

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:

DELIVERY AGENT, INC., et al.,<sup>1</sup>

Debtors.

Chapter 11

Case No. 16-12051 ( )

Joint Administration Requested

**DEBTORS' MOTION FOR ORDERS (I)(A) AUTHORIZING  
DEBTORS' ENTRY INTO THE ASSET SALE AGREEMENT,  
(B) AUTHORIZING AND APPROVING THE BIDDING PROCEDURES,  
(C) APPROVING PROCEDURES RELATED TO THE ASSUMPTION OF  
CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (D)  
AUTHORIZING AND APPROVING A BREAK-UP FEE AND EXPENSE  
REIMBURSEMENT, (E) APPROVING THE NOTICE PROCEDURES, AND  
(F) SETTING A DATE FOR THE SALE HEARING, AND (II) AUTHORIZING  
AND APPROVING (A) THE SALE OF CERTAIN ASSETS FREE AND  
CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS  
AND (B) THE ASSUMPTION AND ASSIGNMENT OF CERTAIN CONTRACTS**

The above-captioned affiliated debtors and debtors in possession (collectively, "Delivery Agent" or the "Debtors"), by their undersigned counsel, hereby submit this motion (the "Motion"), pursuant to sections 105, 107(b)(1), 363 and 365 of title 11 of the United States Code (the "Bankruptcy Code"), Rules 2002, 6004, 6006, 9014 and 9018 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules 6004-1 and 9018-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), for entry of orders (i)(a) approving the Debtors' entry into that certain Asset Purchase Agreement dated as of September [ ], 2016, among Delivery

<sup>1</sup> The Debtors in these chapter 11 cases and the last four digits of each Debtor's U.S. tax identification number are as follows: Delivery Agent, Inc. (8744), Musictoday, LLC (7995), Clean Fun Promotional Marketing, Inc. (6635), and Shop the Shows, LLC (n/a). The notice address for all of the Debtors is: 300 California Street, 3rd Floor, San Francisco, California 94104.

Agent, Inc., Music Today, LLC (“Music Today”), Shop The Shows, LLC (the “Shop the Shows”), and Clean Fun Promotional Marketing, Inc. (“Clean Fun”) as sellers (collectively, “Sellers”), and Hillair Capital Management LLC, as DIP Agent (as defined below) on behalf of the DIP Lender (as defined below) under the DIP Credit Agreement (as defined below) and not in its individual capacity, as purchaser (together with its assignees or designee(s), “Buyer”) (substantially in the form attached as Exhibit B hereto, the “Agreement”), (b) authorizing and approving the bidding procedures (as appended to the Bidding Procedures Order (as defined herein) as Exhibit 1, the “Bidding Procedures”), (c) approving procedures related to the assumption of certain executory contracts and unexpired leases, (d) authorizing and approving the terms and conditions of the Break-Up Fee and Expense Reimbursement (as defined below), including granting administrative expense status to the Break-Up Fee and Expense Reimbursement (together, the “Bid Protections”) to be paid by the Sellers to Buyer, (e) approving the form and manner of sale notices (the “Notice Procedures”), and (f) setting the time, date and place of a hearing to consider the sale and the assumption and assignment of the Assumed Agreements (the “Sale Hearing”) and (ii) authorizing and approving (a) the sale of the Debtors’ right, title and interest in the assets (the “Assets” or the “Purchased Assets”), free and clear of all Liens, claims, encumbrances, and interests (each as described below), pursuant to section 363 of the Bankruptcy Code, except as set forth in the Agreement and (b) the assumption and assignment of certain executory contracts and real property leases pursuant to section 365 of the Bankruptcy Code; and (iii) granting them such other and further relief as the Court deems just and proper. In support of this Motion, the Debtors incorporate the statements set forth in the *Declaration of James Jeffrey Hagan in Support of Chapter 11 Petitions and First Day Motions* filed contemporaneously herewith and further respectfully state as follows:

### **JURISDICTION AND VENUE**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. The statutory predicates for the relief requested herein are (i) sections 105, 107(b)(1), 363 and 365 of the Bankruptcy Code; (ii) Bankruptcy Rules 2002, 6004, 6006, 9014 and 9018; and (iii) Local Rule 6004-1 and 9018-1.

3. Further, pursuant to Local Rule 9013-1(f), the Debtors hereby consent to the entry of a final judgment or order in connection with this Motion if it is determined that this Court cannot—absent the consent of the parties—enter such final judgment or order consistent with Article III of the United States Constitution.

### **I.** **BACKGROUND**

### **INTRODUCTION**

4. On the date hereof (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

5. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or official committee of unsecured creditors has been appointed in the Debtors’ cases.

6. Simultaneously with the filing of this Motion, the Debtors have sought an order of joint administration pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) that would provide for the joint administration of these cases and for consolidation for procedural purposes only.

### **COMPANY OVERVIEW**

7. Delivery Agent (the “Company”) has developed one of the leading and most advanced platforms to monetize entertainment content (TV, movies, music, and sports) through an integrated suite of solutions built to help increase fan engagement and drive direct revenue generation. In business for over a decade, the Company’s solutions serve some of the world’s largest media companies and consumer brands. The Company is headquartered in San Francisco, CA, with offices in Denver, CO; Costa Mesa, CA; Crozet, VA; and New York, NY.

8. The Company engages in three related businesses: (1) e-commerce, (2) promotional marketing (Clean Fun), and (3) television commerce or “t-commerce” (ShopTV).

### **EVENTS LEADING UP TO CHAPTER 11**

9. In late 2015 through the first quarter of 2016, a number of events occurred that impacted Delivery Agent’s liquidity:

#### **General Market and Business Conditions**

##### **A. Volatility in Capital Markets**

10. Based upon extensive discussions with leading investment banks, analysts, and the public market buy-side investors, the company was on a path to file an initial public offering in late 2015 or early 2016. In line with this strategy, the Company mandate was to focus on growth in its core markets. As such, the company invested in and successfully grew top-line revenue over 30%. By the third quarter of 2015, however, the capital markets began to show signs of weakness, and by the first quarter of 2016, the Company’s investment banks advised that an IPO in the near-term would be unlikely.

B. Discontinuation of the Company's Linear Advertising Business (The Band)

11. In May 2010, the Company acquired The Band, Inc. ("The Band"),<sup>2</sup> a media agency based in Denver. The Band acted as a sales representative for cable operators and satellite providers re-selling linear TV advertising inventory. The Band also operated long-form shopping channels on behalf of its partners. In the first quarter of 2016, as a result of a number of factors, including declining performance of existing deals and continued cash flow challenges due to the operating cycle of the business, the Company made the decision to discontinue the operations of the linear advertising business. The shut-down of The Band reduced the Company's operating revenue by 38% and resulted in an unpaid accounts payable liability of approximately \$20 million. This unpaid accounts payable liability triggered several collection lawsuits from former clients of The Band, which are currently pending.

C. Ongoing Challenges with E-commerce Business Economics

12. The Company's e-commerce business, which currently generates the largest portion of the Company's revenues, has not achieved profitability for a number of reasons. These reasons include long-term contracts with some of the Company's partners that include minimum guaranteed revenue-sharing terms that are not sustainable in the current market, as well as the challenges of integrating the operations of the Musictoday business post-acquisition.

D. Slower than Expected Maturity of the T-commerce Business

13. Success of the Company's propriety t-commerce business segment depends upon significant scale and consumer adoption. The time to deploy the technology across enough devices, thereby driving mass consumer adoption, took longer than anticipated, and thus the subsequent high margin revenue from this channel has not materialized as quickly as the

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<sup>2</sup> After its acquisition by Delivery Agent, The Band was merged into a newly-formed wholly-owned subsidiary of Delivery Agent, Inc., Debtor Shop the Shows, LLC.

Company had hoped.

### **Entry Into Secured Debt Facilities**

14. In late 2015, Delivery Agent sought new or replacement financing and received such financing from Western Alliance Bank (the “Pre-Petition Accounts Receivable Lender” or “Western Alliance”) and Hillair Capital Investments L.P. (“Hillair”) in December 2015. Some of the proceeds were used to repay notes issued to Pinnacle Ventures LLC.

15. On December 9, 2015, the Pre-Petition Accounts Receivable Lender entered into a Business Financing Agreement (the “Senior Loan Agreement”) with Delivery Agent, Musictoday, and Clean Fun, pursuant to which the Pre-Petition Accounts Receivable Lender lent the Debtors amounts against a borrowing base fixed against the Debtors’ accounts receivable, which obligations are secured by a first lien on substantially all of the Debtors’ assets.

16. Delivery Agent concurrently issued to Hillair an 8% Original Issue Discount Secured Convertible Debenture due November 1, 2017 (the “Hillair Debenture”), in the principal amount of \$9,280,000, which obligation is secured by a lien on substantially all of the Debtors’ assets and subject to a Subordination Agreement between Western Alliance and Hillair, whereby Hillair agreed to become the junior lender for purposes of the loan relationship between Hillair and Western Alliance.

### **Attempts to Finance and Market the Business**

17. Notwithstanding the issuance of the Senior Loan Agreement and the Hillair Debenture, Delivery Agent anticipated the need to raise additional capital in 2016. During the end of 2015 and early 2016, realizing the previously very active IPO market appeared to be slowing, the Company worked with its selected IPO underwriters to test the waters on a sales process. Barclays and BMO worked together to contact strategic buyers to purchase the Company as an alternative to the IPO, but the process was ultimately not successful in

identifying a buyer for the business.

18. Concurrently, the Company approached potential debt and equity investors for additional funding. However, capital markets cooled substantially in the winter of 2015, and the Company was unable to find additional investors willing to inject more capital into the Company on terms that were acceptable to the Debtors. In July 2015, the Debtors entered into a Convertible Bridge Note Purchase Agreement with certain of its existing investors, pursuant to which it issued promissory notes in the approximate principal amount of \$11 million. In March 2016, the Debtors entered into a further agreement to purchase such notes from such investors, pursuant to which the Company issued additional promissory notes in the approximate principal amount of \$9 million. The proceeds of that issuance were used to finance operations while the Company explored further financing opportunities, including sale of equity. These efforts continued through the spring of 2016 without yielding a long-term liquidity solution.

19. Upon concluding both the Barclays process and the additional internal fundraising efforts described above, the Company determined that it needed to increase the scope of its efforts to approach additional strategic buyers, as well as investors who typically seek more distressed situations. To that end, on May 18, 2016, Delivery Agent retained Houlihan Lokey (“Houlihan”) to evaluate strategic alternatives and to engage in a marketing process of all of the Company’s business segments. Houlihan began discussions with strategic and financial buyers in early June 2016 and continues to lead a robust marketing process that has been underway for more than three months. Houlihan has contacted over 150 potential interested parties, entered into confidentiality agreements and engaged in deeper discussions with a number of parties that expressed interest in all or parts of the business. Although Houlihan was able to identify a number of interested parties, who provided both formal and informal indications of that interest,

no purchaser has yet emerged with a commitment to acquire some or all of the Company's business units.

### **Decision to File Chapter 11**

20. By August 2016, with liquidity pressure increasing, it was projected that obtaining a firm purchase or financing commitment prior to exhausting the Company's remaining liquidity was unlikely. The Debtors explored their options with Houlihan and concluded that a sale of the Debtors' assets pursuant to section 363 of the Bankruptcy Code would most likely maximize the value of the Debtors' assets. As no buyer or lender emerged from the process run by Houlihan and the Debtors, the Debtors requested that Hillair agree to become a stalking horse bidder and proposed DIP lender for the purposes of continuing the sale process in the context of a chapter 11 filing.

21. The Company's cash concerns were compounded by the fact that in early September, the Pre-Petition Accounts Receivable Lender declared a default under the Senior Loan Agreement. Pursuant to section 5.12 of the Senior Loan Agreement, Delivery Agent was required to raise additional equity capital on or before March 8, 2016. In August 2016, the Pre-Petition Accounts Receivable Lender asserted that Delivery Agent was in default under the Senior Loan Agreement for its failure to timely complete the equity raise, the notice of which was sent on September 5. Thereafter, the Pre-Petition Accounts Receivable Lender proceeded to sweep on a daily basis its cash accounts and apply cash proceeds of the Debtors' accounts receivable, as it asserted it was entitled to do under the Senior Loan Agreement.

22. As a result of Pre-Petition Accounts Receivable Lender's cash sweeps, Delivery Agent's liquidity needs became critical.

23. After extensive negotiations, and at the Debtors' request, on September 8, 2016, Hillair agreed to advance \$1,425,000 (the "Emergency Loan") to the Debtors pursuant to that



certain Secured Promissory Note executed by Delivery Agent, Inc. and guaranteed by each of the other Debtors, including Shop the Shows. The Emergency Loan allowed the Debtors to pay expenses, vendors and also fund payroll, which the Debtors were at considerable risk of not being able to pay absent the Emergency Loan.

24. In order to facilitate the Debtors' efforts to execute the foregoing sale, Hillair agreed to (a) provide the Emergency Loan, (b) provide post-petition debtor-in-possession financing, and (c) enter into an asset purchase agreement with the Debtors.

25. The Debtors approached other prospective financiers to determine if financing on the terms offered by Hillair, or better, are available to the Debtors in these Chapter 11 cases. They concluded that no such financing is available.

26. Due to the seasonal nature of Delivery Agent's business, it is of paramount importance that the Company has stability and funding to support its operations in the fourth quarter of 2016, when expected revenues and cash disbursements are the greatest. In light of Hillair's willingness to provide post-petition financing and support a Section 363 sale process that would result in a prompt sale transaction and minimal disruption to the holiday shopping season, the Company's board decided that it was in the best interests of the Company and its stakeholders to file this Chapter 11 pleading and pursue a Section 363 sale process.

27. Therefore, in light of the foregoing, on September 14, 2016, Delivery Agent, Inc., Musictoday, LLC, Clean Fun Promotional Marketing, Inc., and Shop the Shows, LLC filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code with this Court.

#### **THE AGREEMENT**

28. After extensive arm's length, good faith negotiations among Sellers and Buyer and their respective advisors as described above, the Debtors determined that the Agreement

represents the best opportunity for the Debtors to maximize the value of their assets and serve as a basis for conducting an auction to seek higher and/or better offers.

29. In order provide the Debtors with the liquidity needed to accomplish a sale of substantially all of their assets under Section 363 of the Bankruptcy Code, Buyer agreed to provide debtor-in-possession financing to the Debtors in an amount up to \$5,425,000 (the “DIP Financing”) pursuant to the terms and conditions in that certain *Senior Secured, Super-priority Debtor-In-Possession Loan and Security Agreement* (as it may be amended from time to time, the “DIP Agreement”), subject to approval of the Court. A motion to approve the DIP Financing and the DIP Agreement was filed with the Court on the Petition Date.

30. The Debtors have negotiated and entered into the Agreement with the DIP Lender (i.e., Buyer),<sup>3</sup> pursuant to which Buyer will acquire the Purchased Assets on the terms and conditions specified therein. A Word version of the stalking horse Agreement will be placed in the data room set up by the Debtors for prospective bidders no later than 2 days before the hearing to consider entry of the Bidding Procedures Order (the “Bid Procedures Hearing”).

31. The sale transaction pursuant to the Agreement is subject to competitive bidding as set forth herein, the Bidding Procedures, and the Bidding Procedures Order. Pursuant to the terms of the Agreement, Buyer has agreed to purchase the Purchased Assets for a purchase price of (i) \$18,914,000 (plus accrued interest thereon) (the “Credit Bid Amount”), to be satisfied in the form of a credit against the obligations arising under the DIP Agreement and the Hillair Debenture, pursuant to Section 363(k) of the Bankruptcy Code, plus (ii) a cash payment in an amount not to exceed \$250,000 to cover the Sellers’ post-Closing wind-down costs.

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<sup>3</sup> Capitalized terms used but not defined in this Motion have the definitions ascribed to them in the Agreement. To the extent that there are inconsistencies between the summary description of the Agreement contained herein and the terms and conditions of the Agreement, the terms and conditions of the Agreement control.

32. Buyer, in making this offer, has relied on promises by the Debtors to seek the Court's approval of (a) a fee of five hundred thousand dollars (\$500,000) (the "Break-Up Fee"), which is less than 3% of the aggregate Purchase Price, and (b) Buyer's reasonable fees, costs and expenses (including, without limitation, consultants' and attorneys' fees, costs and expenses) incurred in connection with the transactions contemplated by this Agreement through the date of termination, including any such Person employed by any of Buyer's Affiliates, not to exceed in the aggregate \$350,000 minus amounts paid by Sellers to the DIP Agent as adequate protection, prior to such termination, for such fees, costs and expenses as provided in any DIP Order (the "Expense Reimbursement," and, together with the Break-Up Fee, the "Bid Protections") to compensate Buyer for its time and effort in examining the Debtors' business, conducting due diligence, and the loss of opportunity that such time and effort has caused should another bidder be the Successful Bidder (as defined below). The Debtors, in the exercise of their business judgment, believe that the Bid Protections are a necessary inducement for Buyer, and thus, necessary to establish a "floor" for the sale of the Purchased Assets and ultimately encourage competitive bidding and promote the realization of the highest value for the Purchased Assets.

