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (stating that Bankruptcy Code section 363(f) is written in the disjunctive; holding that the court may approve the sale “free and clear” provided at least one of the subsections of section 363(f) of the Bankruptcy Code is met).

30. The Debtor is aware of multiple lienholders and parties that have asserted a lien on the Debtor’s assets, including, most significantly, the liens and security interests of JPMorgan Chase Bank, N.A. The Debtor believes that for any known or unknown lienholders that exist, one or more of the tests of section 363(f) will be satisfied with respect to the transfer of the Purchased Assets pursuant to the Purchase Agreement submitted by the Prevailing Bidder. In particular, any and all lienholders will be adequately protected by having their liens against the Debtor or the estate attach to the cash proceeds of the Purchased Assets in which such creditor alleges an interest, in the same order of priority, with the same validity, force and effect that such creditor had prior to the sale, subject to any claims and defenses the Debtor and the Debtor’s estate may possess with respect thereto. Additionally, any lienholder who receives notice of the sale but does not object is deemed to consent to the proposed sale. *See In re Borders Group, Inc.*, 453 B.R. 477, 484 (Bankr. S.D.N.Y. 2001). Accordingly, section 363(f) of the Bankruptcy

Code authorizes the transfer and conveyance of the Purchased Assets free and clear of any such Liabilities.

**D. The Purchased Assets Should be Sold Free and Clear of Successor Liability**

31. Under the Purchase Agreement, the Prevailing Bidder will be assuming only those Liabilities expressly assumed and set forth therein. The Prevailing Bidder, therefore, should not be liable for any of the Debtor's liabilities in connection with the sale of the Purchased Assets as a successor to the Debtor's business or otherwise, unless expressly assumed.

32. Courts have consistently held that a buyer of a debtor's assets pursuant to a section 363 sale takes free from successor liability resulting from pre-existing claims. *See In re Chrysler LLC*, 576 F.3d 108, 126 (2d Cir. 2009), *cert. granted, judgment vacated sub nom. Indiana State Police Pension Trust v. Chrysler LLC*, 558 U.S. 1087, 130 S. Ct. 1015, 175 L. Ed. 2d 614 (2009), and *vacated sub nom. In re Chrysler, LLC*, 592 F.3d 370 (2d Cir. 2010) (sale authorized free and clear of products liability claims); *but see In Matter of Motors Liquidation Co.*, 829 F.3d 135 (2d Cir. 2016), *cert. denied sub nom. Gen. Motors LLC v. Elliott*, No. 16-764, 2017 WL 1427591 (U.S. Apr. 24, 2017) (creditors with ignition switch claims were entitled to notice by direct mail or some equivalent, not mere publication notice); *see also Ninth Ave. Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 732 (N.D. Ind. 1996) (stating that a bankruptcy court has the power to sell assets free and clear of any interest that could be brought against the bankruptcy estate during the bankruptcy); *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 93-94 (2d Cir. 1988) (channeling of claims to proceeds consistent with intent of sale free and clear under section 363(f) of the Bankruptcy Code); *In re New England Fish Co.*, 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982) (transfer of property in free and clear sale included free and clear of Title VII employment discrimination

and civil rights claims of debtor's employees); *In re Hoffman*, 53 B.R. 874, 876 (Bankr. D. R.I. 1985) (transfer of liquor license free and clear of any interest permissible even though the estate had unpaid taxes).

33. The purpose of an order purporting to authorize the transfer of assets free and clear of all "interests" would be frustrated if claimants could thereafter use the transfer as a basis to assert claims against the Prevailing Bidder arising from the Debtor's pre-Sale conduct. Under section 363(f) of the Bankruptcy Code, the Prevailing Bidder is entitled to know that the Purchased Assets are not infected with latent claims that will be asserted against the Prevailing Bidder after the proposed transaction is completed.

34. Accordingly, consistent with the above-cited case law, the order approving the sale of the Purchased Assets should state that the Prevailing Bidder is not liable as a successor under any theory of successor liability, for claims that encumber or relate to the Purchased Assets (except for Liabilities assumed by the Prevailing Bidder).

**E. The Prevailing Bidder is a Good Faith Purchaser and is Entitled to the Full Protections of Section 363(m) of the Bankruptcy Code**

35. The Debtor requests that the Court find that the Prevailing Bidder is entitled to the full protections of section 363(m) of the Bankruptcy Code. Courts have indicated that a party would have to show fraud or collusion between the buyer and the debtor-in-possession or trustee or other bidders in order to demonstrate a lack of good faith. *See In re Colony Hill Assocs.*, 111 F.3d 269, 276 (2d Cir. 1997) ("Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders."); *See also In re Angelika Films 57th, Inc.*, 1997 U.S. Dist. LEXIS 7463 at \*19-\*28 (S.D.N.Y. May 29, 1997).

36. As discussed, there is ample business justification for the proposed Sale of the Debtor's assets, the sale and the Purchase Agreement will have been pursued in good faith, and there will have been no fraud or collusion between the Debtor, the Prevailing Bidder or any other bidder. In addition, the Purchase Agreement will be the product of extensive, arm's length negotiations between the Debtor and the Prevailing Bidder.

37. Further, the Prevailing Bidder will have recognized that the Debtor is free to deal with any other party interested in acquiring the Purchased Assets. In fact, the Bidding Procedures and Auction process contemplated by this Motion make this point abundantly clear. At the Sale Hearing, the Debtor will be able to demonstrate that the Prevailing Bidder has also complied with the Bidding Procedures Order and agreed to subject its bid to the competitive Bidding Procedures. Additionally, all payments to be made to the Prevailing Bidder and other agreements or arrangements entered into by the Prevailing Bidder in connection with the Sale will have been disclosed. In this regard, the Debtor intends to offer evidence at the Sale Hearing to show that such Prevailing Bidder is entitled to the protection of section 363(m) of the Bankruptcy Code.

**F. Relief Under Bankruptcy Rules 6004(h) And 6006(d) Is Appropriate**

38. Bankruptcy Rule 6004(h) provides that an order authorizing the use, sale, or lease of property ... is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h). Also, Bankruptcy Rule 6006(d) provides that an "order authorizing the trustee to assign an executory contract or unexpired lease ... is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6006(d). The Debtor requests that any order approving the proposed Purchase Agreement (or the Bidding Procedures in connection with the sale proposed thereunder) be

effective immediately by providing that the 14-day stays under Bankruptcy Rules 6004(h) and 6006(d) are waived.

39. The purpose of Bankruptcy Rules 6004(h) and 6006(d) is to provide sufficient time for an objecting party to appeal before an order can be implemented. *See* Advisory Committee Notes to Fed. R. Bankr. P. 6004(h) and 6006(d). Although Bankruptcy Rules 6004(h) and 6006(d) and the Advisory Committee Notes are silent as to when a court should “order otherwise” and eliminate or reduce the 14-day stay period, Collier suggests that the 14-day stay period should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to the procedure.” 10 Lawrence P. King, Collier on Bankruptcy, 6004.10 (16th Ed. 2011). Collier further provides that if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to seek a stay, unless the court determines that the need to proceed sooner outweighs the interests of the objecting party. *Id.*

40. To maximize the value received for the Purchased Assets, the Debtor seeks to implement the Bidding Procedures and Auction process as quickly as possible after the Bidding Procedures Hearing, as well as close the Sale as soon as possible after the Sale Hearing. Accordingly, the Debtor hereby requests that the Court waive the fourteen-day stay period under Bankruptcy Rules 6004(h) and 6006(d) or, in the alternative, if an objection to the Sale is filed, reduce the stay period to the minimum amount of time needed by the objecting party to seek a stay pending appeal.

## V. **NOTICE**

41. The Debtor is serving this Motion on the United States Trustee, counsel to the Landlord, and all parties that have filed a notice of appearance. Upon approval of the bidding



procedures, the full motion and bid package will be served on all creditors as described in accordance with paragraph 18 above. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtor respectfully requests that the Court enter the Bidding Procedures Order attached hereto as Exhibit 1 and, following the subsequent Sale Hearing, enter the Sale Order in substantially the form attached hereto as Exhibit 2, and grant such other relief as this Court deems proper and just.