#### **RELIEF REQUESTED**<sup>4</sup>

33. First, by this Motion, the Debtors seek entry of the Bidding Procedures Order: (a) authorizing the Debtors' to enter into the Agreement and take other such steps as are necessary to consummate the transactions contemplated thereunder, (b) authorizing and approving the Bidding Procedures, (c) approving procedures related to the assumption of certain executory contracts and unexpired leases, (d) authorizing and approving the Bid Protections, (e) approving the Notice Procedures, and (f) setting the time, date, and place of the Sale Hearing

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<sup>4</sup> In compliance with Local Rule 6004-1 and for the convenience of the reader, the salient terms of the transaction as currently set forth in the Agreement have been summarized and are attached hereto as Exhibit A.

(such order, substantially in the form attached hereto as Exhibit C, the “Bidding Procedures Order”).

34. Second, the Debtors request entry of the Sale Order, pursuant to sections 105, 363, and 365: authorizing and approving (a) the sale of the Purchased Assets, free and clear of all Liens, claims, encumbrances, and interests, to the Successful Bidder (the “Sale”); and (b) the assumption and assignment of certain contracts and leases (such order, substantially in the form attached hereto as Exhibit D, the “Sale Order”); and (iii) granting them such other and further relief as the Court deems just and proper.

## **I. PROPOSED BID AND SALE PROCEDURES**

### **A. Assets to be Sold**

35. The Assets to be acquired by Buyer, subject to higher or better offers, include, among other things, (i) Accounts Receivable, (ii) cash and cash equivalents, other than the Cash Payment, (iii) inventory, (iv) deposits, (v) real property leases, (vi) furniture and equipment, (vii) intellectual property, (viii) contracts, (ix) documents, (x) permits, (xi) supplies, (xii) insurance policies, (xiii) rights under confidentiality agreements, (xiv) rights pursuant to warranties, representations, and guarantees, (xv) goodwill and other intangible assets associated with the Business and/or Purchased Assets, (xvi) certain claims, rights, and causes of action, (xvii) pre-paid Taxes, (xviii) all other property and assets pertaining to or used in the conduct of the Business or ownership of the Purchased Assets. “Business” in the Agreement means the business and operations of Sellers relating to e-commerce, television commerce (“t-commerce”) and interactive advertising.

### **B. The Bidding Procedures**

36. In order to ensure that the Debtors receive the maximum value for the Assets, the

Agreement will serve as the “stalking-horse” bid for the Assets.

37. The key provisions of the Bidding Procedures to be employed with respect to the proposed sale of the Assets and assumption of Assumed Liabilities as set forth in the Agreement are as follows:<sup>5</sup>

- a. Bid Deadline. A Qualified Bidder that desires to make a bid will deliver written copies of its bid to the following parties (collectively, the “Notice Parties”): (i) Delivery Agent, Inc. and the other Debtors, Attn: Jeff Hagan, CFO, 300 California Street, Suite 300, San Francisco, CA 94104, [jhagan@deliveryagent.com](mailto:jhagan@deliveryagent.com); (ii) Debtors’ counsel: Keller & Benvenuti LLP, Attn: Tobias S. Keller, Esq. and Jane Kim, Esq., 650 California Street, Suite 1900, San Francisco, CA 93108, [tkeller@kellerbenvenuti.com](mailto:tkeller@kellerbenvenuti.com), [jkim@kellerbenvenuti.com](mailto:jkim@kellerbenvenuti.com); (iii) Debtors’ counsel: Pachulski Stang Ziehl & Jones LLP, Attn: Laura Davis Jones, Esq., 919 North Market Street, 17th Floor, Wilmington, DE 19801, [ljones@pszjlaw.com](mailto:ljones@pszjlaw.com); (iv) Debtors’ financial advisors: Arch & Beam, LLC, 2500 Camino Diablo, Suite 110, Walnut Creek, CA 94597, [hbailey@arch-beam.com](mailto:hbailey@arch-beam.com); and (v) Debtor’s investment bankers: Houlihan Lokey, Attn: Ryan Sandahl, 111 South Wacker Drive, 37<sup>th</sup> Floor, Chicago, IL 60606, [rsandahl@hl.com](mailto:rsandahl@hl.com); so as to be received not later than October 31, 2016, at 12:00 p.m. (PT) by the Debtors by electronic mail or hard copy (as may be extended as set out below, the “Bid Deadline”). The Debtors may extend the Bid Deadline once or successively, but they are not obligated to do so; provided that for any such extension beyond five (5) Business Days, the Debtors have obtained the written consent of the Buyer, which consent will not be unreasonably withheld. If the Debtors extend the Bid Deadline, they will promptly notify all Qualified Bidders (including Buyer) and the parties listed above of such extension.
- b. Provisions Governing Qualifications of Bidders. Unless otherwise ordered by the Court, for cause shown, or as otherwise determined by the Debtors, in order to participate in the Bidding Process, prior to the Bid Deadline (as defined below), each person other than Buyer who wishes to participate in the Bidding Process (a “Potential Bidder”) must deliver to the Notice Parties at the addresses provided above:
  - (i) an executed confidentiality agreement (to be delivered prior to the distribution of any confidential information by the Debtors to a Potential Bidder) in form and substance satisfactory to the Debtors. In the event that the Potential Bidder has already entered into an acceptable confidentiality agreement with the Debtors, it must provide a statement waiving any of its rights under such confidentiality agreement that are in conflict with the Bidding Procedures or that would otherwise prohibit disclosures regarding the Potential Bidder, or any Transactions it may enter into, to the Notice Parties;

<sup>5</sup> Capitalized terms used but not defined in this section only have the meanings ascribed to them in the Bidding Procedures.

(ii) sufficient information, as determined by the Debtors, which may include current audited financial statements and latest unaudited financial statements of the Potential Bidder, or, if the Potential Bidder is an entity formed for the purpose of acquiring the Assets (or any portion thereof), current audited financial statements and latest unaudited financial statements of the equity holders of the Potential Bidder who will guarantee the obligations of the Potential Bidder, or such other form of financial disclosure and credit-quality support or enhancement that will allow the Debtors and their financial advisors to make a reasonable determination as to the Potential Bidder's financial and other capabilities to consummate the Transactions; and

(iii) a statement demonstrating to the Debtors' satisfaction, a bona fide interest in purchasing the Assets from the Debtors.

A Potential Bidder that has executed a confidentiality agreement and has otherwise complied with the requirements described above, and that the Debtors determine in their reasonable business judgment, after consultation with their counsel and financial advisors, is likely (based on availability of financing, experience and other considerations) to be able to consummate the Transactions, will be deemed a "Qualified Bidder."

- c. Provisions Governing Qualified Bids. A bid submitted will be considered a Qualified Bid only if the bid is submitted by a Qualified Bidder, pursuant to the previous paragraph and complies with all of the following (a "Qualified Bid"):

(i) it states that the applicable Qualified Bidder offers to purchase the Assets upon the terms and conditions substantially as set forth in the Asset Purchase Agreement, including without limitation, with respect to certainty and timing of closing, or pursuant to an alternative structure (including without limitation, an offer conditioned upon confirmation of a plan of reorganization proposed by the Debtors either individually or in collaboration with such Qualified Bidder), or upon alternative terms and conditions that the Debtors reasonably determine are no less favorable than the terms and conditions of the Asset Purchase Agreement.

(ii) it includes a letter stating that the bidder's offer is irrevocable until the selection of the Successful Bidder and, if applicable, the Back-Up Bidder (as defined below), provided that if such bidder is selected as the Successful Bidder or the Back-Up Bidder, its offer shall remain irrevocable until the earlier of (i) closing of the Sale to the Successful Bidder or the Back-Up Bidder, and (ii) (x) with respect to the Successful Bidder only, 25 days from the Sale Hearing, subject to further extensions as may be agreed to under the applicable purchase agreement and (y) with respect to the Back-Up Bidder only, the Back-Up Bid Expiration Date (as defined below);

(iii) it includes duly authorized and executed Asset Purchase Agreement, including the purchase price for the Assets expressed in U.S. Dollars (the "Purchase Price"), together with all exhibits and schedules thereto and such

additional ancillary agreements as may be required by the bidder with all exhibits and schedules thereto (or term sheets that describe the material terms and provisions of such agreements), as well as copies of such materials marked to show those amendments and modifications to the Asset Purchase Agreement (“Marked Agreement”) and the proposed order to approve the Sale by the Court proposed by the bidder;

(iv) it includes written evidence of a firm, irrevocable commitment for financing, or other evidence of ability to consummate the proposed transaction, that will allow the Debtors to make a reasonable determination as to the Qualified Bidder's financial and other capabilities to consummate the transaction contemplated by the Marked Agreement;

(v) it is not conditioned on (i) the outcome of unperformed due diligence by the bidder and/or (ii) obtaining financing;

(vi) it fully discloses the identity of each entity that will be bidding for the Assets or otherwise sponsoring or participating in connection with such bid, and the complete terms of any such participation;

(vii) it has a value to the Debtors, in the Debtors' reasonable business judgment, after consultation with their financial advisors, that either individually or, when evaluated in conjunction with any other Qualified Bid for the Assets, is greater than or equal to the sum of the Purchase Price offered under the Asset Purchase Agreement, plus the amount of the Bid Protections, plus \$100,000;

(viii) it includes an acknowledgment and representation that the bidder will assume the Debtors' obligations under the executory contracts and unexpired leases proposed to be assigned pursuant to the Asset Purchase Agreement (or identifies with particularity which of such contracts and leases the bidder wishes not to assume, or alternatively which additional executory contracts or unexpired leases the bidder wishes to assume), contains full details of the bidder's proposal for the treatment of related cure costs; and it identifies with particularity any executory contract or unexpired lease the assumption and assignment of which is a condition to closing;

(ix) it includes an acknowledgement and representation that the bidder: (i) has had an opportunity to conduct any and all required due diligence regarding the Assets prior to making its offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Assets in making its bid; (iii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the Assets or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in the Marked Agreement; and (iv) is not entitled to any expense reimbursement or break-up fee in connection with its bid;

(x) it includes evidence, in form and substance reasonably satisfactory to the Debtors, of authorization and approval from the bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the Marked Agreement;

(xi) it is accompanied by a good faith deposit in the form of a wire transfer (to a bank account specified by the Debtors), certified check or such other form acceptable to the Debtors, payable to the order of the Debtors (or such other party as the Debtors may determine) in an amount equal to ten percent (10%) of the purchase price, to be dealt with as provided for under "Good Faith Deposits" herein;

(xii) it (i) contains full details of the proposed number of employees of the Debtors who will become employees of the Qualified Bidder and any proposed measures associated with their continued employment and associated with the employment of all employees who will become employees of the Qualified Bidder, and (ii) identifies any Employee Liabilities of any employees who will become employees of the Qualified Bidder that the Qualified Bidder intends to assume or purchase;

(xiii) it includes evidence of the Potential Bidder's ability to comply with section 365 of the Bankruptcy Code (to the extent applicable), including providing adequate assurance of such Potential Bidder's ability to perform in the future the contracts and leases proposed in its bid to be assumed by the Debtors and assigned or subleased to the Potential Bidder, in a form that will permit the immediate dissemination of such evidence to the counterparties to such contracts and leases;

(xiv) it contains other information reasonably requested by the Debtors; and

(xv) it is received by the Bid Deadline.

The Debtors will determine, in their reasonable business judgment, whether to entertain bids for the Assets that do not conform to one or more of the requirements specified herein and deem such bids to be Qualified Bids. Notwithstanding the foregoing, Buyer will be deemed a Qualified Bidder, and the Asset Purchase Agreement will be deemed a Qualified Bid, for all purposes in connection with the Bidding Process, the Auction, and the Sale.

- d. Evaluation of Competing Bids. A Qualified Bid will be valued based upon several factors including, without limitation, items such as the purchase price and the net value (including assumed liabilities and the other obligations to be performed or assumed by the bidder) provided by such bid, the claims likely to be created by such bid in relation to other bids, the counterparties to such Transactions, the proposed revisions to the relevant Transaction documents, the effect of the Transactions on the value of the ongoing businesses of the Debtors (including ongoing relationships with partners, customers and suppliers), other factors affecting the speed, certainty and



value of the Transactions (including any regulatory approvals required to close the Transactions), the assets included or excluded from the bid, the estimated number of the Debtors' employees to be offered post-closing employment by the Qualified Bidder and any proposed measures associated with their continued employment, the transition services required from the Debtors post-closing and any related restructuring costs, and the likelihood and timing of consummating such transactions, each as determined by the Debtors, in consultation with their advisors.

- e. No Qualified Bids. If the Debtors do not receive any Qualified Bids other than the Asset Purchase Agreement received from Buyer, the Auction shall be cancelled and the Debtors shall report the same to the Court, and subject to requiring and obtaining approvals of the Court and satisfaction of the conditions set forth in the Asset Purchase Agreement, the Debtors shall promptly proceed to seek entry of the appropriate order approving the Transactions with Buyer pursuant to the terms and conditions set forth in the Asset Purchase Agreement. In addition, if no Qualified Bid is received, the Debtors reserve the right to request that the Court advance the date of the Sale Hearing (as defined below) and provide notice of such new date to those parties in interest entitled to notice thereof.
- f. Auction Process. If the Debtors receive one or more Qualified Bids in addition to the Asset Purchase Agreement, the Debtors will conduct an auction (the "Auction") of the Assets, which shall be transcribed or recorded on video to the extent required under Delaware local practice, at **10:00 a.m. on November 4, 2016**, at the offices of Pachulski Stang Ziehl & Jones LLP, located at 919 North Market Street, 17th Floor, Wilmington, DE 19801, or such other location as shall be timely communicated to all entities entitled to attend the Auction, which Auction may be cancelled or adjourned, subject to the terms of the Asset Purchase Agreement. The Auction shall run in accordance with the following procedures:
  - (i) The Debtors, the Buyer, (and the advisors to each of the foregoing), any official committee appointed in these cases, and any other Qualified Bidder that has timely submitted a Qualified Bid, and each of their respective advisors, shall attend the Auction in person, and only Buyer and such other Qualified Bidders will be entitled to make any subsequent bids at the Auction.
  - (ii) Each Qualified Bidder shall be required to confirm that it has not engaged in any collusion with respect to the bidding or the Transactions.
  - (iii) At least two (2) days prior to the Auction, each Qualified Bidder who has timely submitted a Qualified Bid must inform the Debtors whether it intends to attend the Auction; provided that in the event a Qualified Bidder elects not to attend the Auction, such Qualified Bidder's Qualified Bid shall nevertheless remain fully enforceable against such Qualified Bidder until (i) the date of the selection of the Successful Bidder at the conclusion of the Auction and (ii) if such bidder is selected as a Back-Up Bidder (as defined below), the Back-Up Bid Expiration Date. At least one (1) day prior to the Auction, the Debtors will provide copies of the Qualified Bid or combination of Qualified Bids which the

Debtors believe, in their reasonable business judgment, is the highest or otherwise best offer (the "Starting Bid") to Buyer and all other Qualified Bidders which have informed the Debtors of their intent to participate in the Auction.

(iv) All Qualified Bidders who have timely submitted Qualified Bids will be entitled to be present for all Subsequent Bids (as defined below) at the Auction with the understanding that the true identity of each Qualified Bidder at the Auction will be fully disclosed to all other Qualified Bidders at the Auction and that all material terms of each Subsequent Bid will be fully disclosed to all other bidders throughout the entire Auction; provided that all Qualified Bidders wishing to attend the Auction must have at least one individual representative with authority to bind such Qualified Bidder attend the Auction in person.

(v) The Debtors, after consultation with their counsel and financial advisors, may employ and announce at the Auction additional procedural rules that are reasonable under the circumstances (e.g., the amount of time allotted to make Subsequent Bids) for conducting the Auction, provided that such rules are (i) not inconsistent with these Bidding Procedures, the Local Rules, the Bankruptcy Code, or any order of the Court entered in connection herewith, and (ii) disclosed to each Qualified Bidder at the Auction.