Dated: New York, New York  
October 9, 2018

Respectfully Submitted,

MORRISON TENENBAUM PLLC

/s/ Lawrence F. Morrison

By: Lawrence F. Morrison

Brian J. Hufnagel

*Counsel for the Debtor and*

*Debtor in Possession*

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**EXHIBIT 1**

**BIDDING PROCEDURES ORDER**

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

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In re:

Chapter 11

BENJYS KOSHER PIZZA & DAIRY  
RESTAURANT INC. d/b/a BENJYS,

Case No. 18-41353 (ESS)

Debtor.

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**ORDER (I) APPROVING BIDDING PROCEDURES; (II) SCHEDULING  
BID DEADLINE, AUCTION DATE AND SALE HEARING AND  
APPROVING NOTICE THEREOF; AND  
APPROVING NOTICE THEREOF**

Upon the Motion (the “Motion”) of Benjys Kosher Pizza & Dairy Restaurant Inc. d/b/a Benjys, debtor and debtor-in-possession (the “Debtor”), dated October 9, 2018, under sections 105, 363, and 365 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”), Rule 6004-1 of the E.D.N.Y. Local Bankruptcy Rules (the “Local Rules”) and Rules 2002, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) for the entry of: (i) this initial order (the “Bidding Procedure Order”), approving the bidding procedures (the “Bidding Procedures”), substantially similar to the procedures attached to this Bidding Procedures Order as Exhibit A, (b) approving the form of notice of the Bidding Procedures, Auction, Sale Hearing and Sale, (c) and granting other related relief; and (ii) the entry of a second order (the “Sale Order”), (a) authorizing the Debtor to enter into the Proposed Asset Purchase Agreement (the “Purchase Agreement”) with Diana Nisanova for the sum of \$40,000.00 subject to higher and better offers, and approving the sale to the bidder for the Purchased Assets set forth in the Purchase Agreement (the “Sale”), (b) granting other relief related thereto; the Court having reviewed the Motion and scheduled a hearing (the “Procedures Hearing”) on the Motion, and the Court having found that (i) the Court has jurisdiction to

consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334, (ii) venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b); and (iv) notice of the Motion and Hearing was sufficient under the circumstances; and after due deliberation the Court having determined that the relief requested in the Motion is in the best interest of the Debtor's estate and its creditors; and good and sufficient cause having been shown; it is hereby ORDERED, as follows:

1. The Motion (as it pertains to approval of the matters set forth herein) is granted. Any objections to this Bidding Procedures Order that have not been previously resolved or withdrawn are overruled on the merits. This Bidding Procedures Order shall be valid, binding and enforceable on all parties in interest and fully effective immediately upon entry.

2. The Debtor shall cause to be served, within five (5) business days after issuance of this Bidding Procedures Order, by first-class mail, postage prepaid, or by electronic mail (i) notice of the Bid Deadline, Auction and Sale Hearing substantially in the form annexed hereto as Exhibit C (the "Notice of Bid Deadline, Auction, and Sale Hearing"), (ii) this Bidding Procedures Order, including the Bidding Procedures attached hereto as Exhibit A, and (iii) the Motion (the Notice of Bid Deadline, Auction, and Sale Hearing, this Bidding Procedures Order and the Bidding Procedures, the Motion, collectively, the "Sale Package"), upon (a) all potential buyers previously identified or solicited by the Debtor and any additional parties who have previously expressed an interest in potentially acquiring the Purchased Assets, (b) all other potentially interested parties identified by the Debtor or their professionals; (c) the Office of the United States Trustee for the Eastern District of New York (the "U.S. Trustee"), (d) all parties in interest who have requested notice in the Case under Bankruptcy Rule 2002, (e) all parties who are known to possess or assert a lien, claim, encumbrance or interest in or upon any of the

Purchased Assets, (f) the Internal Revenue Service, and (g) all applicable federal, state and local regulatory or taxing authorities or recording offices which have a reasonably known interest in the relief requested in the Motion. The Debtor shall also publish the Notice of Bid Deadline, Auction, and Sale Hearing in the classified section of the New York Daily News. Such notice shall be sufficient and appropriate notice of the Sale with respect to known interested parties.

### **BIDDING PROCEDURES AND AUCTION**

3. The Bidding Procedures, annexed hereto as Exhibit A, are incorporated herein by reference and are approved and shall govern the qualification of bidders, the submission, content and qualification of all Qualified Bids and bidding procedures relating to the Auction of the Purchased Assets. The Bidding Procedures are necessary and reasonable under the circumstances of this case, are intended and are likely to preserve and enhance the value of the Debtor's estate and are approved in their entirety.

4. The proposed Purchase Agreement, annexed hereto as Exhibit B, is incorporated herein by reference and is approved as the form of agreement to be used by bidders in conjunction with the Bidding Procedures.

5. Subject to the terms and conditions set forth in the Bidding Procedures, the Debtor is hereby authorized and directed to (a) solicit any person to become a Potential Bidder, (b) permit Potential Bidders to conduct a due diligence investigation in connection with the Sale, (c) determine whether a bid timely submitted by a Potential Bidder is a Qualified Bid, (d) if one or more Qualified Bids is submitted, conduct an Auction, (e) at the conclusion of such Auction, designate the highest or otherwise best offer as the Prevailing Bidder and the next highest or otherwise best offer and the Back-Up Bidder, and (f) seek Bankruptcy Court approval at the Sale

Hearing of the Prevailing Bid submitted by the Prevailing Bidder and the Back-Up Bid submitted by the Back- Up Bidder.

### **SALE HEARING AND OBJECTIONS TO THE SALE**

6. The Court shall hold the Sale Hearing on **December \_\_\_\_\_, 2018 at \_\_ .M.** (Eastern Time), or such other date and time as may be convenient to the Court, or as may be announced at the Sale Hearing without further notice.

7. To be considered by the Court, any objections to the Sale of the Purchased Assets to the Prevailing Bidder under the Purchase Agreement shall (a) be in writing, (b) conform to the Bankruptcy Rules and the Local Rules, (c) set forth the name of the objecting party, the nature and amount of any claims or interest held or asserted against the Debtor's estate or its properties, the basis for the objection and the specific grounds therefor and (d) be filed with the with the Clerk of the Bankruptcy Court with a courtesy copy delivered to the chambers of the Honorable Elizabeth S. Stong, United States Bankruptcy Judge of the United States Bankruptcy Court for the Eastern District of New York at 271-C Cadman Plaza East, Suite 1595, Brooklyn, New York 11201 and served on the following (collectively, the "Objection Notice Parties"): (i) the Office of the United States Trustee, 201 Varick Street, Suite 1006, New York, New York 10014, attn: William E. Curtin, Esq., (ii) Debtor's counsel, Morrison Tenenbaum PLLC, 87 Walker Street, Floor 2, New York, New York 10013, attn: Brian J. Hufnagel, Esq., and (iii) counsel for the Prevailing Bidder, so as to be received no later than \_\_\_\_M. (Eastern time) on December \_\_, 2018 (the "Sale Objection Deadline").

8. Any entity that fails to file and serve its objection before the expiration of the Sale Objection Deadline and otherwise in accordance with this Bidding Procedures Order shall be prohibited from asserting at the Sale Hearing or at any time thereafter any objection to the

Motion or the consummation and performance of the Sale as contemplated by the terms of the Purchase Agreement submitted by the Prevailing Bidder, including the transfer of the Purchased Assets free and clear of all Liabilities (other than Liabilities assumed by the Prevailing Bidder).

9. If the Debtor receives more than one Qualified Bid from Qualified Bidders the Debtor shall conduct an Auction commencing at 10:00 A.M. (Eastern Time) on November 30, 2018 at Morrison Tenenbaum PLLC, 87 Walker Street, Floor 2, New York, New York, 10013 or such other time or place as the Debtor, at least two (2) business days before the Auction, notifies all Qualified Bidders who have submitted Qualified Bids. The Debtor shall conduct an open Auction in accordance with the Bidding Procedures on the record, recorded digitally or by a court reporter. Each Qualified Bidder participating at the Auction shall confirm that it has not engaged in any collusion with respect to the bidding or the Sale.