(vi) Bidding at the Auction will begin with the Starting Bid and continue, in one or more rounds of bidding, so long as during each round at least one subsequent bid is submitted by a Qualified Bidder that (i) improves upon such Qualified Bidder's immediately prior Qualified Bid (a "Subsequent Bid") and (ii) the Debtors determine, in consultation with their advisors, that such Subsequent Bid is (A) for the first round, a higher or otherwise better offer than the Starting Bid, and (B) for subsequent rounds, a higher or otherwise better offer than the Leading Bid (as defined below). Each incremental bid at the Auction shall provide net value to the estate of at least \$100,000 over the Starting Bid or the Leading Bid, as the case may be, provided that the Debtors shall retain the right to modify the increment requirements at the Auction after informing each participating Qualified Bidder. After the first round of bidding and between each subsequent round of bidding, the Debtors shall announce the bid or combination of bids (and the value of such bid(s)) that it believes to be the highest or otherwise better offer (the "Leading Bid"). A round of bidding will conclude after each participating Qualified Bidder has had the opportunity to submit a Subsequent Bid with full knowledge of the Leading Bid.

(vii) Except as specifically set forth herein, for the purpose of evaluating the value of the consideration provided by Subsequent Bids (including any Subsequent Bid by Buyer), the Debtors will, at each round of bidding, give effect to the Bid Protections that may be payable to Buyer under the Asset Purchase Agreement as well as any additional liabilities to be assumed by a Qualified Bidder and any additional costs which may be imposed on the Debtors. For the avoidance of doubt, in submitting any Subsequent Bid, Buyer shall be permitted to credit bid the full Credit Bid Amount, as such term is defined in the Asset

## Purchase Agreement.

- g. Selection of Successful Bid. Prior to the conclusion of the Auction, the Debtors, in consultation with their advisors, will (a) review each Qualified Bid and evaluate each Qualified Bid as set forth in the section titled "Evaluation of Competing Bids" herein, (b) identify the highest or otherwise best offer or offers for the Assets received at the Auction (one or more such bids, collectively the "Successful Bid" and the bidder(s) making such bid, collectively, the "Successful Bidder") and (c) communicate to Buyer and the other Qualified Bidders the identity of the Successful Bidder, the Back-Up Bidder (as defined below), if any, and the details of the Successful Bid and Back-Up Bid (as defined below), if any. The determination of the Successful Bid and Back-Up Bid by the Debtors, at the conclusion of the Auction, shall be final subject to approval by the Court.

The Debtors will sell the Assets to the Successful Bidder pursuant to the terms of the Successful Bid (or, under certain circumstances described herein, the Back-Up Bidder) upon the approval of such Successful Bid (or Back-Up Bidder if applicable) by the Court at the Sale Hearing.

- h. Closing with Back-Up Bidders. If the Debtors receive one or more additional Qualified Bid(s), then, at the Sale Hearing, the Debtors will seek approval of the Successful Bid, and, at the Debtors' election, the next highest or best Qualified Bid (the "Back-Up Bid" and, such bidder, the "Back-Up Bidder"). The Debtors' presentation to the Court of the Successful Bid and, if applicable, the Back-Up Bid will not constitute the Debtors' acceptance of either of such bids, which acceptance will only occur upon the approval of such bids by the Court at the Sale Hearing. Following approval of the Sale to the Successful Bidder, if the Successful Bidder fails to consummate the Sale for any reason, then the Back-Up Bid will be deemed to be the Successful Bid and the Debtors will be authorized, but not directed, to effectuate a Sale to the Back-Up Bidder subject to the terms of the Back-Up Bid of such Back-Up Bidder without further order of the Court. The Back-Up Bid shall remain open until the earlier of (a) the thirtieth (30<sup>th</sup>) calendar day following the conclusion of the Auction, unless, prior to such date, the Debtors have delivered written notice to the Back-Up Bidder that the transaction contemplated by the Successful Bid will not occur and the Debtors intend to consummate the transaction contemplated by the Back-Up Bid, in which case the terms of the Back-Up Bid shall be enforceable and shall govern or (b) the consummation of the Sale to the Successful Bidder (the "Back-Up Bid Expiration Date"). All the Qualified Bids other than the Successful Bid and the Back-Up Bid shall be deemed rejected by the Debtors on and as of the date of approval of the Successful Bid and the Back-Up Bid by the Court.
- i. Break-Up Fee and Expense Reimbursement. In recognition of Buyer's expenditure of time, energy, and resources, Sellers have agreed that, if Buyer is not the Successful Bidder or if the Agreement is otherwise terminated under certain provisions of the Agreement as set forth in section 4.5 of the Agreement, they will pay Buyer the Break-Up Fee and/or the Expense Reimbursement. Such Bid Protections will not be payable unless Sellers consummate an Alternative Proposal for all or substantially all

of the Purchased Assets. If payable, the Bid Protections will be paid on the date of the closing of the Alternative Proposal.

- j. Good Faith Deposits. Other than with respect to Buyer, whose Good Faith Deposit shall be treated in accordance with the terms and conditions of the Asset Purchase Agreement, the Good Faith Deposit of any Back-Up Bidder shall be retained by the Debtors until the Back-Up Bid Expiration Date and returned to the Back-Up Bidder within five (5) Business Days thereafter or, if the Back-Up Bid becomes the Successful Bid, shall be applied to the purchase price to be paid by the Back-Up Bidder in accordance with the terms of the Back-Up Bid. The Good Faith Deposits of Qualified Bidders not selected as either the Successful Bidder or Back-Up Bidder shall be returned to such bidders within five (5) Business Days of the date of the selection of the Successful Bidder and the Back-Up Bidder. The Good Faith Deposit of the Successful Bidder will be dealt with in accordance with the terms of the Successful Bid.
- k. Sale Hearing. The Debtors will seek entry of the Sale Order from the Court at the Sale Hearing to begin on or before **November 8, 2016** (or at another date and time convenient to the Court) to approve and authorize the sale transaction to the Successful Bidder(s) on terms and conditions determined in accordance with the Bidding Procedures.

### C. The Sale Notice Procedures

38. As stated above, the Debtors request that this Court schedule the Sale Hearing for November 8, 2016. The Debtors propose that any objections to the Sale (other than an Assumption Objection (defined herein)), which shall be governed by the procedures set forth below) (a “Sale Objection”), must (i) be in writing; (ii) comply with the Bankruptcy Rules and the Local Rules; (iii) set forth the specific basis for the Sale Objection; (iv) be filed with the Court, 824 N. Market Street, 3<sup>rd</sup> Floor, Wilmington, Delaware 19801, together with proof of service, **on or before 4:00 p.m. (prevailing Eastern Time) on November 1, 2016** (the “Sale Objection Deadline”) and (v) be served, so as to be actually received on or before the Sale Objection Deadline, upon the following parties (collectively, the “Objection Notice Parties”): (i) Debtors’ counsel: Keller & Benvenuti LLP, Attn: Tobias S. Keller, Esq. and Jane Kim, Esq., 650 California Street, Suite 1900, San Francisco, CA 93108, [tkeller@kellerbenvenuti.com](mailto:tkeller@kellerbenvenuti.com), [jkim@kellerbenvenuti.com](mailto:jkim@kellerbenvenuti.com); (ii) Debtors’ counsel: Pachulski Stang Ziehl & Jones LLP, Attn:

Laura Davis Jones, Esq., 919 North Market Street, 17th Floor, Wilmington, DE 19801, [ljones@pszjlaw.com](mailto:ljones@pszjlaw.com); (iii) counsel to Buyer: Olshan Frome Wolosky LLP, Attn: Adam H. Friedman, Esq. and Jonathan H. Deblinger, Esq., 1325 Avenue of the Americas, New York, New York 10019, [afriedman@olshanlaw.com](mailto:afriedman@olshanlaw.com), [jdeblinger@olshanlaw.com](mailto:jdeblinger@olshanlaw.com), (iv) the Office of the United States Trustee (the "U.S. Trustee"): U.S. Trustee, 844 King Street, Suite 2207, Lockbox #35, Wilmington, Delaware, 19801 (Fax: 302-573-6497), and (vi) counsel to any Official Committee. If a Sale Objection is not filed and served on or before the Sale Objection Deadline, the Debtors request that the objecting party be barred from objecting to the Sale and not be heard at the Sale Hearing, and this Court may enter the Sale Order without further notice to such party.

39. The Debtors also request that the Court approve the form of the Procedures Notice, substantially in the form of Exhibit 2 to the Bidding Procedures Order. The Debtors will serve a copy of the Procedures Notice on the following parties: (i) the Objection Notice Parties, (ii) any parties requesting notices in this case pursuant to Bankruptcy Rule 2002, (iii) all entities reasonably known to have expressed an interest in a transaction with respect to the Assets during the past nine (9) months, (iv) all parties known by the Debtors to assert a lien on any of the Purchased Assets, (v) all persons known or reasonably believed to have asserted an interest in any of the Purchased Assets, (vi) all non-Debtor parties to any Purchased Contracts or Designation Rights Contracts, (vii) the Office of the United States Attorney for the District of Delaware, (viii) the Office of the Attorney General in each state in which the Debtors operate, (ix) the Office of the Secretary of State in each state in which the Debtors operate or are organized, (x) all taxing authorities having jurisdiction over any of the Assets, including the IRS, and (xi) all environmental authorities having jurisdiction over any of the Assets (collectively with the parties specified in this paragraph, the "Procedures Notice Parties").

40. The Debtors propose to file with the Court and serve the Procedures Notice within two (2) business days following entry of the Bidding Procedures Order, by first-class mail, postage prepaid on the Procedures Notice Parties. The Procedures Notice provides that any party that has not received a copy of the Motion or the Bidding Procedures Order that wishes to obtain a copy of the Motion or the Bidding Procedures Order, including all exhibits thereto, may make such a request in writing to Keller & Benvenuti LLP, Attn: Jane Kim, Esq., 650 California Street, Suite 1900, San Francisco, CA 93108, or by e-mailing [jkim@kellerbenvenuti.com](mailto:jkim@kellerbenvenuti.com).

41. The Debtors submit that the foregoing notices comply fully with Bankruptcy Rule 2002 and are reasonably calculated to provide timely and adequate notice of the Bidding Procedures, Auction and Sale, and Sale Hearing to the Debtors' creditors and other parties in interests as well as to those who have expressed an interest or are likely to express an interest in bidding on the Assets. Based on the foregoing, the Debtors respectfully request that this Court approve these proposed Notice Procedures.

**E. Sale Free and Clear of All Liens, Claims, Encumbrances, and Interests**

42. At the Sale Hearing, the Debtors will seek Court approval of, the Sale to the Successful Bidder(s), free and clear of all liens, claims, interests, and encumbrances pursuant to Section 363 of the Bankruptcy Code, with all liens, claims, interests, and encumbrances to attach to the Sale Proceeds with the same validity and in the same order of priority as they attached to the Purchased Assets prior to the Sale, including the assumption by the Debtors and assignment to the Successful Bidder(s) of the Purchased Contracts pursuant to Section 365 of the Bankruptcy Code. The Debtors will also seek an order of the Court prohibiting all persons holding Liens, claims, encumbrances, and other interests, including rights or claims based on any successor or transferee Liability, from asserting them against Buyer under section 363(f) of the Bankruptcy

Code. The Debtors will submit and present additional evidence, as necessary, at the Sale Hearing demonstrating that the Sale is fair, reasonable, and in the best interest of the Debtors' estates and all interested parties, and satisfies the standards necessary to approve a sale of substantially all of a debtor's assets articulated by the Court of Appeals for the Third Circuit in *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986).

**F. Procedures for Assumption and Assignment of the Purchased Contracts**

43. At the Sale Hearing, to facilitate and effect the sale of their Assets, the Debtors will also seek authorization to assume certain pre-petition executory contracts and leases (the "Purchased Contracts") of the Debtors related to the Assets, and to assign such executory contracts to Buyer or the Successful Bidder.

44. The Agreement provides that Buyer will pay all Cure Amounts, as determined by the Court, if any, necessary to cure all defaults, if any, and to pay all actual or pecuniary losses that have resulted from such defaults under the Purchased Contracts assumed at Closing. Sellers will prepare a schedule setting forth a good faith estimate as of the date of the Agreement of all Cure Amounts for all Purchased Contracts (the "Cure Schedule").

**Purchased Contracts**

45. The Agreement provides that, at least initially, contracts designated for assumption and assignment at Closing (the "Purchased Closing Contracts") will be identified on a schedule to the Agreement. Subject to Buyer's right to exclude any Purchased Contract at any time prior to Closing, and subject to section 365 of the Bankruptcy Code, the Agreement provides that all Purchased Contracts will be assumed and assigned to Buyer at Closing.

46. In addition, the Agreement contemplates that Buyer may designate certain additional Contracts to be assumed and assigned during a period of two months commencing on

the Closing Date (the “Designation Rights Period”). During the Designation Rights Period, the Debtors will not reject any contracts that are not expressly designated by Buyer as an Excluded Contract and have not been assumed and assigned on the Closing Date (the “Designation Rights Assets”). Buyer will reimburse Sellers for the costs of carrying, and not rejecting, the Designation Rights Assets during such post-Closing period, up to the amount set forth in a budget to be proposed by Sellers. Until the end of the Designation Rights Period or the designation by Buyer of inclusion or exclusion of a Designation Rights Asset, all consideration received by Sellers in respect of such Designation Rights Asset will be delivered to Buyer. Upon the written designation of a Designation Rights Asset by Buyer during the Designation Rights Period, such Designation Rights Asset will be assumed and assigned (a “Purchased Designation Rights Contract”).

#### **Cure Notice Procedures**

47. In the interim, the Debtors will file with the Court and serve the Cure Notice, substantially in the form of Exhibit 3 to the Bid Procedures Order, (along with a copy of this Motion) upon each counterparty to the Purchased Contracts by no later than **October 21, 2016**. The Cure Notice will state the date, time and place of the Sale Hearing as well as the date by which any objection to the assumption and assignment of Purchased Contracts (including the Cure Amount (defined below)) must be filed and served. The Cure Notice also will identify the amounts, if any, that the Debtors believe are owed to each counterparty to a Purchased Contract in order to cure any defaults that exist under such contract (the “Cure Amounts”). To the extent there is a contract added to the list of contracts to be assumed by the Successful Bidder pursuant to the Successful Bidder’s Purchase Agreement selected at the Auction, this Motion constitutes a separate motion to assume and assign that contract to the Successful Bidder pursuant to Section



365 of the Bankruptcy Code; each such contract will be listed on an exhibit to the Successful Bidder's Purchase Agreement, and will be given a separate Cure Notice filed and served by overnight delivery within five (5) business days of the conclusion of the Auction and announcement of the Successful Bidder.

48. The inclusion of a contract, lease, or other agreement on the Cure Notice shall not constitute or be deemed a determination or admission by the Debtors and their estates or any other party in interest that such contract, lease, or other agreement is, in fact, an executory contract or unexpired lease within the meaning of the Bankruptcy Code, and any and all rights with respect thereto shall be reserved.

49. If a Contract is assumed and assigned pursuant to Court Order, then unless the Purchased Contract counterparty properly files and serves an objection to the Cure Amount contained in the Cure Notice by the Assumption Objection Deadline (defined below), the Purchased Contract counterparty will receive at the time of the assumption and assignment (as specified below) the Cure Amount as set forth in the Cure Notice, if any. If an objection is filed by a counterparty to a Purchased Contract, the Debtors propose that such objection must set forth a specific default in the executory contract or unexpired lease, claim a specific monetary amount that differs from the amount, if any, specified by the Debtors in the Cure Notice, and set forth any reason why the counterparty believes the executory contract or unexpired lease cannot be assumed and assigned to the Successful Bidder.

50. If any counterparty objects for any reason to the assumption and assignment of a Purchased Contract (including to a Cure Amount) (an "Assumption Objection"), the Debtors propose that the counterparty must file the objection and serve it so as to be actually received on or before the Assumption Objection Deadline (defined below), upon the Notice Parties by no

later than (i) **4:00 p.m. (prevailing Eastern Time) on November 1, 2016** or (ii) the date otherwise specified in the Cure Notice (the “Assumption Objection Deadline”), provided, however, as to any Successful Bidder who is not the Buyer, any counterparty may raise at the Sale Hearing an objection to the assumption and assignment of the Purchased Contract solely with respect to the Successful Bidder’s ability to provide adequate assurance of future performance under the Purchased Contract. After receipt of an Assumption Objection, the Debtors will attempt to reconcile any differences in the Cure Amount or otherwise resolve the objection with the counterparty. In the event that the Debtors and the counterparty cannot resolve an Assumption Objection, and the Court does not otherwise make a determination at the Sale Hearing regarding an Assumption Objection related to a Cure Amount, such Purchased Contract will not be assumed and assigned until the Court’s determination as to Cure Amount, as further set forth below.

51. The Successful Bidder(s) shall be responsible for paying any Cure Amount for a Purchased Contract that is assumed and assigned and for satisfying any requirements regarding adequate assurance of future performance that may be imposed under section 365(b) of the Bankruptcy Code in connection with the proposed assignment of any Purchased Contract, and the failure to provide adequate assurance of future performance to any counterparty to any Purchased Contract shall not excuse the Successful Bidder(s) from performance of any and all of its obligations pursuant to the Successful Bidder’s Purchase Agreement. The Debtors propose that the Court make its determinations concerning adequate assurance of future performance under the Purchased Contracts pursuant to section 365(b) of the Bankruptcy Code at the Sale Hearing. Cure Amounts disputed by any counterparty will be resolved by the Court at the Sale Hearing or such later date as may be agreed to or ordered by the Court.