#### **ADDITIONAL PROVISIONS**

10. The proposed Purchase Agreement and any exhibits and schedules thereto (collectively, the “Transaction Documents”) may be amended, modified or supplemented, or the provisions thereof waived, in accordance with the terms of the proposed Purchase Agreement and/or as required to implement the Bidding Procedures and Sale process without further order of this Court or notice thereof to any party, other than Potential Bidders or Qualified Bidders.

11. The failure to include or reference in this Bidding Procedures Order any particular provisions of the Bidding Procedures shall not diminish or impair the effectiveness of such provisions, it being the intent of the Court that the Bidding Procedures be authorized and approved in their entirety.

12. This Court shall retain exclusive jurisdiction to interpret, construe, enforce and implement the terms of this Bidding Procedures Order and grant any remedy, at law or equity, as the circumstances require.

13. Notwithstanding Bankruptcy Rules 6004(h) and 6006(d), this Bidding Procedures Order shall not be stayed for fourteen (14) days after the entry hereof and shall be effective and enforceable immediately upon signature hereof.

14. The Court shall retain jurisdiction over any matter or dispute arising from or relating to the implementation of this Bidding Procedures Order.



**EXHIBIT A**

**BIDDING PROCEDURES**

## **BIDDING PROCEDURES**

These bidding procedures (the “Bidding Procedures”) set forth the terms by which Benjys Kosher Pizza & Dairy Restaurant Inc. d/b/a Benjys, (the “Debtor” or the “Seller”), Debtor and debtor in possession may effectuate a sale (the “Sale”) of substantially all of its assets (the “Purchased Assets”) subject to the terms and conditions and in accordance with the process and procedures set forth herein. These Bidding Procedures were approved by an order (the “Bidding Procedures Order”) entered on \_\_\_\_\_, 2018, by the United States Bankruptcy Court for the Eastern District of New York (the “Bankruptcy Court”) in the following proceeding: In re Benjys Kosher Pizza & Dairy Restaurant Inc. d/b/a Benjys, Case No. 18-41353 (ESS).

### **I. Important Dates, Contact Information, and Terms**

The following dates and deadlines apply to the proposed Sale.

<b>Bid Qualification Deadline:</b>	November 27, 2018 at 12:00 p.m. (ET)
<b>Auction:</b>	November 30, 2018 at 10:00 a.m. (ET)
<b>Sale Hearing:</b>	TBD
<b>Sale Closing:</b>	on or before 14 days after entry of sale order

The key dates in the sale process may be extended by the Debtor or by the Bankruptcy Court for cause.

Parties interested in the Assets may contact the Debtor through its attorneys by contacting Brian J. Hufnagel, Esq, Morrison Tenenbaum PLLC, 87 Walker Street, Floor 2, New York, NY 10013, telephone: (212) 620-0938, email: bjhufnagel@m-t-law.com.

### **II. Due Diligence and Participation**

To participate in the sale process as a potential purchaser, conduct due diligence upon the Assets and be entitled to submit a bid for consideration hereunder, a party (each an “Interested Party”) must deliver the following to the Debtor:

- (A) a statement and other factual support demonstrating to the Debtor’s reasonable satisfaction that the Interested Party has a *bona fide* interest in purchasing the Assets or some subset of the Assets; and
- (B) sufficient information, as determined by the Debtor, to confirm that the Interested Party has the financial wherewithal and any required corporate, legal or other authorization necessary to close the Sale, including, but not limited to, a form of financial disclosure acceptable to the Debtor in their discretion.

Upon satisfactory receipt of the items above, as determined by the Debtor, then such Interested Party will be deemed a "Potential Bidder." The identity of each Potential Bidder may be disclosed to any other Potential Bidders.

Until the business day immediately preceding the Bid Deadline, the Debtor will provide any Potential Bidder such due diligence access or additional information as the Debtor, determines to be reasonably requested and appropriate under the circumstances. In the event that any such due diligence material is in written form and has not previously been provided to any other Potential Bidder, the Debtor will provide such materials to all Potential Bidders to the extent practicable.

Unless otherwise determined by the Debtor, the availability of additional due diligence to a Potential Bidder will cease if (A) the Potential Bidder does not become a Qualified Bidder or (B) the bidding process is terminated in accordance with its terms.

A party may participate in the bidding process by submitting a bid to purchase less than all of the Purchased Assets. In addition, parties may participate in the bidding process by submitted a joint bid to purchase all, or less than all, of the Purchased Assets.

### **III. General Bid Deadline**

A Potential Bidder that desires to make a bid shall deliver written and electronic copies of its bid in both PDF and Word format to counsel to the Debtor, Morrison Tenenbaum PLLC, 87 Walker Street, Floor 2, New York, NY 10013, Tel. (212) 620-0938, attn.: Brian J. Hufnagel, [bjhufnagel@m-t-law.com](mailto:bjhufnagel@m-t-law.com) and Lawrence F. Morrison, [lmorrison@m-t-law.com](mailto:lmorrison@m-t-law.com) so as to be received no later than 12:00 p.m. (prevailing Eastern Time) on November 27, 2018 (the "General Bid Deadline").

### **IV. Qualified Bids**

Assuming that there is an Auction, a Potential Bidder will not be entitled to participate in any Auction or otherwise purchase the Assets, unless it shall have submitted a Qualified Bid by the General Bid Deadline in accordance with these Bidding Procedures that includes all of the following items (the "Bid Package"):

- (A) The true identity of the party submitting the bid and details regarding any other parties participating in the bid;
- (B) A written acknowledgment by the Qualified Bidder and each participant in such bid that it/they agrees to all of the terms set forth in these Bidding Procedures;
- (C) Written evidence that the Qualified Bidder has obtained authorization and approval from its board of directors (or comparable governing body) with respect to the submission of its bid and acceptance of the terms set forth in these Bidding Procedures, or representation that no such authorization or approval is required;

(D) Audited (if in existence) or unaudited financial statements and/or other written evidence of a financing commitment or other evidence, satisfactory to the Debtor, of the financial ability to close under its asset purchase agreement within the deadline described above;

(E) A signed Purchase Agreement, in form and substance substantially similar to the form Asset Purchase Agreement attached hereto as Exhibit 1 and incorporated herein by reference;

(F) The bid is formal, binding and unconditional (except for those conditions expressly set forth in the applicable APA) and is not subject to any due diligence or financing contingency and is irrevocable until the earlier of 48 hours after the Sale of the Purchased Assets has closed or 30 days after the conclusion of the Sale Hearing;

(G) Does not entitle the Potential Bidder to any breakup fee, termination fee, expense reimbursement or similar type of payment or reimbursement and includes a waiver of any substantial contribution administrative expense claim under section 503(b) of the Bankruptcy Code related to bidding for the Assets;

(H) A Good Faith Deposit (defined below); and

(I) The Qualified Bid is received by the Bid Deadline.

A Potential Bidder must deposit with counsel to the Debtor as escrow agent (the “Deposit Agent”) a cash deposit of \$10,000 (such deposit, a “Good Faith Deposit”). The Good Faith Deposit must be made by wire transfer or certified check and will be held by the Deposit Agent.

If a bid is received and, in the Debtor’s judgment, it is not clear whether the bid is a Qualified Bid, the Debtor may consult with the Potential Bidder and seek additional information in an effort to establish whether or not a bid is a Qualified Bid.

A Bid Package received from a Potential Bidder that is determined by the Debtor, to meet the above requirements (or any modification to the above requirements made after consultation with the Consultation Parties) will be considered a “Qualified Bid,” and each Potential Bidder that submits a Qualified Bid will be considered a “Qualified Bidder.”

A Qualified Bid and bids at the Auction may be valued by the Debtor, based upon factors such as: (A) the purported amount of the Qualified Bid, including the bid’s impact on all constituents of the Debtor, any benefit to the Debtor’s bankruptcy estate from any assumption of liabilities, the waiver of liabilities through a Credit Bid, and an analysis of other non-cash consideration; (B) the value to be provided to the Debtor under the Qualified Bid, including the net economic effect upon the Debtor’s estate; (C) contingencies with respect to the Sale and the ability to close the proposed Sale without delay, and any incremental costs to the Debtor in closing delays; (D) the ability to obtain any and all necessary governmental approvals for the proposed transaction; and (E) any other factors the Debtor, may deem relevant.

The Debtor, reserves the right to impose additional terms and conditions with respect to all Qualified Bidders.

#### **V. Credit Bid**

Parties with a lien that secures an allowed claim (“Secured Creditors”) may credit bid to the extent permitted by 11 U.S.C. § 363(k). Secured Creditors must comply with the bid requirements to be deemed a Qualified Bidder including the posting of a Good Faith Deposit. As a condition to credit bidding any portion of its secured claim, Secured Creditors, or their designated affiliate(s), shall include an offer to fund, in cash, at Closing, a carve-out to pay any reasonable, allowed estate professional fees and expenses incurred and unpaid as of Closing.

#### **VI. Baseline Bid**

The Debtor, will select what they determine to be the highest or best Qualified Bid (or collection of Qualified Bids) for the Purchased Assets (the “Baseline Bid”) to serve as the starting point at the Auction. As soon as practicable, the Debtor will identify the Baseline Bid and provide to all Qualified Bidders copies of all Qualified Bids. Absent a higher bid prior to the Auction, the Baseline Bid will be the bid of Diana Nisanova in the amount of \$40,000.00.

#### **VII. Auction**

If more than one Qualified Bid is received by the General Bid Deadline, then the Debtor will conduct an auction (the “Auction”) to take place at 10:00 a.m. (prevailing ET) on November 30, 2018 at Morrison Tenenbaum PLLC, 87 Walker Street, Floor 2, New York, New York 10013, or such other time as the Debtor, may notify Qualified Bidders who have submitted Qualified Bids.

Only Qualified Bidders and their designated agents will be eligible to participate at the Auction, subject to such modifications and limitations as the Debtor may impose in good faith. Attorneys who have filed a notice of appearance in the case and a representative(s) from the Office of the United States Trustee for the Eastern District of New York will be able to attend and observe the Auction.

At the Auction, participants will be permitted to increase their bids. Bidding on the Assets will start at the purchase price and terms proposed in the Baseline Bid, and will proceed thereafter in increments of \$1,000 (the “Minimum Overbid”).

The Debtor may adopt rules for the Auction at any time that the Debtor determines to be appropriate to promote the goals of the bidding process and are not inconsistent with these Bidding Procedures, including auctioning subsets of the Purchased Assets first but making any “winning bid” on a subset of the Purchased Assets contingent upon the outcome of the Auction of all of the Purchased Assets. The Debtor, is permitted, but not required, to ascribe a liquidation value to certain assets to assist the Debtor in comparing bids for a subset of the Purchased Assets against bids for all of the Purchased Assets, provided that any ascribed liquidation value shall not be determinative of the actual value of such Purchased Assets. If the Debtor believes that such

value would be overly speculative under the circumstances, however, they may decline to assign any such liquidation values. Any rules developed by the Debtor will provide that all bids will be made and received in one room, on an open basis, and all other Qualified Bidders will be entitled to be present for all bidding with the understanding that the true identity of each Qualified Bidder will be fully disclosed to all other Qualified Bidders and that all material terms of each Qualified Bid submitted in response to the Baseline Bid or to any successive bids made at the Auction will be fully disclosed to all other Qualified Bidders throughout the entire Auction, and each Qualified Bidder will be permitted to take what the Debtor determines to be an appropriate amount of time to respond to the previous bid at the Auction.

The Debtor reserves the right to and may, reject at any time before entry of the relevant Sale Order (as defined below) any bid that, in the Debtor's judgment, is: (A) inadequate or insufficient; (B) not in conformity with the requirements of the Bankruptcy Code, these Bidding Procedures or the terms and conditions of the Sale; or (C) contrary to the best interests of the Debtor and the estate. In doing so, the Debtor may take into account the factors set forth above regarding the contents of a Qualified Bid.

Prior to the conclusion of the Auction, the Debtor 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 highest or otherwise best offer or collection of offers (the "Prevailing Bid"); (C) determine which Qualified Bid is the Prevailing Bid and which is the next highest or otherwise best bid (the "Back-Up Bid") for the Purchased Assets; and (D) notify all Qualified Bidders participating in the Auction, prior to its adjournment, of the Prevailing Bidder, the amount and other material terms of the Prevailing Bid and the identity of the party that submitted the Back-Up Bid (the "Back-Up Bidder"). At the Sale Hearing, the Debtor will present the Prevailing Bid and the Back-Up Bid to the Bankruptcy Court for approval.

No additional bids may be submitted or considered after the conclusion of the Auction.

**EACH BID - INCLUDING BIDS CONTAINED IN THE BID PACKAGE SHALL CONSTITUTE AN IRREVOCABLE OFFER AND BE BINDING ON THE QUALIFIED BIDDER(S) FROM THE TIME THE BID IS SUBMITTED UNTIL THE EARLIER OF 48 HOURS AFTER THE SALE OF THE ASSETS HAS CLOSED OR 30 DAYS AFTER THE CONCLUSION OF THE SALE HEARING.**

### **VIII. Acceptance of Qualified Bids**

The Debtor presently intends to consummate the Sale with the Prevailing Bidder, or if the Prevailing Bidder cannot or refuses to consummate the Sale because of the breach or failure on the part of the Prevailing Bidder, then with the Back-Up Bidder. However, the Debtor's presentation of the Prevailing Bid and the Back-Up Bid to the Bankruptcy Court for approval does not constitute the Debtor's acceptance of such bid. The Debtor will be deemed to have accepted the Prevailing Bid or the Back-Up Bid, as applicable, only when such bid has been approved by the Sale Order.

If for any reason the Prevailing Bidder fails to consummate the purchase of the Purchased Assets, or any subset thereof, the Back-Up Bidder may be deemed by the Debtor to be the highest or best bid, and the Debtor and the Back-Up Bidder will thereafter effect the sale of the Purchased Assets to the Back-Up Bidder as soon as is commercially reasonable. If such failure to consummate the purchase is the result of a breach by the Prevailing Bidder, the Debtor shall have the right to retain the Good Faith Deposit until required to return it by an order of the Bankruptcy Court and shall reserve the right to seek all available damages from the Prevailing Bidder, including, but not limited to, with respect to the Good Faith Deposit.

### **IX. The Sale Hearing**

On or before TBD subject to any continuance or postponement by the Bankruptcy Court, the Bankruptcy Court shall conduct a hearing (the “Sale Hearing”) to determine whether to approve the Sale of Purchased Assets free and clear of all liens, claims, interests, encumbrances and liabilities.

At the Sale Hearing, the Debtor will seek Bankruptcy Court Approval of the Sale of the Purchased Assets to the Prevailing Bidder and the Back-Up Bidder. In the event the Prevailing Bidder cannot or refuses to consummate the Sale because of the breach or failure on the part of the Prevailing Bidder, the Debtor will be permitted to close with the Back-Up Bidder without further order of the Bankruptcy Court. The Debtor’s presentation to the Bankruptcy Court for approval of these particular bids does not constitute acceptance of any bids. The Debtor has accepted a bid only when the Bankruptcy Court, following the Sale Hearing, has approved the Sale and entered an order authorizing and approving the Sale, which shall be in form and substance acceptable to the Debtor and the Prevailing Bidder or the Back-Up Bidder, as applicable (the “Sale Order”). The Sale Hearing may be adjourned or rescheduled without notice or with limited and shortened notice to parties other than the Consultation Parties, including by (A) an announcement of such adjournment at the Sale Hearing or at the Auction or (B) the filing of a notice of adjournment with the Bankruptcy Court prior to the commencement of the Sale Hearing.

### **X. Terms of Sale: “As Is, Where Is”**

Any Sale shall be on an “as is, where is” basis and without representations or warranties of any kind, nature or description by the Debtor, their agents or the Debtor’s chapter 11 estate, whether written or verbal, whether express, implied or by operation of law, except and solely to the extent expressly set forth in the Purchase Agreement of the Prevailing Bidder or the Back-Up Bidder, as applicable. Each Qualified Bidder shall be deemed to acknowledge and represent that it has had an opportunity to conduct any and all due diligence regarding the Purchased Assets that are the subject of the Auction prior to making its bid, that it has relied solely upon its own independent review and investigation in making its bid. Except as otherwise provided in the Purchase Agreement of the Prevailing Bidder or the Back-Up Bidder, as applicable, all of the Debtor’s right, title and interest in the Purchased Assets shall be sold free and clear of liens, claims, interests, encumbrances and liabilities as proposed in the form of Sale Order (collectively, “Liabilities”), with any Liabilities to attach to the proceeds of the Sale as permitted by law and

provided in the proposed form of Sale Order.