### **Effective Date of Assumption and Assignment**

52. The Debtors seek authorization and approval to assume and assign the Purchased Contracts at Closing. Debtors further seek authorization and approval to assume and assign the Purchased Designation Rights Contracts at the time of Buyer's designation of a Contract as a Purchased Designation Rights Contract.<sup>6</sup>

53. However, if the Cure Amount for any Purchased Closing Contract is subject to dispute as of the Closing (or for any Purchased Designation Rights Contract, as of the end of the Designation Rights Period), then such Contract will not be assumed and assigned until after the Court determines the Cure Amount. If the Court determines the Cure Amount for such Contract to be less than or equal to the amount set forth in the Cure Schedule, then Debtors seek, by this Motion, authorization and approval to assume and assign such Contract on the date of such determination by the Court, if not stayed. If the Cure Amount for such Contract is determined by the Court to be greater than the amount set forth in the Cure Schedule, then Buyer shall have ten days to decide whether to have such Contract assumed and assigned, and in such event, the Debtors seek authorization and approval to assume and assign such Contract only upon, and at the time of, Buyer's written declaration that such Contract is a Purchased Contract.

54. Except to the extent otherwise provided in the Successful Bidder's Purchase Agreement, the Debtors and the Debtors' estates shall be relieved of all liability accruing or arising after the assumption and assignment of the Purchased Contracts pursuant to Section 365(k) of the Bankruptcy Code.

55. Pursuant to Section 365(f) of the Bankruptcy Code, the Debtors seek authorization and approval to assume and assign the Purchased Contracts and Purchased

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<sup>6</sup> For any Purchased Designation Rights Contract for which the counterparty does not receive a Cure Notice prior to the Sale Hearing, the Debtors will file a separate motion, as necessary, to assume and assign such Purchased Designation Rights Contracts promptly after the expiration of the Designation Rights Period.

Designation Rights Contracts notwithstanding any provision to the contrary in the Purchased Contracts and Purchased Designation Rights Contracts, or in applicable non-bankruptcy law, that prohibits, restricts, or conditions the assignment.

56. Upon assumption of the Purchased Contracts and Purchased Designation Rights Contracts by the Debtors and assignment to the Successful Bidder, the Purchased Contracts and Purchased Designation Rights Contracts shall be deemed valid and binding, in full force and effect in accordance with their terms, subject to the provisions of this Order.

### **BASIS FOR RELIEF REQUESTED**

#### **A. Sale of the Assets Is a Product of the Debtors' Reasonable Business Judgment**

57. In accordance with Bankruptcy Rule 6004, sales of property rights outside the ordinary course of business may be by private sale or public auction. The Debtors have determined that the Sale of the Purchased Assets by public auction will enable them to obtain the highest and best offer for these assets (thereby maximizing the value of the estate) and is in the best interests of the Debtors' creditors. In particular, the Agreement is the result of comprehensive arms' length negotiations for the Sale of the Purchased Assets, and the Sale, subject to higher or otherwise better offers at the Auction, will provide a greater recovery for the Debtors' creditors than would be provided by any other existing alternative.

58. Section 363(b)(1) of the Bankruptcy Code provides: "the Trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." Section 105(a) of the Bankruptcy Code provides in relevant part: "The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

59. Virtually all courts have held that approval of a proposed sale of assets of a debtor under section 363 of the Bankruptcy Code outside the ordinary course of business and prior to

the confirmation of a plan of reorganization is appropriate if a court finds that the transaction represents a reasonable business judgment on the part of the trustee or debtor-in-possession. *See In re Abbotts Dairies of Pa.*, 788 F.2d 143 (3d Cir. 1986); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991) (holding that the following non-exclusive list of factors may be considered by a court in determining whether there is a sound business purpose for an asset sale: “the proportionate value of the asset to the estate as a whole; the amount of elapsed time since the filing; the effect of the proposed disposition of [sic] the future plan of reorganization; the amount of proceeds to be obtained from the sale versus appraised values of the property; and whether the asset is decreasing or increasing in value”); *In re Stroud Ford, Inc.*, 164 B.R. 730, 732 (Bankr. M.D. Pa. 1993); *Titusville Country Club V. Pennbank (In re Titusville Country Club)*, 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991); *In re Industrial Valley Refrigeration & Air Conditioning Supplies Inc.*, 77 B.R. 15, 21 (Bankr. E.D. Pa. 1987); *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 391 (6th Cir. 1986); *In re Ionosphere Clubs, Inc.*, 100 B.R. 670, 675 (Bankr. S.D.N.Y. 1989); *In re Phoenix Steel Corp.*, 82 B.R. 334, 335-36 (Bankr. D. Del. 1987) (stating that the elements necessary for approval of a section 363 sale in a chapter 11 case are “that the proposed sale is fair and equitable, that there is a good business reason for completing the sale and the transaction is in good faith”).

60. The “sound business reason” test requires a trustee or debtor-in-possession to establish four elements: (1) that a sound business purpose justifies the sale of assets outside the ordinary course of business; (2) that accurate and reasonable notice has been provided to interested persons; (3) that the trustee or the debtor-in-possession has obtained a fair and reasonable price; and (4) good faith. *In re Titusville Country Club*, 128 B.R. at 399; *In re Sovereign Estates, Ltd.*, 104 B.R. 702, 704 (Bankr. E.D. Pa. 1989); *Phoenix Steel Corp.*, 82 B.R.

at 335-36; *see also Stephens Indus.*, 789 F.2d at 390; *In re Lionel Corp.*, 722 F.2d at 1071.<sup>7</sup>

61. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See, e.g., 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 (“It is a well-established principle of bankruptcy law that the . . . [trustee’s] duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.”) (quoting *In re Atlanta Packaging Prods., Inc.*, 99 BR. 124, 130 (Bankr. N.D. Ga. 1988)). As long as the sale appears to enhance a debtor’s estate, court approval of a trustee’s decision to sell should only be withheld if the trustee’s judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code. *GBL Holding Co., Inc. v. Blackburn/Travis/Cole, Ltd.*, 331 B.R. 251, 255 (N.D. Tex. 2005); *In re Lajijani*, 325 B.R. 282, 289 (9th Cir. B.A.P. 2005); *In re WPRV-TV, Inc.*, 143 B.R. 315, 319 (D.P.R. 1991) (“The trustee has ample discretion to administer the estate, including authority to conduct public or private sales of estate property. Courts have much discretion on whether to approve proposed sales, but the trustee’s business judgment is subject to great judicial deference.”).

**B. The Bidding Procedures Are Appropriate and Will Maximize the Value Received for the Assets**

62. As noted above, the paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. To that end, 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.

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<sup>7</sup> Lionel’s “sound business purpose test” replaces an older rule that held that sales of substantially all of a debtor’s assets prior to the confirmation of a plan of reorganization could only be made in emergencies, *i.e.*, when the assets to be sold were “wasting” or perishable. *Lionel*, 722 F.2d at 1071.

*See, e.g., In re Fin'l News Network, Inc.*, 126 B.R. 152, 156 (Bankr. S.D.N.Y. 1991) (“court-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates”).

63. Procedures to dispose of assets, similar to the proposed Bidding Procedures, have been approved in other bankruptcy cases. *See, e.g., In re IMRIS, Inc.*, Case No. 15-11133 (CSS) (Bankr. D. Del. June 16, 2015); *In re Velti Inc.*, Case No. 13-12878(PJW) (Bankr. D. Del. Nov. 20, 2013); *In re Orchard Supply Hardware Stores Corp.*, Case No. 13-11565 (CSS) (Bankr. D. Del. Jul. 8, 2013); *In re Conex Holdings LLC*, Case No. 11-10501(CSS) (Bankr. D. Del. Sept. 14, 2011); *In re Barnes Bay Dev. Ltd., Case No. 11-10792 (PJW) (Bankr. D. Del. May 19, 2011); In re East West Resort Dev. V, L.P., L.L.L.P.*, Case No. 10-10452 (BLS) (Bankr. D. Del. March 31, 2010); *In re Dana Corp.*, Case No. 06-10354 (Bankr. S.D.N.Y. Oct. 19, 2006); *In re Delphi Corp.*, Case No. 05-44481 (Bankr. S.D.N.Y. June 22, 2006); *In re Oxford Automotive, Inc.*, Case No. 04-74377 (Bankr. E.D. Mich. Jan. 24, 2005); *see also In re Calpine Corp.*, Case No. 05-60200 (Bankr. S.D.N.Y. Dec. 6, 2006).

64. The Debtors believe that the Bidding Procedures will establish the parameters under which the value of the Purchased Assets may be tested at an auction and through the ensuing Sale Hearing. Such procedures will increase the likelihood that the Debtors’ creditors will receive the greatest possible consideration for their assets because they will ensure a competitive and fair bidding process. They also allow the Debtors to undertake an auction in as expeditious and efficient manner as possible, which the Debtors believe is essential to maximizing the value of the Debtors’ estate for their creditors.

65. The Debtors also believe that the proposed Bidding Procedures will promote active bidding from seriously interested parties and will dispel any doubt as to the best and

highest offer reasonably available for the Debtors' assets. In particular, the proposed Bidding Procedures will allow the Debtors to conduct an auction in a controlled, fair, and open fashion that will encourage participation by financially capable bidders who demonstrate the ability to close a transaction. Further, the Bidding Procedures provide the Debtors with the opportunity to consider all Qualified Bids and to select, in their reasonable business judgment, and after consultation with its professionals and any Official Committee, the highest and best offer(s) for the Assets. Moreover, the Bidding Procedures provide the Debtors with the flexibility to modify the Bidding Procedures, if necessary, to maximize value for the Debtors' estates.

66. At the same time, a prompt sale process is necessary because the Debtors' failure to meet certain "Chapter 11 Milestones" by certain deadlines, including with respect to entry of the Bid Procedures Order, Final DIP Order, conclusion of the Auction, Sale Order, and Closing, are events of default under the DIP Agreement. The process set forth in the proposed Bidding Procedures ensures that the Debtors can comply with such deadlines while providing for a competitive process that maximizes value.

67. In sum, the Debtors believe that the Bidding Procedures will encourage bidding for the Assets and are consistent with the relevant standards governing auction proceedings and bidding incentives in bankruptcy proceedings. Accordingly, the proposed Bidding Procedures are reasonable, appropriate, and within the Debtors' sound business judgment.

**C. Provision for Bid Protection in the Form of a Break-Up Fee and Expense Reimbursement Has Become a Recognized and Necessary Practice**

68. The Debtors have formulated a bidding process that the Debtors believe will induce prospective competing bidders to expend the time, energy and resources necessary to submit a bid, and which the Debtors believe is fair and reasonable and provide a benefit to the Debtors' estates and creditors. The Bidding Procedures and, in particular, the proposed Break



Up Fee and Expense Reimbursement, are reasonable and supported by applicable case law.

69. The use of bid protections such as these has become an established practice in chapter 11 asset sales involving the sale of significant assets because such bid protections enable a debtor to ensure a sale to a contractually committed bidder at a price the debtor believes is fair, while providing the debtor with the potential of obtaining an enhanced recovery through an auction process. Historically, bankruptcy courts have approved bidding incentives (including bid protections) solely by reference to the “business judgment rule,” which proscribes judicial second-guessing of the actions of a corporation's board of directors taken in good faith and in the exercise of honest judgment. *See, e.g., In re 995 Fifth Ave. Assocs.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1992) (holding that bidding incentives may “be legitimately necessary to convince a “white knight to enter the bidding by providing some form of compensation for the risks it is undertaking”) (citation omitted); *In re Marrose Corp.*, Nos. 89 B 12171-12179 (CB), 1992 WL 33848, at \*5 (Bankr. S.D.N.Y. 1992) (“bidding incentives are meant to compensate the potential acquirer who serves as a catalyst or ‘stalking horse’ which attracts more favorable offers”). *See also In re Integrated Res.*, 147 B.R. 650, 657-58 (S.D.N.Y. 1992).

70. The Third Circuit Court of Appeals has clarified the standard for determining the appropriateness of bidding incentives in the bankruptcy context. In *Calpine Corp. v. O'Brien Env'tl. Energy, Inc. (In re O'Brien Env'tl. Energy, Inc.)*, 181 F.3d 527 (3d Cir. 1999), the Third Circuit held that even though bidding incentives are measured against a business judgment standard in non-bankruptcy transactions, the administrative expense provisions in section 503(b) of the Bankruptcy Code govern in the bankruptcy context. Accordingly, to be approved, bidding incentives such as the Break-Up Fee must provide benefit to a debtor's estate. *Id.* at 533.

71. The *O'Brien* opinion identified at least two instances in which bidding incentives

may provide benefit to the estate. First, benefit may be found if “assurance of a break-up fee promoted more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited.” *Id.* at 537. Second, where the availability of bidding incentives induced a bidder to research the value of the debtor and submit a bid that serves as a minimum or floor bid on which other bidders can rely, “the bidder may have provided a benefit to the estate by increasing the likelihood that the price at which the debtor is sold will reflect its true worth.” *Id.*

72. The bid protections proposed by the Debtors are consistent with the “business judgment rule” and satisfy the Third Circuit’s “administrative expense” standard. At the inception of the marketing process, potential purchasers will be provided with the Agreement and will be afforded an opportunity to submit their own adaptation of that agreement, marked to show changes necessary to consummate a sale which must be acceptable to the Debtors. Under the “administrative expense” standard enunciated in *O’Brien*, as well as the “sound business judgment” standard followed in other jurisdictions, the bid protections proposed by the Debtors, including the Break-Up Fee and the Expense Reimbursement, should be approved as fair and reasonable. The proposed bid protections are reasonable and generally consistent with the range of bidding protections typically approved by bankruptcy courts in this district. *See, e.g., In re Hipcricket, Inc.*, Case No. 15-10104 (LSS) (Bankr. D. Del., Feb. 11, 2015) (court approved break-up fee, which together with expense reimbursement, was 4.3% of the purchase price under stalking horse agreement); *In re Point Blank Solutions, Inc.*, Case No. 10-11255 (PJW) (Bankr. D. Del., Oct. 5, 2011) (court approved break-up and expense reimbursement of 3.75% or \$750,000 in connection with sale of debtor’s assets for purchase price of \$20,000,000); *In re Western Nonwovens, Inc.*, Case No. 08-11435 (PJW) (Bankr. D. Del., July 28, 2009) (court

approved break-up fee and expense reimbursement of \$250,000 in connection with sale of debtor's assets for purchase price of \$4,000,000 to \$6,500,000 purchase price); *In re Filene's Basement, Inc.*, Case No. 09-11525 (MFW) (Bankr. D. Del., May 15, 2009) (court approved break-up fee and expense reimbursement of 3.68%, or \$810,000 in connection with sale of debtor's assets for purchase price of \$22,000,000); *In re Global Motorsport Group, Inc.*, (Case No. 08-10192 (KJC) (Bankr. D. Del. Feb. 14, 2008) (court approved a break-up fee of approximately 4%, or \$500,000 in connection with sale).

73. Therefore, the Debtors' payment of the Bid Protections under the conditions set forth in the Motion and this Order is (a) an actual and necessary cost of preserving the Debtors' estates, within the meaning of section 503(b) of the Bankruptcy Code, (b) of substantial benefit to the Debtors' estates and creditors and all parties in interest herein, (c) reasonable and appropriate, and (d) necessary to ensure that Buyer will continue to pursue the proposed Agreement to undertake the sale of the Assets, and therefore constitute administrative expenses with priority pursuant to Bankruptcy Code sections 503(b).

**D. Notice of the Proposed Sale Is Reasonable Under the Circumstances**

74. The Debtors submit that the Procedures Notice as set forth above is appropriate and reasonably calculated to provide all interested parties with timely and proper notice of the Bidding Procedures, the Auction (if necessary) and the Sale Hearing.

75. Under Bankruptcy Rules 2002(a) and (c), the Debtors are required to notify creditors of the proposed sale of the Debtors' assets, including a disclosure of the time and place of an auction, the terms and conditions of a sale, and the deadline for filing any objections. The Debtors submit that the notice procedures herein comply fully with Bankruptcy Rule 2002 and are reasonably calculated to provide timely and adequate notice of the sale by auction to the

Debtors' creditors and other interested parties, as well as to those parties who have expressed an interest, or may express an interest, in bidding on the Assets. The proposed time frame between the filing of this Motion, the commencement of the bidding process and the Auction will provide interested purchasers sufficient time to participate in the Auction.

**E. The Successful Bidder Should Be Granted the Protection of Bankruptcy Code Section 363(m)**

76. As will be set forth in further detail at the Sale Hearing, the Debtors also maintain that the Successful Bidder is entitled to the protections afforded by Bankruptcy Code section 363 (m).

77. Specifically, Bankruptcy Code section 363 (m) provides that:

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

11 U.S.C. S 363(m).

78. While the Bankruptcy Code does not define "good faith," the Third Circuit in In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143 (3d Cir. 1986), has held that:

the requirement that a purchaser act in good faith . . . speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between Buyer and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

788 F.2d at 147 (citations omitted); *see generally* Marin v. Coated Sales, Inc., (*In re Coated Sales, Inc.*), Case No. 89-3704 (KMW), 1990 WL 212899 (S.D.N.Y. Dec. 13, 1990) (holding that party, to show lack of good faith, must demonstrate "fraud, collusion, or an attempt to take grossly unfair advantage of other bidders"); *see also* In re Sasson Jeans, Inc., 90 B.R. 608, 610 (S.D.N.Y. 1988) (quoting In re Bel Air Assocs., Ltd., 706 F.2d 301, 305 (10th Cir. 1983)); *In re*

*Pisces Leasing Corp.*, 66 B.R. 671, 673 (E.D.N.Y. 1986) (examining facts of each case, concentrating on “integrity of [an actor’s] conduct during the sale proceedings” (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)).

79. As the Debtors will demonstrate at the Sale Hearing, over the weeks leading up to the filing of these chapter 11 proceedings, the Debtors have spent a considerable amount of time and resources negotiating the Agreement at arm’s length, with give and take on both sides. Under the circumstances, this Court should find that the Successful Bidder is entitled to all of the protections of Bankruptcy Code section 363(m).

**F. The Agreement is Not the Subject of Collusive Bidding Under Bankruptcy Code Section 363(n)**

80. As set forth above, the Debtors have been negotiating with Buyer at arm’s length and in good faith regarding the sale of the Assets. Moreover, the Debtors do not believe that any sale pursuant to the Bidding Procedures will be the result of collusion or other bad faith between bidders or that the purchase price under the Agreement has been or will be controlled by an agreement between potential or actual bidders within the meaning of Bankruptcy Code section 363(n).

81. As will be set forth in further detail at the Sale Hearing, the Sale has been negotiated, proposed, and entered into without collusion, in good faith, and from arm's-length bargaining positions. Neither the Debtors nor Buyer, nor, as will be demonstrated at the Sale Hearing, any Successful Bidder, have engaged in any conduct that would cause or permit the Agreement to be avoided under Bankruptcy Code section 363(n).

**G. Sale of the Assets Should Be Free and Clear of Liens, Claims, Encumbrances, and Interests**

82. Pursuant to section 363(f) of the Bankruptcy Code, the Debtors seek authority to sell and transfer the Debtors’ right, interest and title in the Assets to Buyer or the Successful

Bidder free and clear of all Liens, claims, encumbrances, and interests, except as set forth in the Agreement, with such Liens, claims, encumbrances, and interests, to attach to the proceeds of the sale of the Assets, subject to any rights and defenses of the Debtors and other parties in interest with respect thereto.

83. Section 363(f) of the Bankruptcy Code provides, in pertinent part:

The trustee may sell property under subsection (b) or (c) of this Section free and clear of any interest in such property of an entity other than the estate, only if –

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

11 U.S.C. § 363(f). *See also In re Elliot*, 94 B.R. 343, 345 (E.D. Pa. 1988) (holding that section 363(f) written in disjunctive; court may approve sale “free and clear” provided at least one of the requirements is met).

84. With respect to each creditor asserting a Lien, claim, encumbrance, or interest, one or more of the standards set forth in Bankruptcy Code §§ 363(f)(1)-(5) has been satisfied. Those holders of Liens, claims, encumbrances, or interests who did not object or who withdraw their objections to the sale or the Motion are deemed to have consented to the Motion and sale pursuant to Bankruptcy Code § 363(f)(2). Those holders of Liens, claims, encumbrances, or interests who do object fall within one or more of the other subsections of Bankruptcy Code Section 363(f).

85. A sale free and clear of Liens, claims, encumbrances, or interests is necessary to

maximize the value of the Assets. Buyer would not have entered into the Agreement and would not consummate the Transaction if the sale of the Purchased Assets to Buyer were not free and clear of all Liens, claims, encumbrances, or interests, or if Buyer would, or in the future could, be liable for any of such Lien, claim, encumbrance, or interest. A sale of the Purchased Assets other than one free and clear of all Liens, claims, encumbrances, or interests would yield substantially less value for the Debtors' estates, with less certainty than the transaction contemplated in the Agreement. Therefore, the transaction contemplated by the Agreement is in the best interests of the Debtors, their estates and creditors, and all other parties in interest. A sale free and clear of Liens, claims, encumbrances, or interests is particularly appropriate under the circumstances because any lien, claim, encumbrance, or interest in, to or against the Debtors' right, interest and title in the Assets that exists immediately prior to the closing of any sales will attach to the sale proceeds allocated to the Debtors with the same validity, priority, force and effect as it had at such time, subject to the rights and defenses of the Debtors or any party in interest. The Debtors submit that holders of Liens, claims, encumbrances, or interests, if any, will be adequately protected by the availability of the proceeds of the sale to satisfy their Liens, claims, encumbrances, or interests.

**H. The Assumption and Assignment of the Purchased Contracts and the Procedures for Assumption and Assignment Should Be Authorized**

86. Under Bankruptcy Code section 365(a), a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Bankruptcy Code Section 365(b)(1), in turn, codifies the requirements for assuming an executory contract of a debtor. This subsection provides:

(b) (1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume Such contract or lease unless, at the time of assumption of Such contract or lease, the trustee -

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default. . . ;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. S 365(b)(1). Section 365(f)(2) of the Bankruptcy Code provides, in pertinent part, that:

The trustee may assign an executory contract or unexpired lease of the debtor only if

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by

the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. S 365(f)(2).

87. The meaning of “adequate assurance of future performance” depends on the facts and circumstances of each case, but should be given “practical, pragmatic construction.” *EBG Midtown S. Corp. v. McLaren/Hart Envtl. Eng’g Corp. (In re Sanshoe Worldwide Corp.)*, 139 B.R. 585, 593 (S.D.N.Y. 1992); *In re Prime Motor Inns Inc.*, 166 B.R. 993, 997 (Bankr. S.D. Fla. 1994); *Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1988).

88. Among other things, adequate assurance may be provided by demonstrating the assignee’s financial health and experience in managing the type of enterprise or property assigned. *See, e.g., In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (finding adequate assurance of future performance present when prospective assignee of lease from



debtor has financial resources and has expressed willingness to devote sufficient funding to business in order to give it strong likelihood of succeeding).

89. To the extent any defaults exist under any Purchased Contract, any such default will be promptly cured or adequate assurance that such default will be cured will be provided prior to the assumption and assignment. If necessary, the Debtors will submit facts prior to or at the Sale Hearing to show the financial credibility of the Successful Bidder and willingness and ability to perform under the Purchased Contracts. The Sale Hearing will therefore provide the Court and other interested parties the opportunity to evaluate and, if necessary, challenge the ability of the Successful Bidder to provide adequate assurance of future performance under the Purchased Contracts, as required under section 365(b)(1)(C) of the Bankruptcy Code.

90. In addition, the Debtors submit that it is an exercise of their sound business judgment to assume and assign the Purchased Contracts to Buyer in connection with the consummation of the transactions contemplated in the Agreement, and the assumption, assignment, and sale of the Purchased Contracts to Buyer are in the best interests of the Debtors, their estates, their creditors, and all parties in interest. The Purchased Contracts being assigned to Buyer are an integral part of the Purchased Assets being purchased by Buyer, and accordingly, such assumption, assignment, and sale of the Purchased are reasonable and enhance the value of the Debtors' estates. The Court should therefore authorize the Debtors to assume and assign the Purchased Contracts as set forth herein.

91. The Debtors submit that the cure procedures set forth herein are appropriate, reasonably calculated to provide notice to any affected party, and afford the affected party to opportunity to exercise any rights affected by the Motion, and consistent with Section 365 of the Bankruptcy Code. To the extent that any defaults exist under any Purchased Contracts, any such

defaults will be cured pursuant to the Successful Bidder's Purchase Agreement. Accordingly, the Debtors submit that the cure procedures for effectuating the assumption and assignment of the Purchased Contracts as set forth herein are appropriate and should be approved.

**I. Waiver of Automatic Fourteen-Day Stay Under Bankruptcy Rules 6004(h) and 6006(d)**

92. Pursuant to Bankruptcy Rule 6004(h), unless the Court orders otherwise, all orders authorizing the sale of property pursuant to section 363 of the Bankruptcy Code are automatically stayed for fourteen days after entry of the order. Similarly, under Bankruptcy Rule 6006(d), unless the Court orders otherwise, all orders authorizing the assignment of contracts or unexpired leases are automatically stayed for fourteen days after entry of the order. The purpose of Bankruptcy Rules 6004(h) and 6006(d) is to provide sufficient time for an objecting party to request a stay pending appeal before the order can be implemented. *See* Advisory Committee Notes to Fed. R. Bankr. P. 6004(h); Advisory Committee Notes to Fed. R. Bankr. P. 6006(d).

93. 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, commentators agree 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. *See generally Collier on Bankruptcy* P 6004.11 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Furthermore, 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 necessary to file such appeal. *Id.*

94. Pursuant to the Agreement, and because of the potentially diminishing value of the Assets, the Debtors must close this sale promptly after all closing conditions have been met or waived. Thus, waiver of any applicable stays is appropriate in this circumstance.

**Notice**

95. The Debtors will provide notice of this Motion to: (a) the Notice Parties; (b) the holders of the thirty largest unsecured claims against the Debtor; (c) the Procedures Notice Parties; and (d) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

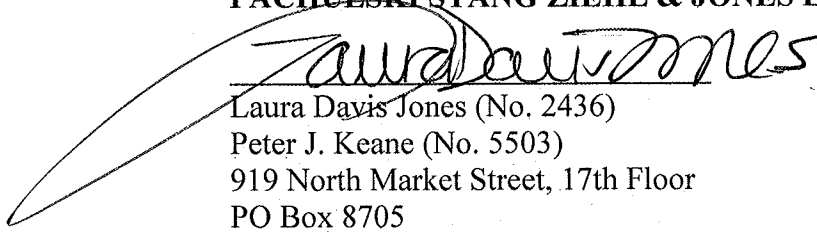
**No Prior Request**

96. No prior Motion for the relief requested herein has been made to this Court or any other court.

WHEREFORE, the Debtors respectfully requests entry of the Bidding Procedures Order attached hereto as **Exhibit C**, and the Sale Order attached hereto as **Exhibit D**, granting the relief requested herein, and granting such other and further relief as is just and proper.

Dated: September 15, 2016  
Wilmington, Delaware

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*Proposed Attorneys for Debtors  
and Debtors-in-Possession*

**Exhibit B**  
**(Agreement)**

**ASSET PURCHASE AGREEMENT**

**BY AND AMONG**

**DELIVERY AGENT, INC.,  
MUSIC TODAY, LLC,  
SHOP THE SHOWS, LLC,  
CLEAN FUN PROMOTIONAL MARKETING, INC.**

**AND**

**HILLAIR CAPITAL MANAGEMENT LLC  
(as DIP Agent on behalf of the DIP Lender under the DIP Credit Agreement and not in its  
individual capacity)**

**Dated as of September \_\_, 2016**

**TABLE OF CONTENTS**

	<b>Page(s)</b>
ARTICLE I DEFINITIONS.....	1
Section 1.1 Certain Definitions .....	1
Section 1.2 Other Definitional and Interpretive Matters.....	10
ARTICLE II PURCHASE AND SALE OF ASSETS; ASSUMPTION OF LIABILITIES.....	11
Section 2.1 Purchase and Sale of Assets .....	11
Section 2.2 Excluded Assets .....	13
Section 2.3 Excluded Liabilities.....	14
Section 2.4 Assumed Liabilities .....	15
Section 2.5 Purchased Assets .....	16
Section 2.6 Further Conveyances and Assumptions .....	16
Section 2.7 Transitional Matters .....	16
ARTICLE III CONSIDERATION .....	19
Section 3.1 Purchase Price .....	19
ARTICLE IV CLOSING AND TERMINATION .....	20
Section 4.1 Closing Date .....	20
Section 4.2 Deliveries by Sellers.....	20
Section 4.3 Deliveries by Buyer.....	20
Section 4.4 Termination of Agreement .....	21
Section 4.5 Expense Reimbursement; Break-Up Fee .....	23
Section 4.6 Effect of Termination .....	23
ARTICLE V REPRESENTATIONS AND WARRANTIES OF SELLERS.....	23
Section 5.1 Authorization of Agreement.....	23
Section 5.2 No Conflicts .....	24
Section 5.3 Title to Purchased Assets .....	24
Section 5.4 Real Property Leases .....	25
Section 5.5 Tangible Personal Property .....	25
Section 5.6 Intellectual Property .....	25
Section 5.7 Financial Statements.....	25
Section 5.8 Financial Advisors.....	26
Section 5.9 Litigation .....	26
Section 5.10 Compliance with Laws.....	26
Section 5.11 Permits.....	26
Section 5.12 [Intentionally Omitted].....	27
Section 5.13 Purchased Inventory .....	27
Section 5.14 Contracts.....	27
Section 5.15 Taxes .....	27
Section 5.16 Labor Matters .....	28

Section 5.17	Wind Down Payments and Designation Rights Budget.....	28
Section 5.18	No Other Agreements to Purchase .....	28
ARTICLE VI	REPRESENTATIONS AND WARRANTIES OF BUYER.....	28
Section 6.1	Organization and Good Standing .....	28
Section 6.2	Authorization of Agreement.....	28
Section 6.3	Financial Advisors.....	29
Section 6.4	Litigation .....	29
ARTICLE VII	BANKRUPTCY COURT APPROVAL.....	29
Section 7.1	Competing Transaction .....	29
Section 7.2	Bankruptcy Court Filings .....	29
ARTICLE VIII	COVENANTS .....	30
Section 8.1	Access to Information .....	30
Section 8.2	Further Assurances .....	31
Section 8.3	Confidentiality.....	31
Section 8.4	Preservation of Records.....	32
Section 8.5	Publicity.....	32
Section 8.6	Operation of Business .....	33
Section 8.7	WARN Act Notices.....	35
Section 8.8	Section 363(b)(1)(A) .....	35
Section 8.9	Adequate Assurances Regarding Purchased Contracts and Certain Real Property Leases .....	35
Section 8.10	Notification of Certain Matters .....	35
Section 8.11	Prospective Employees.....	35
Section 8.12	Name Change .....	36
ARTICLE IX	CONDITIONS TO CLOSING .....	37
Section 9.1	Conditions Precedent to Obligations of Buyer.....	37
Section 9.2	Conditions Precedent to Obligations of Sellers.....	38
Section 9.3	Conditions Precedent to Obligations of Buyer and Sellers .....	39
Section 9.4	Frustration of Closing Conditions .....	39
ARTICLE X	NO SURVIVAL.....	39
Section 10.1	No Survival of Representations and Warranties .....	39
ARTICLE XI	TAX MATTERS.....	39
Section 11.1	Transfer Taxes.....	39
Section 11.2	Prorations.....	39
Section 11.3	Purchase Price Allocation .....	40
ARTICLE XII	MISCELLANEOUS .....	40
Section 12.1	Expenses.....	40
Section 12.2	Submission to Jurisdiction; Consent to Service of Process.....	40
Section 12.3	Waiver of Right to Trial by Jury .....	41
Section 12.4	Entire Agreement; Amendments and Waivers.....	41



Section 12.5	Governing Law.....	41
Section 12.6	Notices.....	41
Section 12.7	Severability.....	42
Section 12.8	Binding Effect; Assignment.....	43
Section 12.9	[Intentionally Omitted] .....	43
Section 12.10	No Recourse .....	43
Section 12.11	Counterparts .....	43

## EXHIBITS

Exhibit A	Bid Procedures Order
Exhibit B	Sale Order
Exhibit C	Knowledge of the Sellers

## SCHEDULES

Schedule 1.1(a)	Contracts
Schedule 1.1(b)	Purchased Contracts
Schedule 1.1(c)	Purchased Intellectual Property
Schedule 2.1(t)	Additional Purchased Assets
Schedule 2.2(f)	Additional Excluded Assets
Schedule 2.4(a)	Assumed Liabilities
Schedule 2.4(e)	Specified Trade Payables
Schedule 2.4(j)	Cure Amounts
Schedule 3.1	Wind Down Payments
Schedule 5.2	No Conflicts
Schedule 5.4	Real Property Lease Defaults
Schedule 5.8	Financial Advisors
Schedule 5.9	Litigation
Schedule 5.10	Compliance with Laws
Schedule 5.11	Permits
Schedule 5.15	Tax Audits
Schedule 6.3	Buyer's Financial Advisors
Schedule 8.6(i)	Affiliate Transactions

## ASSET PURCHASE AGREEMENT

**THIS ASSET PURCHASE AGREEMENT**, dated as of September \_\_, 2016 (this “**Agreement**”), is entered into by and among Delivery Agent, Inc., a Delaware Corporation (“**Delivery Agent**”), Music Today, LLC, a Virginia limited liability company (“**Music Today**”), Shop The Shows, LLC, a Delaware limited liability company (the “**Shop the Shows**”), and Clean Fun Promotional Marketing, Inc. (“**Clean Fun**”) (collectively, “**Sellers**”), Hillair Capital Management LLC, a Delaware limited liability company, as DIP Agent (as defined below) on behalf of the DIP Lender (as defined below) under the DIP Credit Agreement (as defined below) and not in its individual capacity (and together with its assignees or designee(s), as provided under Section 12.8, “**Buyer**”).