#### **XI. Closing**

Except to the extent of any contrary provision in the Purchase Agreement of the Prevailing Bidder or the Back-Up Bidder, as applicable, the closing (the “Closing”) shall occur on or before 14 days after entry of the sale order, subject to the right of the Debtor and the Prevailing Bidder or the Back-Up Bidder, as applicable, to extend such date consistent with such party’s Purchase Agreement and these Bidding Procedures.

#### **XII. General**

The Debtor may amend these Bidding Procedures or the bidding process at any time and from time to time in any manner that it determines will best promote the goals of the Bidding Procedures, including extending or modifying any of the dates described herein. The Debtor shall promptly notify parties in interest and Potential Bidders of any such modifications. No bidder has any rights against the Debtor, the estate, or any of the Debtor’s other professionals by virtue of any modification of these Bidding Procedures, or by virtue of having or not having its bid accepted by the Debtor or approved by the Bankruptcy Court. To participate in the Auction, each Qualified Bidder will sign an acknowledgment of no rights or claims against the Debtor, the estate, or the Debtor’s professionals for the foregoing.

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

The Good Faith Deposits of all Qualified Bidders will be held in escrow by the Deposit Agent and while held in escrow will not become property of the Debtor’s bankruptcy estate unless released from escrow pursuant to terms of the applicable escrow agreement or pursuant to further order of the Bankruptcy Court. The Deposit Agent will retain the Good Faith Deposits of the Prevailing Bidder and the Back-Up Bidder until the closing of the Sale unless otherwise ordered by the Bankruptcy Court. The Good Faith Deposits of the other Qualified Bidders will be returned within four business days of the entry of the Sale Order. At the closing of the Sale contemplated by the Prevailing Bid, the Prevailing Bidder will be entitled to a credit for the amount of its Good Faith Deposit. The Good Faith Deposit of the Back-Up Bidder will be released by the Debtor four (4) business days after the Closing of the Sale.

#### **XIV. Reservation of Rights**

The Debtor reserves the right to amend or modify the proposed Bidding Procedures, including without limitation, the proposed Bid Deadline, Auction Date, and Sale Hearing date, in connection with the conditions or requirements of any Qualified Bidder (as defined in the Bidding Procedures).



**EXHIBIT B**

**ASSET PURCHASE AGREEMENT**

**ASSET PURCHASE AGREEMENT**

**By and among**

**Diana Nisanova,  
an individual,  
as Purchaser,**

**Benjys Kosher Pizza & Dairy Restaurant Inc. d/b/a Benjys  
a New York corporation**

**as Seller,**

**October 5, 2018**

## **ASSET PURCHASE AGREEMENT**

This ASSET PURCHASE AGREEMENT (this “**Agreement**”) is made and entered into on October 5, 2018, by and between Diana Nisanova, an individual (the “**Purchaser**”), on the one hand, and Benjys Kosher Pizza & Dairy Restaurant Inc. d/b/a Benjys, a New York corporation (the “**Seller**”).

### **RECITALS**

A. The Seller has filed a voluntary bankruptcy petition pursuant to chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”) before the United States Bankruptcy Court for the Eastern District of New York (the “**Bankruptcy Court**”) and is in the possession of its assets and in the management of its business pursuant to sections 1107 and 1108 of the Bankruptcy Code.

B. The Seller is engaged in the business of operating a restaurant under the name Benjys located at 72-72 Main Street, Flushing, New York 11367 (the “**Business**”).

C. The Purchaser desires to purchase from the Seller, and the Seller desire to sell to the Purchaser, substantially all assets of the Business, other than the exclusions provided for herein, upon the terms and subject to the conditions set forth herein and in accordance with Sections 363 and 365 of the Bankruptcy Code.

NOW, THEREFORE, in consideration of the representations, warranties, covenants and agreements contained in this Agreement and other good and valuable consideration, sufficiency of which is hereby acknowledged, the parties, intending to be legally bound, agree as follows:

### **SECTION 1 PURCHASE OF ASSETS**

**1.1 Acquired Assets.** Subject to the terms and conditions hereof, at the Closing, the Seller shall sell, assign, transfer, convey, and deliver to the Purchaser, and the Purchaser shall purchase and accept, all of the Seller’s right, title and interest in and to substantially all of the Seller’s Business and assets, including but not limited to accounts receivable, inventory, personal property, restaurant equipment tables and chairs, contracts, leases, general intangibles, intellectual property, and other fixed assets (collectively, the “**Acquired Assets**”). The Acquired Assets will not include those items of personal property, contracts, and/or leases set forth on Schedule A hereto (the “**Excluded Assets**”). Certain of the Acquired Assets shall be assumed by Seller and assigned to Purchaser, pursuant to Bankruptcy Code §365, and the balance of the Acquired Assets shall be conveyed by a Bill of Sale and/or Assignment in a form reasonably acceptable to Purchaser and Seller.

**1.2 Sale Free and Clear of Liens.** The Acquired Assets shall be transferred by the Seller, free and clear of all liens, claims and encumbrances (the “**Liens**”), pursuant to Bankruptcy Code §363(f).

**1.3 Assumption of Liabilities.** Notwithstanding anything to the contrary in this Agreement, other than the liabilities of Seller specifically set forth on Schedule B hereto,

Purchaser shall not assume any liabilities of the Seller or its estate, nor shall Purchaser be deemed to be a successor to the Seller or its bankruptcy estate for any purpose whatsoever.

**1.4 Third Party Consents; Assignment and Assumption of Contracts.** At the request of the Purchaser, the Seller shall obtain, prior to the Closing Date, solely those consents of third parties specifically identified by Purchaser which are required to transfer or assign any interest of the Seller in the Seller contracts specifically identified on Schedule B without liability to the Buyer except for obligations first arising under such contracts following Closing. At Closing of the transactions contemplated hereby, Seller shall be required to assume and assign to Purchaser only those contracts specifically identified on Schedule B hereto. To the extent that the Seller is required to pay any cure amounts with respect to the assumption and assignment of the executory contracts and unexpired leases identified on Schedule B hereto, Purchaser shall pay such amounts directly to the relevant counterparty at the Closing which shall be a credit to the purchase price.

## **SECTION 2 PURCHASE PRICE**

**2.1 Purchase Price.** The purchase price for the Acquired Assets (the “**Purchase Price**”) shall be \$40,000.00 Dollars plus the assumption of the liabilities specifically identified on Schedule B hereto. On the Closing Date, the Purchaser shall pay to Seller by wire transfer of immediately available funds to an account(s) designated by Seller an amount equal to the Purchase Price (as defined below) minus the Deposit (defined below). Upon receipt of the Closing Payment, the Seller shall deliver the items set forth herein in Section 3.2 to the Purchaser.

**2.2 Deposit.** Upon the execution of this Agreement, the Purchaser shall pay to Seller the sum of \$20,000.00 Dollars (the “**Deposit**”) payable to “Morrison Tenenbaum as Attorneys,” which amount shall be credited against the Purchase Price as described in Section 2.1 hereof. Upon the Purchaser’s material breach of this Agreement, and upon five (5) business days’ notice to the Purchaser, the Deposit shall be forfeited to the Seller’s bankruptcy estate. In the event that the Seller enters into a Competing Transaction (defined herein), the Deposit shall be returned to the Purchaser within two (2) business days following the Seller’s execution of the agreement to enter into such Competing Transaction unless Purchaser is the second highest bidder at the auction in which Court-approved bid procedures shall apply. The Deposit shall be held in an attorney escrow account of the Seller’s attorney until its application pursuant to this Section 2.2.

## **SECTION 3 CLOSING**

**3.1 Closing.** The closing (the “**Closing**”) shall take place no later than 14 days after entry of an order by the Bankruptcy Court approving the sale, provided that consummation of the sale has not been stayed by operation of law, including pursuant to Rules 6004(h) and 6006(d) of the Federal Rules of Bankruptcy Procedure, or a court of competent jurisdiction, or at such other date and place as shall be agreed among the parties hereto (the “**Closing Date**”) and shall be effective at 11:59 PM on the Closing Date.

**3.2 Seller Closing Deliveries.** The Seller shall deliver to the Purchaser the following documents on the Closing Date:

(a) a bill of sale, assignment and general conveyance, in form and substance reasonably satisfactory to the Purchaser and Seller, dated as of the Closing Date, with respect to the Acquired Assets sufficient to vest title in the Acquired Assets in the Purchaser pursuant to the provisions of the Sale Order; and

(b) all other documents reasonably requested by the Purchaser to be delivered by the Seller in connection with the consummation of the transactions contemplated by this Agreement.

**3.3 Purchaser Closing Deliveries.** The Purchaser shall deliver the following to the Seller on the Closing Date:

(a) the Purchase Price by wire transfer or certified or bank check of immediately available funds to an account or accounts designated by the Seller; and

(b) all other documents reasonably requested by the Seller to be delivered by the Purchaser in connection with the consummation of the transactions contemplated by this Agreement.

## **SECTION 4 REPRESENTATIONS AND WARRANTIES OF THE SELLER**

The Seller hereby represents and warrants to the Purchaser as of the date hereof and as of the Closing Date as follows. The Seller acknowledges that the Purchaser is relying on the following representations and warranties in entering into this Agreement.

**4.1 Authorization for Agreement and Consents.** The Seller has all requisite corporate or limited liability company power and authority, as applicable, to enter into this Agreement and to sell, assign, transfer and convey the Acquired Assets to the Purchaser under this Agreement. The execution, delivery and performance of this Agreement by the Seller is subject to Bankruptcy Court approval. Subject to approval of the Bankruptcy Court, this Agreement and any documents or instruments to be executed and delivered by Seller pursuant hereto constitute and will constitute legal, valid and binding obligations of the Seller, as applicable, enforceable in accordance with their terms.

## **SECTION 5 REPRESENTATIONS AND WARRANTIES OF THE PURCHASER**

The Purchaser hereby represents and warrants to the Seller as of the date hereof and as of the Closing Date as follows. The Purchaser hereby acknowledges that the Seller is relying on the following representations and warranties in entering into this Agreement.

**5.1 Authorization for Agreement and Consents.** The Purchaser has all requisite limited liability company power and authority to enter into this Agreement and to perform its obligations hereunder. The execution, delivery and performance of this Agreement by the Purchaser and the consummation of the transactions contemplated hereby have been duly authorized by all necessary actions of the Purchaser under applicable law. This Agreement and any documents or instruments to be executed and delivered by the Purchaser pursuant hereto constitute and will constitute legal, valid and binding obligations of the Purchaser enforceable in accordance with their terms.

## **SECTION 6 SELLER'S REQUIREMENTS PENDING CLOSING**

**6.1 Conduct of the Business Pending Closing.** From the date of the Agreement until the Closing, the Seller shall operate the Business in a manner consistent with the Seller's operations during the chapter 11 proceeding, provided that Purchaser acknowledges and agrees that the Seller is in severe financial distress, that such operations are not consistent with the Seller's ordinary course historical operations. The Seller shall provide reports, as reasonably requested, to the Purchaser of all of the Business's financial and sales data in a form mutually agreed by Purchaser and Seller. From the date of the Agreement until the Closing, the Purchaser shall have the right to enter and inspect any premises from which the Business operates during normal business hours and upon at least two days prior notice. Except as otherwise contemplated under this Agreement or as required by applicable law, from the date hereof until the Closing, without the prior consent of the Purchaser, which shall not be unreasonably, withheld, conditioned or delayed the Seller shall:

(a) not enter into any contract or agreement to assign, modify, terminate or amend any of the Seller's contracts and leases included in the Acquired Assets except those that expire per terms;

(b) not sell, lease, license, or otherwise surrender, relinquish, encumber, or dispose of any of the Acquired Assets (other than sales of inventory in the ordinary course);

(c) not take any action or omit to take any action that would cause any of the representations and warranties of the Seller to become inaccurate; and

(d) recognizing that the Seller is in severe financial distress, use its commercially reasonable efforts to preserve its relationships with third parties and keep available the services currently provided to the Seller.

provided, however, that (i) nothing in this Section 6 shall restrict the Seller from taking actions otherwise specifically permitted or contemplated by this Agreement or otherwise required by the Bankruptcy Court or the pendency of the Bankruptcy Filing; and provided, further, that nothing in this Section 6 shall restrict the Seller from entering into or consummating the sale or

assignment of any of the Excluded Assets on terms consistent with documentation filed with the Bankruptcy Court.

## **SECTION 7 EMPLOYEES**

**7.1 EMPLOYEES; BENEFITS. EXCEPT AS SET FORTH ON SCHEDULE C ANNEXED HERETO, THE PURCHASER SHALL OFFER EMPLOYMENT TO COMMENCE AS OF THE CLOSING DATE TO SUBSTANTIALLY ALL PERSONS CURRENTLY EMPLOYED BY SELLER (THE “EMPLOYEES”), ON TERMS SIMILAR TO THOSE CURRENTLY OFFERED BY THE SELLER TO SUCH EMPLOYEES. THE EMPLOYEES WHO ACCEPT AND COMMENCE EMPLOYMENT WITH THE PURCHASER ARE HEREINAFTER COLLECTIVELY REFERRED TO AS THE “NEWCO EMPLOYEES”. THE PROVISIONS OF THIS SECTION 7.1 ARE FOR THE SOLE BENEFIT OF THE PARTIES TO THIS AGREEMENT AND NOTHING HEREIN, EXPRESSED OR IMPLIED, IS INTENDED OR SHALL BE CONSTRUED TO CONFER UPON OR GIVE TO ANY PERSON (INCLUDING FOR THE AVOIDANCE OF DOUBT ANY NEWCO EMPLOYEES), OTHER THAN THE PARTIES HERETO AND THEIR RESPECTIVE PERMITTED SUCCESSOR AND ASSIGNS, ANY LEGAL OR EQUITABLE OR OTHER RIGHTS OR REMEDIES UNDER ANY PROVISION OF THIS AGREEMENT.**

## **SECTION 8 APPROVAL OF BANKRUPTCY COURT AND COMPETING TRANSACTIONS**

**8.1 Submission for Bankruptcy Court Approval.** On or before November \_\_, 2018 at \_\_: \_\_ a.m., the Bankruptcy Court will conduct the hearing on the Seller’s motion (the “**Sale Motion**”) seeking (i) approval of this Agreement, the Seller’s performance hereunder and the sale of the Acquired Assets free and clear of all liens, claims, interests, and encumbrances (the “**Sale Order**”). The Sale Order shall be deemed to be reasonably satisfactory to Purchaser if it contains findings and conclusions by the Bankruptcy Court that, among other things, decree, find and conclude that: (i) this Agreement is approved pursuant to section 363 of the Bankruptcy Code; (ii) the Acquired Assets are being sold to Purchaser free and clear of all liens, claims, interests, and encumbrances of any type whatsoever, including claims otherwise arising under doctrines of successor liability pursuant to section 363(f) of the Bankruptcy Code, (iii) the actions taken by the Purchaser in connection with the sale were undertaken in good faith, as such term is defined in section 363(m) of the Bankruptcy Code, and the Purchaser is a good faith purchaser and is entitled to the full protection of section 363(m) of the Bankruptcy Code; (iv) the Purchaser is not liable for any claims held by any Person against the Seller or for any obligations of the Seller arising under or related to the Acquired Assets except as expressly set forth in this Agreement; and (v) the Seller has complied with the notice requirements of Rules 2002, 6004, 6006 and 9014 of the Federal Rules of Bankruptcy Procedure

and any applicable rules of the Bankruptcy Court with respect to the transactions contemplated hereby.