### WITNESSETH:

**WHEREAS**, Sellers, the DIP Lender and DIP Agent are parties to the DIP Credit Agreement;

**WHEREAS**, promptly after the date hereof, Sellers shall commence cases (the “**Bankruptcy Cases**”) under Chapter 11 of Title 11 of the United States Code (as it may be amended from time to time as applicable to the Bankruptcy Cases, the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the District of Delaware (the “**Bankruptcy Court**”) (the date of such commencement being referred to as the “**Petition Date**”);

**WHEREAS**, Sellers shall retain possession of their assets and be authorized under the Bankruptcy Code to continue the operation of their businesses as debtors-in-possession;

**WHEREAS**, Sellers desire to sell, transfer and assign to Buyer, and Buyer desires to acquire and assume from Sellers, pursuant to Sections 363 and 365 of the Bankruptcy Code, the Purchased Assets (as defined below) and Assumed Liabilities (as defined below) as more specifically provided herein; and

**WHEREAS**, certain terms used in this Agreement are defined in Section 1.1.

**NOW, THEREFORE**, in consideration of the premises and the mutual covenants and agreements hereinafter contained, the Parties hereby agree as follows:

### **ARTICLE I** **DEFINITIONS**

Section 1.1 **Certain Definitions**. For purposes of this Agreement, the following terms shall have the meanings specified in this Section 1.1:

“**Accounts Receivable**” means all accounts, accounts receivable, credit card receivables, contract rights to payment, notes, notes receivable, and vendor rebates of Sellers.

“**Affiliate**” means, with respect to any Person, any other Person that, directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such Person, and the term “control” (including the terms “controlled by” and “under

common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through ownership of voting securities, by contract or otherwise.

“**Alternative Proposal**” has the meaning set forth in Section 7.2(a).

“**Antitrust Laws**” has the meaning set forth in Section 8.2(c).

“**Approved Budget**” means the budget established pursuant to the DIP Order and any subsequent budget, in form and substance acceptable to Buyer, that collectively extend through and including the Closing Date, as supplemented, modified or amended with the express written consent of Buyer.

“**Assumed Liabilities**” shall have the meaning set forth in Section 2.4.

“**Auction**” has the meaning set forth in the Bid Procedures Order.

“**Bankruptcy Cases**” shall have the meaning set forth in the Recitals.

“**Bankruptcy Code**” shall have the meaning set forth in the Recitals.

“**Bankruptcy Court**” shall have the meaning set forth in the Recitals.

“**Bid Procedures Order**” means an Order of the Bankruptcy Court, in substantially the form attached hereto as Exhibit A or as otherwise approved by Buyer, approving the bid procedures with respect to the Auction, the Break-Up Fee, the Expense Reimbursement and the qualifications for a Qualified Bid (as defined in the Bid Procedures Order), and providing, among other things, that if no Qualified Bid is received by the Bid Deadline (as defined in the Bid Procedures Order) other than the bid incorporating this Agreement, Buyer’s bid shall be determined to be the Winning Bid (as defined in the Bid Procedures Order) for the Purchased Assets.

“**Break-Up Fee**” means \$500,000.

“**Business**” means the business and operations of Sellers relating to e-commerce, television commerce (“**t-commerce**”) and interactive advertising..

“**Business Day**” means any day of the year on which national banking institutions in New York are open to the public for conducting business and are not required or authorized to close.

“**Buyer**” shall have the meaning set forth in the Preamble.

“**Buyer Employees**” has the meaning set forth in Section 8.11(a).

“**Cash Payment**” shall have the meaning set forth in Section 3.1(b).

“**Closing**” shall have the meaning set forth in Section 4.1.

“**Closing Date**” shall have the meaning set forth in Section 4.1.

**“Code”** means the Internal Revenue Code of 1986, as amended.

**“Competing Bid”** shall have the meaning set forth in Section 7.2(a).

**“Contract”** means any written or oral contract, indenture, commitment, purchase or sale order, note, bond, lease, Real Property Lease, Personal Property Lease, franchise agreement or other agreement (including, without limitation, employment and consulting agreements) to which any Seller is a party, as set forth on Schedule 1.1(a).

**“Credit Bid Amount”** shall have the meaning set forth in Section 3.1(a).

**“Cure Amounts”** means any and all amounts required, as a condition to assumption or assignment, to be paid to a non-debtor party to a Purchased Contract pursuant to Section 365(b) of the Bankruptcy Code.

**“Debenture Lender”** means Hillair Capital Investments LP

**“Designation Cost Overage”** has the meaning set forth in Section 2.7(c).

**“Designation Notice”** has the meaning set forth in Section 2.7(c).

**“Designation Rights Asset”** has the meaning set forth in Section 2.7(c).

**“Designation Rights Budget”** has the meaning set forth in Section 2.7(c).

**“Designation Rights End Date”** has the meaning set forth in Section 2.7(c).

**“Designation Rights Period”** means the period commencing on the Closing Date and ending three (3) months after the Closing Date.

**“DIP Agent”** means Hillair Capital management LLC, as the administrative and collateral agent on behalf of the DIP Lender under the DIP Credit Agreement (and not in its individual capacity), and any successor agent duly appointed under the DIP Credit Agreement.

**“DIP Credit Agreement”** means that certain Senior Secured Super -Priority Debtor-In-Possession Credit Agreement, dated as of September \_\_, 2016, by and among Delivery Agent, as borrower, each of Music Today, Clean Fun, and Shop the Shows, as guarantors, the DIP Agent and the DIP Lender, as amended, restated, supplemented or otherwise modified from time to time in accordance with the DIP Order.

**“DIP Financing”** means the debtor-in possession financing facility under the DIP Credit Agreement.

**“DIP Lender”** shall mean the “Lender” as defined in and under the DIP Credit Agreement.

**“DIP Obligations”** shall mean the “DIP Obligations” as defined under the DIP Order.

**“DIP Order”** means any Order of the Bankruptcy Court relating to the DIP Financing.

**“Documents”** means all files, documents, instruments, papers, books, reports, records, tapes, microfilms, photographs, letters, budgets, forecasts, ledgers, journals, title policies, customer lists, regulatory filings, operating data and plans, technical documentation (design specifications, functional requirements, operating instructions, logic manuals, flow charts, etc.), user documentation (installation guides, user manuals, training materials, release notes, working papers, etc.), marketing documentation (sales brochures, flyers, pamphlets, web pages, etc.), and other similar materials, in each case whether or not in electronic form.

**“Employee Claim”** means any claim, demand, action, cause of action, damage, loss, cost, Liability or expense, including legal costs, made or brought by any Employee, including, but not limited to, any claim made pursuant to any applicable Laws relating to employment standards, occupational health and safety, labor relations, workers compensation, pay equity, employment equity, WARN, the Americans with Disabilities Act, the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act, the Family and Medical Leave Act or the Fair Labor Standards Act or any other federal, state or local, statutory or decisional Law regarding employment discrimination.

**“Employee Obligations”** means all wages, bonuses, incentive, equity, equity-based or similar compensation obligations, deferred compensation arrangements, vacation pay, sick time, pension payments, overtime pay, change of control payments, severance pay and any other termination or severance obligations and any other compensation or obligation which may be due by statute, contract or Law relating to the employment of the Employees in respect of the Business.

**“Employees”** means all individuals, as of the date hereof, whether or not actively at work as of the date hereof, who are employed by Sellers in connection with the Business, together with individuals who are hired in respect of the Business after the date hereof and prior to the Closing.

**“Excluded Assets”** shall have the meaning set forth in Section 2.2, subject to Section 2.7(c).

**“Excluded Contracts”** means all Contracts other than Purchased Contracts, subject to Section 2.7(c).

**“Excluded Liabilities”** shall have the meaning set forth in Section 2.3.

**“Expense Reimbursement”** means Buyer’s reasonable fees, costs and expenses (including, without limitation, consultants’ and attorneys’ fees, costs and expenses) incurred in connection with the transactions contemplated by this Agreement through the date of termination, including any such Person employed by any of Buyer’s Affiliates, not to exceed in the aggregate \$350,000 minus amounts paid by Sellers to the DIP Agent as adequate protection, prior to such termination, for such fees, costs and expenses as provided in any DIP Order.

**“Financial Statements”** has the meaning set forth in Section 5.7.

**“First Lien Credit Agreement”** means that certain Business Financing Agreement, dated as of December 9, 2015, by and among certain of the Sellers and the First Lien Lender, as amended, restated, supplemented or otherwise modified from time to time.

**“First Lien Lender”** means Western Alliance Bank, an Arizona corporation.

**“Final Order”** means an Order, judgment, or other decree of the Bankruptcy Court that has not been vacated, reversed, modified, amended, or stayed, and for which the time to further appeal or seek review or rehearing has expired with no appeal, review or rehearing having been filed or sought.

**“Furniture and Equipment”** means all furniture, fixtures, furnishings, equipment, vehicles, leasehold improvements, and other tangible personal property owned or leased by Sellers, including all artwork, desks, chairs, tables, computer and computer-related hardware (including, computers, file servers, facsimile servers, scanners, printers, and networks), copiers, telephone lines and numbers, telecopy machines and other telecommunication equipment, cubicles, cash registers, point-of-sale equipment, warehouse equipment, and miscellaneous office furnishings and supplies.

**“GAAP”** means generally accepted accounting principles in the United States.

**“Governmental Body”** means any government or governmental or regulatory body thereof, or political subdivision thereof, whether foreign, federal, state, or local, or any agency, instrumentality or authority thereof, or any court or arbitrator (public or private).

**“Hillair Debenture”** means that certain 8% Original issue Discount Secured Convertible Debenture, dated as of December 9, 2015, issued by Delivery Agent in favor of the Debenture Lender and guaranteed by MusicToday and Clean Fun Promotional marketing, Inc., a California corporation, as amended, restated, supplemented or otherwise modified from time to time.

**“Hillair Obligations”** shall mean Liabilities of the Sellers on account of the Hillair Debenture plus the Hillair Secured Note, together with all fees, expenses, indemnities and reimbursement obligations due thereunder and interest thereon accruing both before and after the Petition Date to the extent allowable under the Bankruptcy Code.

**“Hillair Secured Note”** shall mean the amount advanced by Debenture Lender under that certain Secured Promissory Note dated September 8, 2016.

**“Indebtedness”** of any Person means, without duplication, (i) the principal and interest of, and premium (if any) in respect of, (A) indebtedness of such Person for money borrowed and (B) indebtedness evidenced by notes, debentures, bonds or other similar instruments for the payment of which such Person is responsible or liable; (ii) all obligations of such Person issued or assumed as the deferred purchase price of property, all conditional sale obligations of such Person and all obligations of such Person under any title retention agreement (but excluding trade accounts payable and other accrued liabilities arising in the Ordinary Course of Business); (iii) all obligations of such Person under leases required to be capitalized in accordance with GAAP; (iv) all obligations of such Person for the reimbursement of any obligor on any letter of credit, banker’s acceptance or similar credit transaction; (v) all obligations of the type referred to in clauses (i) through (iv) of other Persons for the payment of which such Person is responsible or liable, directly or indirectly, as obligor, guarantor or otherwise, including guarantees of such obligations; and (vi) all obligations of the type referred to in clauses (i) through (v) of other

Persons secured by any Lien on any property or asset of such Person (whether or not such obligation is assumed by such Person).

**“Intellectual Property”** means all worldwide intellectual property rights of Sellers, including all (i) patents, patent applications and inventions, (ii) trademarks, service marks, trade names and trade dress, which expressly includes the goodwill and any common law rights associated with the foregoing, (iii) domain names, websites and mobile device applications, (iv) copyrights, including copyrights in computer software, (v) confidential and proprietary information, including trade secrets, confidential business information, ideas, research and development, customer and supplier lists, pricing and cost information, business and marketing plans and proposals, and know-how (**“Trade Secrets”**), (vi) licenses relating to any of the foregoing, (vi) registrations and applications for registration and renewal of the foregoing, and (vii) any past, present or future claims or causes of action arising out of or related to any infringement or misappropriation of any of the foregoing.

**“Inventory”** means all of Sellers’ now owned or hereafter acquired inventory and goods, wherever located, including, without limitation, all inventory and goods that (a) are leased by any Seller as lessor, (b) are held by such Seller for sale or lease or to be furnished under a contract of service, (c) are furnished by any Seller under a Contract of service, or (d) consist of raw materials, work in process, finished goods or material used or consumed in connection with the Business, provided, however, that for the avoidance of doubt, “Inventory” does not mean any inventory or goods that have been consigned to Sellers.

**“Knowledge”** means, with respect to Sellers, actual current knowledge, after due inquiry, of those Persons listed on Exhibit C hereto.

**“Law”** means any federal, state, local or foreign law, statute, code, ordinance, rule or regulation or Order.

**“Legal Proceeding”** means any judicial, administrative or arbitral actions, suits, proceedings (public or private) or claims or any proceedings by or before a Governmental Body, and any appeal from any of the foregoing.

**“Liability”** means any Indebtedness, liability, obligation, commitment, expense, claim, deficiency, guaranty or endorsement of any type whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due), and including all costs and expenses relating thereto.

**“Lien”** means any lien, encumbrance, pledge, mortgage, deed of trust, security interest, claim, lease, option, right of first refusal, easement, servitude, proxy, voting trust or agreement, or transfer restriction under any shareholder or similar agreement or encumbrance.

**“Material Adverse Effect”** means any event, change, circumstance or occurrence that, individually or in the aggregate, has had or could reasonably be expected to have or result in (i) a material adverse effect on the business, assets, results of operations or financial condition of Sellers, the Business or the Purchased Assets, or (ii) a material adverse effect on the ability of Sellers to consummate the transactions contemplated by this Agreement or perform their obligations under this Agreement, other than (a) the effect of any change resulting from any

action taken by Buyer or its Affiliates with respect to the transactions contemplated hereby, or any effect resulting directly from the filing of the Bankruptcy Cases; (b) a generally applicable change in applicable Law or GAAP or interpretation thereof; (c) any public announcement of this Agreement; (d) any actions or inactions by Sellers in accordance with this Agreement; or (e) general economic, political or financial market conditions; provided that the foregoing clauses (b) and (e) shall not include, and therefore determination of “**Material Adverse Effect**” shall not exclude, any event, change, circumstance or occurrence that affect the Business, the Purchased Assets or the Assumed Liabilities in a disproportionate manner when compared to the effect of the same on other Persons engaged in the industries in which Sellers conduct the Business.

“**Non-Assignable Contracts**” has the meaning set forth in Section 2.8.

“**Non-Recourse Parties**” has the meaning set forth in Section 12.10.

“**Order**” means any order, injunction, judgment, decree, ruling, writ, assessment or arbitration award of a Governmental Body.

“**Ordinary Course of Business**” means the ordinary and usual course of normal day-to-day operations of the Business consistent with the past practice of the Business through the date hereof, subject to any duties and restrictions imposed on Sellers under the Bankruptcy Code.

“**Parent**” means Delivery Agent.

“**Parties**” means Sellers, the DIP Agent and Buyer.

“**Permits**” means any approvals, authorizations, consents, licenses, permits or certifications of a Governmental Body.

“**Permitted Access Parties**” has the meaning set forth in Section 8.1.

“**Permitted Exceptions**” means (i) all defects, exceptions, restrictions, easements, rights of way, encumbrances and Liens reflected in policies of title insurance which have been made available to or are obtained by Buyer and that would not interfere with the use of the Purchased Assets or conduct of the Business in accordance with historical practice; (ii) statutory Liens for current Taxes, assessments or other governmental charges not yet delinquent or the amount or validity of which is being contested in good faith by appropriate proceedings provided an appropriate reserve is established therefor; (iii) mechanics’, carriers’, workers’, repairers’ and similar Liens arising or incurred in the Ordinary Course of Business; (iv) zoning, entitlement and other land use and environmental regulations by any Governmental Body in the Ordinary Course of Business provided that such regulations have not been violated; (v) title of a lessor under a capital or operating lease, (vi) Liens arising under the DIP Credit Agreement, Hillair Debenture, or First Lien Credit Agreement, and (vii) such other imperfections in title which would not interfere with the use of the Purchased Assets.

“**Person**” means any individual, corporation, limited liability company, partnership, firm, joint venture, association, joint-stock company, trust, unincorporated organization, Governmental Body or other entity.



**“Personal Property Leases”** shall have the meaning set forth in Section 5.5.

**“Petition Date”** shall have the meaning set forth in the Recitals.

**“Previously Omitted Contract”** has the meaning set forth in Section 2.7(d)(i).

**“Previously Omitted Contract Designation”** has the meaning set forth in Section 2.7(d)(i).

**“Previously Omitted Contract Notice”** has the meaning set forth in Section 2.7(d)(ii).

**“Products”** means any and all products developed, manufactured, procured, marketed or sold by Sellers, whether work in progress or in final form.

**“Prospective Employees”** shall have the meaning set forth in Section 8.11(a).

**“Purchase Price”** shall have the meaning set forth in Section 3.1.

**“Purchased Assets”** shall have the meaning set forth in Section 2.1.

**“Purchased Contracts”** means the Contracts set forth on Schedule 1.1(b), as such Schedule may be amended from time to time in accordance with this Agreement.

**“Purchased Intellectual Property”** means all Intellectual Property and related Software and Technology of the Sellers, including as set forth on Schedule 1.1(c), except such Intellectual Property that is specifically excluded by Buyer.

**“Purchased Inventory”** means, as of the Closing, all Inventory except as specifically excluded by Buyer.

**“Real Property Leases”** shall have the meaning set forth in Section 5.4.

**“Roll-Up DIP Obligations”** means all DIP Obligations comprised of “Obligations” (as defined in the DIP Credit Agreement) that were converted to DIP Obligations as a result of the Prepetition Debenture Lien Roll-Up (as defined in the DIP Order) pursuant to the DIP Order.

**“Sale and Bid Procedures Motion”** means the motion or motions of Sellers, in form and substance acceptable to Buyer and Sellers, to be filed with the Bankruptcy Court seeking approval and entry of the Bid Procedures Order, and, in the event that Buyer is the winning bidder at the Auction or no Competing Bid is submitted, the Sale Order.

**“Sale Order”** shall be an Order of the Bankruptcy Court, substantially in the form and content attached hereto as Exhibit B or as otherwise approved by Buyer in its sole and absolute discretion.

**“Sellers”** shall have the meaning set forth in the Preamble.

**“Seller Documents”** shall have the meaning set forth in Section 5.1.

**“Seller Marks”** has the meaning set forth in Section 8.12.

**“Seller Names”** has the meaning set forth in Section 8.12.

**“Software”** means, except to the extent generally available for purchase from third Persons, any and all (i) computer programs, including any and all software implementations of algorithms, models and methodologies, whether in source code or object code, (ii) databases and compilations, including any and all data and collections of data, whether machine readable or otherwise, (iii) descriptions, flow-charts and other work product used to design, plan, organize and develop any of the foregoing, screens, user interfaces, report formats, firmware, development tools, templates, menus, buttons and icons and (iv) all documentation including user manuals and other training documentation related to any of the foregoing.

**“Tax Return”** means all returns, declarations, reports, estimates, claims for refund, information returns and statements required to be filed in respect of any Taxes, including any schedule or attachment thereto and any amendment thereof.

**“Taxes”** means (i) all federal, state, local or foreign taxes, charges or other assessments, including, without limitation, all net income, gross receipts, capital, sales, use, ad valorem, value added, transfer, franchise, profits, Inventory, capital stock, license, withholding, payroll, employment, social security, unemployment, excise, severance, stamp, occupation, property, escheatment or unclaimed property, and estimated taxes, and together with all interest, penalties, fines, additions to tax or additional amounts imposed by any taxing authority in connection with any item described in this clause (i), (ii) any liability for the payment of any amounts of any of the foregoing types as a result of being a member of an affiliated, consolidated, combined or unitary group, or being a party to any agreement or arrangement whereby liability for payment of such amounts was determined or taken into account with reference to the liability of any other Person, (iii) any liability for the payment of any amounts as a result of being a party to any tax sharing or allocation agreements or arrangements (whether or not written) or with respect to the payment of any amounts of any of the foregoing types as a result of any express or implied obligation to indemnify any other Person, and (iv) any liability for the payment of any of the foregoing types as a successor, transferee or otherwise.

**“Technology”** means, collectively, all designs, formulae, algorithms, procedures, methods, techniques, ideas, know-how, research and development, technical data, programs, subroutines, tools, materials, specifications, processes, inventions (whether patentable or unpatentable and whether or not reduced to practice), apparatus, creations, improvements, works of authorship and other similar materials, and all recordings, graphs, drawings, reports, analyses, and other writings, and other tangible embodiments of the foregoing, in any form whether or not specifically listed herein, and all related technology, that are used in, incorporated in, embodied in, displayed by or relate to, or are used or useful in the Business or in the design, development, reproduction, maintenance or modification of, any of the Products.

**“Termination Date”** shall have the meaning set forth in Section 4.4(c)(viii).

**“Trade Secrets”** shall have the meaning set forth in Section 1.1 (in the definition of Intellectual Property).

“**Transfer Taxes**” means sales, use, stamp, documentary stamp, recording, transfer or similar fees or Taxes or governmental charges (including any interest and penalty thereon) payable in connection with Sellers’ transfer of the Purchased Assets to Buyer pursuant to this Agreement.

“**WARN Act**” means the Worker Adjustment and Retraining Notification Act of 1988, as amended, and any similar state Law related thereto.

“**Wind Down Payments**” shall have the meaning set forth in Section 3.1(b).

Section 1.2 **Other Definitional and Interpretive Matters.**

(a) Unless otherwise expressly provided, for purposes of this Agreement, the following rules of interpretation shall apply:

Calculation of Time Period. When calculating the period of time before which, within which or following which any act is to be done or step taken pursuant to this Agreement, the date that is the reference date in calculating such period shall be excluded. If the last day of such period is a non-Business Day, the period in question shall end on the next succeeding Business Day.

Dollars. Any reference in this Agreement to \$ shall mean U.S. dollars.

Exhibits/Schedules. The Exhibits and Schedules to this Agreement are hereby incorporated and made a part hereof and are an integral part of this Agreement. All Exhibits and Schedules annexed hereto or referred to herein are hereby incorporated in and made a part of this Agreement as if set forth in full herein. Any matter or item disclosed on one Schedule shall not be deemed to have been disclosed on any other Schedule unless explicitly cross-referenced. Any capitalized terms used in any Schedule or Exhibit but not otherwise defined therein shall be defined as set forth in this Agreement.

Gender and Number. Any reference in this Agreement to gender shall include all genders, and words imparting the singular number only shall include the plural and vice versa.

Headings. The provision of a Table of Contents, the division of this Agreement into Articles, Sections and other subdivisions and the insertion of headings are for convenience of reference only and shall not affect or be utilized in construing or interpreting this Agreement. All references in this Agreement to any “Section” are to the corresponding Section of this Agreement unless otherwise specified.

Herein. The words such as “herein,” “hereinafter,” “hereof,” and “hereunder” refer to this Agreement as a whole and not merely to a subdivision in which such words appear unless the context otherwise requires.

Including. The word “including” or any variation thereof means “including, without limitation” and shall not be construed to limit any general statement that it follows to the specific or similar items or matters immediately following it.

(b) The Parties hereto have participated jointly in the negotiation and drafting of this Agreement and, in the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as jointly drafted by the Parties hereto and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any provision of this Agreement.

**ARTICLE II**  
**PURCHASE AND SALE OF ASSETS; ASSUMPTION OF LIABILITIES**

Section 2.1 **Purchase and Sale of Assets.** On the terms and subject to the conditions set forth in this Agreement, at the Closing Buyer shall purchase, acquire and accept from Sellers, and Sellers shall sell, transfer, assign, convey and deliver to Buyer the Purchased Assets. **“Purchased Assets”** shall mean all of Sellers’ right, title and interest in, to and under the following assets of Sellers (but excluding Excluded Assets) as of the Closing:

(a) all Accounts Receivable of Sellers, together with any unpaid financing charges accrued thereon;

(b) all cash, cash equivalents, bank deposits and similar cash items of Sellers, other than the Cash Payment;

(c) all Purchased Inventory;

(d) all deposits (including, without limitation, customer deposits and security deposits for rent, electricity, telephone or otherwise) and other prepaid charges and expenses of Sellers;

(e) all rights of Sellers under each Real Property Lease set forth on Schedule 1.1(b), together with Sellers’ interests in and to all improvements and fixtures under each such Real Property Lease, and other appurtenances thereto, and Sellers’ rights in respect thereof;

(f) all Furniture and Equipment except as expressly identified by Buyer;

(g) all Purchased Intellectual Property, to the extent transferable and assignable;

(h) all Purchased Contracts, to the extent transferable and assignable;

(i) all Documents of Sellers, including Documents relating to Accounts Receivable, Employees, Products, services, marketing, advertising, promotional materials, Purchased Intellectual Property and all files, customer lists, files and documents (including credit information), supplier lists, records, literature and correspondence, whether or not physically located on any of the premises referred to in clause (e) above, but excluding Documents set forth in Section 2.2(d);

(j) all Permits held by Sellers, to the extent transferable and assignable;

- (k) all supplies owned by Sellers;
- (l) all insurance policies or rights to proceeds thereof other than any directors and officers or fiduciary insurance policy, each of which shall be an Excluded Asset;
- (m) all rights of Sellers under non-disclosure or confidentiality, non-compete, or non-solicitation agreements with Employees and agents of Sellers or with third parties (other than confidentiality agreements entered into in connection with the process to sell the Business or any other business of the Sellers or to obtain financing or raise capital);
- (n) all rights of Sellers under or pursuant to all warranties, representations and guarantees made by suppliers, manufacturers and contractors;
- (o) subject to the provisions of Section 363(b)(1)(A) of the Bankruptcy Code, all goodwill and other intangible assets associated with the Business and/or the Purchased Assets, including customer and supplier lists and the goodwill associated with the Purchased Intellectual Property owned by Sellers;
- (p) any claim, right or interest of Sellers in or to any refund, rebate, abatement or other recovery for Taxes, together with any interest due thereon or penalty rebate arising therefrom;
- (q) all rights, claims or causes of action of Sellers, including any rights or claims arising under Chapter 5 of the Bankruptcy Code, relating to assets, properties, Business or operations of Sellers or the Purchased Assets;
- (r) to the extent transferable, all prepaid Taxes and Tax credits of Sellers;
- (s) subject to the provisions of Section 363(b)(1)(A) of the Bankruptcy Code, all rights to the telephone and facsimile numbers and e-mail addresses used by Sellers, as well as rights to receive mail and other communications addressed to Sellers (including mail and communications from customers, suppliers, distributors and agents);
- (t) all other property and assets pertaining to or used or useful in the conduct of the Business or the ownership of the Purchased Assets, including but not limited to the assets set forth on Schedule 2.1(t); and
- (u) all other assets, properties, rights and claims of any Seller of any kind or nature whatsoever not otherwise described above but that are not expressly designated as Excluded Assets.

Notwithstanding anything herein to the contrary, Buyer may, from time to time, amend the Purchased Assets so as to include additional assets in its sole and absolute discretion until the Closing (except that Buyer may not add as a Purchased Asset anything specifically listed in Section 2.2 below as an Excluded Asset, other than Excluded Contracts); and provided, however, that no such addition shall result in any adjustment of the Purchase Price. Furthermore, Buyer may, from time to time, remove any Purchased Contract from Schedule 1.1(b) and/or any other Purchased Asset from this Section 2.1 in its sole and absolute discretion until the Closing and

elect to treat such Contract, Permit and/or other asset in accordance with Section 2.7(c) or as an Excluded Asset.

Section 2.2 **Excluded Assets**. Nothing herein contained shall be deemed to sell, transfer, assign or convey the Excluded Assets to Buyer, and Sellers shall retain all right, title and interest to, in and under the Excluded Assets. “**Excluded Assets**” shall mean all assets, properties, interests and rights of Sellers other than the Purchased Assets and Designation Rights Assets, including without limitation each of the following assets:

- (a) the Cash Payment;
- (b) all Excluded Contracts;
- (c) all Liabilities, Indebtedness and other obligations, including any note Indebtedness, owed to or by any Seller to or by any Affiliate of any Seller;
- (d) any (i) books and records that Sellers are required by Law to retain; provided, however, that Buyer shall have, to the extent allowed by applicable Law, the right to make copies of any portions of such retained books and records; (ii) minute books, stock or membership interest records and corporate seals; and (iii) documents relating to proposals to acquire the Business by Persons other than Buyer;
- (e) all of Sellers’ rights under this Agreement and/or other documents and agreements executed in connection with the transactions provided for herein, including, without limitation, Sellers’ right to the Cash Payment;
- (f) the assets set forth on Schedule 2.2(f); and
- (g) any equity interests in any Seller or any subsidiary thereof.

Notwithstanding anything herein to the contrary, Buyer may, from time to time, exclude any assets from the Purchased Assets and/or Designation Rights Assets in its sole and absolute discretion until the Closing; provided, however, that if the Cure Amount for any Purchased Contract is subject to dispute as of the Closing, then (i) if and only if the Bankruptcy Court determines the Cure Amount for such Contract to be less than or equal to the amount set forth in Schedule 2.4(j), such Purchased Contract shall be assumed and assigned on the date of such determination by the Bankruptcy Court if not stayed, and (ii) if the Cure Amount for such Contract is determined by the Bankruptcy Court to be greater than the amount set forth in Schedule 2.4(j), then Buyer shall have ten (10) days after the date of such determination by the Bankruptcy Court, if such determination has not been stayed, to (x) declare in writing such Contract to be a Purchased Contract, in which case such Purchased Contract shall be assumed and assigned on the date of such written declaration, (y) designate in writing such Contract to be a Designation Rights Asset subject to Section 2.7(d), or (z) designate in writing such Contract to be an Excluded Contract or make no designation with respect to such Contract, in which case such Contract shall be deemed an Excluded Contract for all purposes hereunder; provided,

further, that no such exclusion or declaration shall result in any adjustment of the Purchase Price.<sup>1</sup>

Section 2.3 **Excluded Liabilities.** Buyer will not assume or have any responsibility with respect to any Liability of Sellers (or any predecessor or Affiliate of Sellers) of any nature whatsoever not expressly included within the definition of Assumed Liabilities, including, without limitation:

(a) Taxes (i) imposed on any Seller for any period (including, for the avoidance of doubt, Transfer Taxes), or (ii) arising out of or related to the Business or the Purchased Assets for all Tax periods (or portions thereof) ending on or prior to the Closing;

(b) any costs or expenses incurred in connection with, or related to, the administration of the Bankruptcy Cases, including, without limitation, any accrued professional fees and expenses of attorneys, accountants, financial advisors and other professional advisors related to the Bankruptcy Cases except as expressly set forth in Section 3.1(b);

(c) Liabilities to the extent arising out of or related to the Excluded Assets, including Liabilities relating to Excluded Contracts;

(d) Liabilities of Sellers under this Agreement or the Seller Documents;

(e) all Liabilities which may become due or owing under the Purchased Contracts (i) with respect to the period prior to the Closing (other than the Cure Amounts) or (ii) after the Closing but which arise out of or relate to any breach that occurred prior to the Closing (other than the Cure Amounts);

(f) all Indebtedness owed by any Seller or any predecessor of any Seller except pursuant to the First Lien Credit Agreement;

(g) any Employee Obligations to any Employee arising out of such Employee's employment by Sellers;

(h) any Employee Claim of any Employee arising out of such Employee's employment by Sellers;

(i) any WARN Act Liabilities;

(j) any claim (as defined in the Bankruptcy Code) arising prior to Closing and not expressly assumed pursuant to this Agreement;

(k) any Liability to any stockholder or other equity holder of any Seller or any predecessor of any Seller;

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<sup>1</sup> To be discussed

(l) any Liability arising out of or related to any Legal Proceeding commenced or threatened against any Seller or any predecessor of any Seller;

(m) any Liability for infringement or misappropriation of any intellectual property arising out of or related to any conduct of any Seller or operation of the Business on or before the Closing;

(n) except for the costs pursuant to the Designation Rights Budget to the extent set forth in Section 2.7(c), any Liability of any Seller based upon any Seller's acts or omissions occurring before or after the Closing unless expressly assumed by Buyer; and

(o) all other Liabilities and obligations for which Buyer does not expressly assume any liability (collectively, the "**Excluded Liabilities**").