**82     Competing Transaction.** The Purchaser acknowledges that, from the date hereof until the entry of the Sale Order, the Seller has a fiduciary duty to, and to cause its representatives and affiliates to consider submission of any inquiries, proposals or offers by, any Person (in addition to the Purchaser and its affiliates, agents, and representatives) in connection with any sale or other disposition, directly or indirectly, in one or more transactions, of the Acquired Assets or any portion thereof, whether such transaction is structured as an asset sale, stock sale, merger, recapitalization or otherwise (each, a “**Competing Transaction**”). In addition, Purchaser acknowledges that from the date hereof until the issuance of the Sale Order by the Bankruptcy Court, the Seller shall have the responsibility and obligation to respond to any inquires or offers to purchase all or any part of the Acquired Assets and perform any and all other acts related thereto which are required under the Bankruptcy Code or other applicable legal requirements, including, without limitation, supplying information relating to the Business and the Acquired Assets to prospective purchasers.

## SECTION 9 CONDITIONS PRECEDENT

**9.1     Conditions Precedent to the Obligations of the Purchaser.** The obligations of the Purchaser hereunder are subject to the satisfaction on or prior to the Closing of the conditions set forth below (compliance with which or the occurrence of which may be waived in whole or in part in a writing executed by the Purchaser, unless such a waiver is prohibited by law).

(a)     Compliance with Agreement. The Seller shall have performed and complied in all material respects with all of its obligations under this Agreement which are to be performed or complied with by Seller prior to or on the date of the Closing.

(b)     No Order. No statute, rule, regulation, executive order, decree, ruling, or preliminary or permanent injunction shall have been enacted, entered, promulgated, or enforced by any governmental authority or arbitrator, including without limitation the Bankruptcy Court, that prohibits, restrains, enjoins, or materially restricts the consummation of the transactions contemplated by this Agreement that has not been withdrawn or terminated; and no claim, action, suit, arbitration, inquiry, adverse proceeding or investigation (each, an “**Action**”) shall be pending (other than an Action that has been or would be vitiated by the Sale Order) by or before any governmental authority or arbitrator against the Purchaser or the Seller, seeking to restrain, enjoin or materially restrict the transactions contemplated by this Agreement; provided, however, that the provisions of this Section shall not apply if the Purchaser has directly solicited or encouraged any such Action.

(c)     Release. The Sale Order shall provide that the Purchaser is released from any and all claims of any kind or nature whatsoever, through and including the Closing Date, which could be asserted by the Seller, the Seller's bankruptcy estate or any party having



standing to take action on behalf of the Seller's bankruptcy estate.

(d) Bankruptcy Court Approval. The Bankruptcy Court shall have entered the Sale Order as described herein.

**9.2 Conditions Precedent to the Obligations of the Seller**. The obligations of the Seller hereunder are subject to the satisfaction on or prior to the Closing of the conditions set forth below (compliance with which or the occurrence of which may be waived in whole or in part in a writing executed by the Seller, unless such a waiver is prohibited by law).

(a) Representations and Warranties True. The representations and warranties made by the Purchaser in this Agreement shall be true and correct, in each case as of the Closing Date (other than those representations and warranties that address matters as of a particular date), with the same effect as though such representations and warranties had been made or given on and as of such date.

(b) Compliance with Agreement. The Purchaser shall have performed and complied in all material respects with all of their obligations under this Agreement which are to be performed or complied with by Purchaser prior to or on the date of the Closing Date.

(c) No Order. No statute, rule, regulation, executive order, decree, ruling, or preliminary or permanent injunction shall have been enacted, entered, promulgated, or enforced by any governmental authority or arbitrator, including without limitation the Bankruptcy Court, that prohibits, restrains, enjoins, or materially restricts the consummation of the transactions contemplated by this Agreement that has not been withdrawn or terminated; and no Action shall be pending (other than an Action that has been or would be vitiated by the Sale Order) by or before any governmental authority or arbitrator against the Purchaser or the Seller, seeking to restrain, enjoin or materially restrict the transactions contemplated by this Agreement.

(d) Bankruptcy Court Approval. The Bankruptcy Court shall have entered the Sale Order as described herein, and such Sale Order shall not be subject to any stay.

## **SECTION 10 MISCELLANEO US**

**10.1 Expenses**. Except as provided in 8.4 above, each party will be responsible for the payment of its own costs and expenses (including, without limitation, professional fees of its attorneys, accountants and other advisors) in connection with the transactions contemplated herein.

**10.2 Notice of Litigation**. During the period from the date of this Agreement to the Closing Date, each party will promptly inform the other party in writing of any litigation commenced or, to the knowledge of such party, threatened against such party in respect of the transactions contemplated by this Agreement or the Business.

**103 Assignment.** Purchaser may, without the prior written consent of the Seller, transfer or assign by operation of law or otherwise this Agreement to one or more parents, subsidiaries, or affiliates of the Purchaser.

**104 Good Faith.** The Seller and the Purchaser shall cooperate in all reasonable respects and in good faith in seeking (i) entry by the Bankruptcy Court of the Sale Order and (ii) the consummation of the transactions contemplated hereby.

**105 Governing Law.** This Agreement shall in all respects be governed by, and construed and enforced in accordance with, the laws of the State of New York, without giving effect to any choice of law or conflict of law rules or provisions (whether of the State of New York or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of New York.

**106 Jurisdiction and Jury Waiver.** The Parties agree that the Bankruptcy Court shall have exclusive jurisdiction to resolve any controversy or claim arising out of or relating to this Agreement or any other agreement entered into by the Parties in connection herewith, or the breach hereof or thereof, and each of the Parties hereby consents to the personal jurisdiction of such court (and of the appropriate appellate courts) in any such action or proceeding and waives any right to trial by jury and any objection, including, but not limited to, any objection to the laying of venue or on the grounds of *forum non conveniens*, which any of them may now or hereafter have to the bringing of such action or proceeding in such jurisdiction. Each Party hereby irrevocably consents to the service of process of any of the aforesaid courts in any such action or proceeding by the mailing of copies thereof by registered or certified mail, postage prepaid, to the other parties to such action or proceeding.

**107 Amendment and Modification.** No amendment, modification, waiver, replacement, termination, or cancellation of any provision of this Agreement will be valid, unless the same will be in writing and signed by the Purchaser and the Seller party hereto.

**108 Notices.** All notices, requests, demands and other communications hereunder shall be made in writing. Notices, requests, demands and other communications shall be deemed to be duly given upon the date of delivery, if delivered by hand; upon the date of sending, if

delivered by email; upon the second business day after mailing, if mailed by certified or registered mail with postage prepaid; or upon the first day after dispatch, if sent by nationally-recognized overnight courier as follows:

If to the Seller:

Benjys Kosher Pizza & Dairy  
Restaurant Inc. d/b/a Benjys  
c/o Brian J. Hufnagel, Esq.  
Morrison Tenenbaum PLLC  
87 Walker Street, Floor 2  
New York, NY 10013  
bjhufnagel@m-t-law.com

If to the Purchaser:

With a copy to:

or to such other addresses as any party may provide to the other parties in writing.

**10.9 Entire Agreement.** This Agreement, together with its schedules and the certificates, agreements, documents, instruments and writings that are delivered pursuant hereto, constitutes the entire agreement and understanding of the Purchaser and the Seller with respect to the subject matter hereof and supersedes all prior understandings, agreements, or representations by or among the Purchaser and the Seller, written or oral, to the extent they relate in any way to the subject matter hereof or the transactions contemplated hereby.

**10.10 Successors.** This Agreement shall be binding upon and shall inure to the benefit of each of the parties hereto and to their respective successors and permitted assigns.

**10.11 Counterparts and Electronic Signatures.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute but one and the same instrument. Signatures in Portable Document Format or other similar electronic format shall constitute original signatures for the purposes of this Agreement.

**10.12 Severability.** The provisions of this Agreement will be deemed severable and the invalidity or unenforceability of any provision of this Agreement will not affect the validity or enforceability of the other provisions hereof.

**10.13 Drafting Presumption.** The parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or a question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties, and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provisions of this Agreement.

**10.14 Headings.** The headings used in this Agreement are for convenience only and shall not constitute a part of this Agreement.

**10.15 Schedules.** All of the Schedules attached hereto are incorporated herein and made a part of this Agreement by reference.

**10.16 Third Party Beneficiaries.** This Agreement is solely for the benefit of the parties hereto and their respective successors and permitted assigns, and this Agreement shall not be deemed to confer upon or give to any other third party any remedy, claim of liability or reimbursement, cause of action, or other right.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

**PURCHASER:**

By: /s/ Diana Nisanova  
Name: Diana Nisanova  
Title:

**SELLER:**

**Benjys Kosher Pizza & Dairy Restaurant Inc.  
d/b/a Benjys**

By: /s/ Eved Nisanov  
Name: Eved Nisanov  
Title: President

**SCHEDULE A**  
**EXCLUDED ASSETS**

Excluded Assets shall include:

**SCHEDULE B**  
**ASSUMED LIABILITIES AND CONTRACTS**

Purchaser shall assume the following contracts liabilities of Seller subject to the terms hereof:

- Seller's ordinary course payables incurred since the petition date.
- Seller's obligations to JPMorgan Chase Bank, N.A. on a certain business loan referenced proof of claim no. 5 filed in the bankruptcy case to the extent not paid from proceeds of sale.

**SCHEDULE C**  
**EXCLUDED EMPLOYEES**

The Purchaser shall not offer employment to the following employees of the Seller:

**EXHIBIT C**

**NOTICE OF BID DEADLINE, AUCTION, AND SALE HEARING**



MORRISON TENENBAUM PLLC  
*Counsel to the Debtor*  
87 Walker Street, Floor 2  
New York, New York 10013  
Phone: 212-620-0938  
Lawrence F. Morrison, Esq.  
Brian J. Hufnagel, Esq.

**Auction: November 30, 2018 at  
10:00 a.m. at Morrison  
Tenenbaum**

**Sale Hearing: TBD**

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

-----X

In re:

Chapter 11

BENJYS KOSHER PIZZA & DAIRY  
RESTAURANT INC. d/b/a BENJYS,

Case No. 18-41353 (ESS)

Debtor.

-----X

**NOTICE OF BID DEADLINE, AUCTION AND SALE HEARING FOR THE  
APPROVAL OF THE SALE OF SUBSTANTIALLY ALL OF THE ASSETS OF THE  
DEBTOR FREE AND CLEAR OF LIENS, CLAIMS AND INTERESTS**

**PLEASE TAKE NOTICE**, that on \_\_\_\_\_, 2018 the United States Bankruptcy Court for the Eastern District of New York (the “Bankruptcy Court”) entered an order (the “Bidding Procedures Order”) approving certain bidding and auction procedures (the “Bidding Procedures”) and related schedules and deadlines for the sale by Benjys Kosher Pizza & Dairy Restaurant Inc. d/b/a Benjys (the “Debtor”), the debtor and debtor-in-possession in the above captioned case (the “Case”), of substantially all of the assets and personal property (the “Purchased Assets”) of the Debtor to Diana Nisanova for the sum of \$40,000.00 subject to higher and better offers.

**PLEASE TAKE FURTHER NOTICE** that all interested parties are invited to seek to become a Qualified Bidder and submit a Qualified Bid to purchase the Purchased Assets in accordance with the terms of the Bidding Procedures Order and the Bidding Procedures. Only Qualified Bidders who have submitted Qualified Bids shall be eligible to participate in the

Auction. *All interested potential bidders should carefully read the Bidding Procedures, a copy of which is attached hereto as Exhibit A. All interested potential bidders should contact counsel for the Debtor for a copy of the proposed Purchase Agreement referenced in the Bidding Procedures.*

**PLEASE TAKE FURTHER NOTICE** that the following dates and times shall apply with respect to the Bidding Procedures:

**Bid Qualification Deadline:** November 27, 2018 at 12:00 p.m. (ET)

**Auction:** June 26, 2018 at 10:00 a.m. (ET)

**Sale Hearing:** TBD (ET)

**Sale Closing:** on or before 14 days after entry of sale order

**PLEASE TAKE FURTHER NOTICE** THAT PURSUANT TO 11 U.S.C. §§ 363(b) AND (f), THE PROPOSED SALE IS FREE AND CLEAR OF LIABILITIES (OTHER THAN ASSUMED LIABILITIES AND PERMITTED ENCUMBRANCES) OF OTHERS, AND ALL SUCH LIABILITIES SHALL ATTACH TO THE PROCEEDS OF THE SALE WITH THE SAME VALIDITY AND PRIORITY THAT EXISTED IMMEDIATELY PRIOR TO THE SALE.

**PLEASE TAKE FURTHER NOTICE** that the Bankruptcy Court shall hold a sale hearing (the “Sale Hearing”) on \_\_\_\_\_, 2018 at \_\_\_\_\_ a.m. (Eastern Time), or such other date and time as may be convenient to the Bankruptcy Court, or as may be announced at the Sale Hearing without further notice. At the Sale Hearing, the Debtor intends to request that the Bankruptcy Court enter an order approving, among other things, the Prevailing Bid for the Purchased Assets, and under that order the Debtor will transfer the Purchased Assets to the Prevailing Bidder free and clear of Liabilities (other than Liabilities assumed by the Prevailing

Bidder), including Assigned Contracts. At the Sale Hearing, the Bankruptcy Court may enter such orders as it deems appropriate under applicable law and as required by the circumstances and equities of the Case.

**PLEASE TAKE FURTHER NOTICE** that objections to the sale of the Purchased Assets to the Prevailing Bidder or to the Purchase Agreement submitted by the Prevailing Bidder shall (a) be in writing, (b) conform to the Bankruptcy Rules and the Local Rules, (c) set forth the name of the objecting party, the nature and amount of any claims or interest held or asserted against the Debtor's estate or its properties, the basis for the objection and the specific grounds therefor and (d) be filed with the with the Clerk of the Bankruptcy Court with a courtesy copy delivered to the chambers of the Honorable Elizabeth S. Stong, United States Bankruptcy Judge of the United States Bankruptcy Court for the Eastern District of New York at 271-C Cadman Plaza East, Suite 1595, Brooklyn, New York 11201 and served on the following (collectively, the "Objection Notice Parties"): (i) the Office of the United States Trustee, 201 Varick Street, Suite 1006, New York, New York 10014, attn: William E. Curtin, Esq., (ii) Debtor's counsel, Morrison Tenenbaum PLLC, 87 Walker Street, Floor 2, New York, New York 10013, attn: Brian J. Hufnagel, Esq., and (iii) counsel for the Prevailing Bidder, so as to be received no later than \_ .M. (Eastern time) on \_ 2017 (the "Sale Objection Deadline").

**PLEASE TAKE FURTHER NOTICE THAT** any entity that fails to file and serve an objection before the Sale Objection Deadline shall be prohibited from asserting at the Sale Hearing or at any time thereafter any objection to the Motion for approval of the Sale of the Purchased Assets or the consummation and performance of the Sale as contemplated by the terms of the Purchase Agreement submitted by a Prevailing Bidder, including the

**transfer of the Purchased Assets free and clear of all Liabilities (other than Liabilities assumed by the Prevailing Bidder).**

**PLEASE TAKE FURTHER NOTICE THAT** if a copy of the Motion to approve the Sale of the Purchased Assets is not enclosed, you may obtain a copy by contacting counsel for the Debtor at the address set forth herein.

**PLEASE TAKE FURTHER NOTICE THAT** this Notice is subject to the full terms and conditions of the Bidding Procedures and the Bidding Procedures Order, which shall control in the event of any conflict, and the Debtor encourages parties in interest to review such documents in their entirety.

**IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE BANKRUPTCY COURT MAY GRANT THE RELIEF REQUESTED WITHOUT FURTHER NOTICE OR HEARING.**

Dated: New York, New York  
October 9, 2018

Respectfully Submitted,

MORRISON TENENBAUM PLLC

/s/ Lawrence F. Morrison

By: Lawrence F. Morrison

Brian J. Hufnagel

*Counsel for the Debtor and*

*Debtor in Possession*

87 Walker Street, Floor 2

New York, New York 10013

[lmorrison@m-t-law.com](mailto:lmorrison@m-t-law.com)

[bjhufnagel@m-t-law.com](mailto:bjhufnagel@m-t-law.com)

**EXHIBIT 2**

**SALE ORDER**

(to be filed in advance of Sale Hearing)