Section 2.4 **Assumed Liabilities.** From and after the Closing Date, Buyer shall pay, perform and discharge, as and when due or as may otherwise be agreed between Buyer and the obligee, all of the Assumed Liabilities. The "**Assumed Liabilities**" are specifically as follows:

(a) all Liabilities of Sellers set forth on Schedule 2.4(a);

(b) all Liabilities under the Purchased Contracts accruing after the Closing;

(c) all Liabilities with respect to the Business or the Purchased Assets accruing after the Closing;

(d) all Liabilities, in the amounts listed on Schedule 2.4(e), to the vendors listed on Schedule 2.4(e) (regardless of the amount set forth in the vendors' proofs of claim); provided that to the extent such amounts are greater than the amount actually owed to such vendor, Buyer will only pay the actual amount owed to the vendor;

(e) all Liabilities expressly contemplated by the First Lien Credit Agreement, if not previously terminated;

(f) all Liabilities relating to amounts required to be paid by Buyer hereunder;

(g) all costs pursuant to the Designation Rights Budget to the extent set forth in Section 2.7(c); and

(h) subject to Section 9.1(g), the Cure Amounts, as determined by the Bankruptcy Court, if any, necessary to cure all defaults, if any, and to pay all actual or pecuniary losses that have resulted from such defaults under the Purchased Contracts assumed at Closing. Sellers have provided to Buyer a schedule set forth on Schedule 2.4(j) setting forth a good faith estimate as of the date hereof of all Cure Amounts for all Purchased Contracts, which schedule the Sellers shall update on or prior to the date that is fourteen (14) days prior to the Closing Date.

Buyer's assumption of the Assumed Liabilities shall in no way expand the rights or remedies of third parties against Buyer as compared to the rights and remedies which such parties would have had against Sellers had this Agreement not been consummated.



Section 2.5 **Purchased Assets.** Subject to the provisions of (i) Section 2.2 regarding Buyer's right to declare a Contract to be an Excluded Contract if the Cure Amount for such Contract is materially greater than the amount set forth on Schedule 2.4(j), (ii) Section 2.7(c) regarding the post-Closing time frame and procedure with respect to the Designation Rights Assets at Closing, and (iii) Section 2.8 regarding Non-Assignable Contracts, and pursuant to Section 363 and Section 365 of the Bankruptcy Code, Sellers shall assume, assign and sell to Buyer the Purchased Assets.

Section 2.6 **Further Conveyances and Assumptions.** From time to time following the Closing, Sellers and Buyer shall, and shall cause their respective Affiliates to, execute, acknowledge and deliver all such further conveyances, notices, assumptions, releases and acquaintances and such other instruments, and shall take such further actions, as may be reasonably necessary or appropriate to assure fully to Buyer and its respective successors or assigns, all of the properties, rights, titles, interests, estates, remedies, powers and privileges intended to be conveyed to Buyer under this Agreement and the Seller Documents and to assure fully to Sellers and their respective Affiliates and their respective successors and assigns, the assumption of the liabilities and obligations intended to be assumed by Buyer under this Agreement and the Seller Documents, and to otherwise make effective the transactions contemplated hereby and thereby. If following the Closing, the Sellers receive or become aware that they hold any property, right, claim, demand or asset which constitutes a Purchased Asset then the Sellers shall transfer such property, right, claim, demand or asset to the Buyer as promptly as practicable for no additional consideration.

Section 2.7 **Transitional Matters.**

(a) From and after Closing, Sellers shall retain full right and authority to use, enforce, pursue remedies and take actions with respect to any of the Excluded Assets.

(b) Buyer will retain and make available to Sellers, for a period of eighteen (18) months following the Closing Date, the Documents delivered by Sellers to Buyer, if reasonably needed by Sellers for liquidation, winding up, Tax reporting or other proper purposes; provided, that Sellers will use reasonable efforts to retain copies of Documents and the Parties otherwise will reasonably cooperate to minimize inconvenience to Buyer, provided, however, that after the period of eighteen (18) months following the Closing Date, Buyer shall notify Sellers, thirty (30) days in advance of any proposed destruction of the Documents, of its intent to destroy such Documents, and Buyer will permit Sellers (or their designee) to retain such Documents (at Sellers' or such designee's sole cost and expense). With respect to any litigation and Claims that are Excluded Liabilities, Buyer shall (at Sellers' sole cost and expense) render reasonable assistance to Sellers in defending such litigation or claim and shall make available to Sellers for reasonable time periods, their counsel and their other agents, advisors or representatives, Buyer's personnel most knowledgeable about the matter in question.

(c) Following the Closing Date, Sellers shall be permitted to continue to use the Seller Names only as provided in Section 8.12, and Buyer shall, or shall cause its Affiliates to, grant a non-exclusive license to the extent necessary to permit such use.<sup>2</sup>

(d) Designation Rights.

(i) During the Designation Rights Period, Sellers shall (A) not reject any Contract unless such Contract is expressly designated by Buyer in writing as an Excluded Contract or unless otherwise agreed to in writing by Buyer and (B) hold all Permits and other assets specified by Buyer in writing in abeyance pending designation for assignment or exclusion by Buyer in accordance with this Section 2.7(c).

(ii) Any Contract not designated by Buyer in writing as either a Purchased Contract or an Excluded Contract, and any Permits and other assets designated in writing by Buyer, in each case prior to Closing, shall constitute a **“Designation Rights Asset.”** Buyer shall have the right, by written notice to Sellers within the Designation Rights Period, to specify that (A) any Designation Rights Asset that is a Contract shall be held by the Sellers and not rejected pursuant to Section 365 of the Bankruptcy Code for the duration of the Designation Rights Period or earlier as provided in this Section 2.7(c), and (B) any Designation Rights Asset that is not a Contract shall be held by Sellers in abeyance during the Designation Rights Period pending designation for assignment or exclusion by Buyer in accordance with this Section 2.7(c). With respect to any Designation Rights Asset, (i) Buyer shall reimburse Sellers and thereby be solely responsible for all costs associated with the continuation or holding by Sellers of such Designation Rights Asset (as set forth in a budget proposed by Sellers and approved by Buyer no later than ten (10) days prior to the Closing Date, provided, however, that such budget may be amended from time to time by Sellers with the written consent of Buyer, such consent not to be unreasonably withheld (such budget as may be amended under this Section 2.7(c), the **“Designation Rights Budget”**)) for the period from the Closing through the earlier of (A) the end of the Designation Rights Period and (B) the date of Sellers’ receipt of written notice from Buyer designating the assignment or exclusion of such Designation Rights Asset (such date, such Designation Rights Asset’s **“Designation Rights End Date”**), (ii) for the avoidance of doubt, all consideration received by Sellers in respect of, and other benefits deriving from, such Designation Rights Asset (including Designation Rights Assets sold or assigned to third parties in accordance with clause (iii) below) until such Designation Rights Asset’s Designation Rights End Date, shall be promptly delivered to Buyer, and (iii) the foregoing shall not affect the validity of the transfer to Buyer of any other Purchased Asset whether or not related to such Designation Rights Asset. In the event that the costs associated with any Designation Rights Asset exceed the Designation Rights Budget (a **“Designation Cost Overage”**), Buyer shall not be liable for such Designation Cost Overage.

(iii) As to each Designation Rights Asset, as soon as practical after receiving further written notice(s) (each, a **“Designation Notice”**) from Buyer during the Designation Rights Period requesting assumption, assignment and sale of any Designation Rights Asset to Buyer or a third party, Sellers shall, subject to Buyer or such third party demonstrating

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<sup>2</sup> Discuss other transitional services required by Sellers (e.g., reports, tax returns, etc.)

adequate assurance of future performance thereunder and paying all Cure Amounts to the extent required by Section 365 of the Bankruptcy Code, and subject to Section 2.8 regarding Non-Assignable Contracts, take all actions required by the Sale Order or otherwise that are reasonably necessary to seek to assume, assign and sell to Buyer or such third party the applicable Designation Rights Asset pursuant to Section 363 of the Bankruptcy Code and, if such Designation Rights Asset is a Contract, Section 365 of the Bankruptcy Code.

(iv) Following the earlier of (A) the end of the Designation Rights Period and (B) the date of Sellers' receipt of written notice from Buyer designating the exclusion of a Designation Rights Asset, a Designation Rights Asset shall be deemed to be an Excluded Asset for all purposes under this Agreement.

(v) Sellers and Buyer agree and acknowledge that the covenants set forth in this Section 2.7(c) shall survive the Closing.

(vi) Notwithstanding anything in this Agreement to the contrary, on the date any Designation Rights Asset is assumed, assigned and sold to Buyer or its designee pursuant to this Section 2.7(c), such Designation Rights Asset shall be deemed a Purchased Asset for all purposes under this Agreement and no further consideration (except for the applicable Cure Amount with respect to Designation Rights Assets that are Contracts and the payments due with respect to Designation Rights Assets under the Designation Rights Budget) shall be required to be paid for any Designation Rights Asset that is assumed, assigned and sold to Buyer or its designee.

(vii) Sellers shall use reasonable best efforts to extend the deadline for assumption or rejection of any Designation Rights Asset that is a Real Property Lease for the maximum permitted period of time under Section 365 of the Bankruptcy Code.

(e) Previously Omitted Contracts.

(i) If prior to or following Closing it is discovered that a Contract should have been listed on Schedule 1.1(a) but was not listed on Schedule 1.1(a), (any such Contract, a "**Previously Omitted Contract**"), Sellers shall, promptly following the discovery thereof (but in no event later than two (2) Business Days following the discovery thereof), notify Buyer in writing of such Previously Omitted Contract and all Cure Amounts (if any) for such Previously Omitted Contract. Buyer shall thereafter deliver written notice to Sellers, no later than five (5) Business Days following notification of such Previously Omitted Contract from Sellers, designating such Previously Omitted Contract as "Assumed" or "Rejected" (a "**Previously Omitted Contract Designation**"). A Previously Omitted Contract designated in accordance with this Section 2.7(d)(i) as "Rejected," or with respect to which Buyer fails to timely deliver a Previously Omitted Contract Designation, shall be an Excluded Contract.

(ii) If Buyer designates a Previously Omitted Contract as "Assumed" in accordance with Section 2.7(d)(i), (A) Schedule 1.1(b) shall be amended to include such Previously Omitted Contract and (ii) Sellers shall serve a notice (the "**Previously Omitted Contract Notice**") on the counterparties to such Previously Omitted Contract notifying such counterparties of the Cure Amounts with respect to such Previously Omitted Contract and

Sellers' intention to assume and assign such Previously Omitted Contract in accordance with this Section 2.7(d) with no adjustment to the Purchase Price. The Previously Omitted Contract Notice shall provide the counterparties to such Previously Omitted Contract with seven (7) days to object, in writing to the Sellers and Buyer, to the Cure Amount and the assumption, assignment and sale of the Previously Omitted Contract. If the counterparties, Sellers and Buyer are unable to reach a consensual resolution with respect to the objection, Sellers will seek an expedited hearing before the Bankruptcy Court to determine the Cure Amounts and approve the assumption, assignment and sale. If no objection is timely served on Sellers and Buyer, Sellers shall obtain an Order of the Bankruptcy Court fixing the Cure Amounts and approving the assumption of the Previously Omitted Contract.

Section 2.8 **Non-Assignable Contracts.** To the extent that any Purchased Contract is not capable of being assumed and assigned to Buyer at the Closing under Section 365 of the Bankruptcy Code without the consent of the other party thereto or any third party (including a Governmental Body), and such consent cannot be obtained without Sellers or Buyer compromising any right, asset, or benefit or expending any amount or incurring any Liability or providing any other consideration other than as provided in Section 2.5 (collectively, the "**Non-Assignable Contracts**"), this Agreement shall not constitute an assignment thereof, or an attempted assignment, unless and until such consent is obtained, provided, however, that the Sellers will use their reasonable efforts to facilitate Buyer's negotiation with the other party or non-consenting third party to each Non-Assignable Contract provide Buyer the same interest, benefits and rights under any such Non-Assignable Contracts as the applicable Seller had immediately prior to the Closing, and if arrangements are made such that Buyer has obtained the same interest, benefits and rights under any such Non-Assignable Contracts as the applicable Seller had immediately prior to the Closing, then, as between Sellers and Buyer, such Non-Assignable Contracts shall be deemed to be assigned and Buyer shall perform all obligations and covenants thereunder. Notwithstanding the foregoing, nothing in this Section 2.8 shall require any Seller to renew, modify, or amend any Non-Assignable Contract once it has expired or expend any amount or incur any Liability to facilitate Buyer's negotiations with any party or non-consenting third party with respect to any Non-Assignable Contract. Any Non-Assignable Contract assigned pursuant to the terms of this Section 2.8 shall, when assigned, constitute a Purchased Asset for all purposes under this Agreement.

### **ARTICLE III** **CONSIDERATION**

#### **Section 3.1 Purchase Price.**

(a) In consideration of the transfer of the Purchased Assets to Buyer and the other undertakings set forth herein, the purchase price (the "**Purchase Price**") for the Purchased Assets shall be (i) \$18,914,000 (plus accrued interest thereon) (the "**Credit Bid Amount**"), to be satisfied in the form of a credit against the DIP Obligations and the Debenture Obligations pursuant to Section 363(k) of the Bankruptcy Code, plus (ii) the Cash Payment as set forth in Section 3.1(b).

(b) Buyer shall pay by wire transfer of immediately available funds, as and when such amounts become due, the amounts payable to the parties set forth on Schedule 3.1 in

an amount not to exceed the lesser of (A) the aggregate amount set forth on such Schedule, (B) the specific amount set forth on a line item basis next to each item on Schedule 3.1, and (C) the actual amounts that Sellers and Buyer mutually agree are required to be paid to such parties (the “**Wind Down Payments**” or the “**Cash Payment**”), provided, however, Buyer and Sellers hereby acknowledge and agree that the Wind Down Payments shall not exceed \$250,000 in the aggregate.

#### **ARTICLE IV** **CLOSING AND TERMINATION**

Section 4.1 **Closing Date.** Subject to the satisfaction of the conditions set forth in Section 9.1, Section 9.2 and Section 9.3 hereof (or the waiver thereof by the Party entitled to waive that condition), the closing of the purchase and sale of the Purchased Assets and the assumption of the Assumed Liabilities provided for in Article II hereof, but in no event later than 59 days following the Petition Date (the “**Closing**”) shall take place remotely via electronic communication (or at such other place as the Parties may designate in writing) as soon as practicable following the satisfaction or waiver of the conditions set forth in Article IX (other than conditions that by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of such conditions) and no later than a date that is three (3) Business Days after the Sale Order becomes a Final Order unless extended by Buyer in its sole discretion. The date on which the Closing shall be held is referred to in this Agreement as the “**Closing Date**,” and the Closing shall be deemed effective at the close of business on the Closing Date.

Section 4.2 **Deliveries by Sellers.** At the Closing, Sellers shall deliver to Buyer:

- (a) a duly executed bill of sale and assignment;
- (b) duly executed assignments of the U.S. trademark registrations and applications included in the Purchased Intellectual Property, in a form suitable for recording in the U.S. trademark office, and general assignments of all other Purchased Intellectual Property;
- (c) the officer’s certificate required to be delivered pursuant to Section 9.1(a), Section 9.1(b) and Section 9.1(e); and
- (d) all other instruments of conveyance and transfer, in form and substance reasonably acceptable to Buyer, as may be necessary to convey the Purchased Assets to Buyer.

Section 4.3 **Deliveries by Buyer.** At the Closing, Buyer shall deliver to Sellers:

- (a) the Cash Payment, in immediately available funds, to the extent forth in Section 3.1(b);
- (b) the officer’s certificate required to be delivered pursuant to Section 9.2(a) and Section 9.2(b); and
- (c) all other instruments of conveyance and transfer, in form and substance reasonably acceptable to Sellers, as may be necessary to convey the Purchased Assets to Buyer and for Buyer to assume the Assumed Liabilities.

Section 4.4 **Termination of Agreement.** This Agreement may be terminated prior to the Closing as follows:

(a) by mutual written consent of Sellers and Buyer;

(b) by Sellers or Buyer:

(i) if any of the conditions set forth in Section 9.3 shall have become incapable of fulfillment other than as a result of a breach by the Sellers or Buyer, as applicable, of any covenant or agreement contained in this Agreement, and such condition is not waived by the non-breaching party; or

(ii) if there shall be in effect a final nonappealable Order of a Governmental Body of competent jurisdiction restraining, enjoining or otherwise prohibiting the consummation of the transactions contemplated hereby; it being agreed that the Parties hereto shall promptly appeal any adverse determination which is not nonappealable (and pursue such appeal with reasonable diligence);

(c) by Buyer:

(i) if there shall be a material breach by Sellers of any representation or warranty, or any covenant or agreement contained in this Agreement which would result in a failure of a condition set forth in Section 9.1 or Section 9.3 and which breach cannot be cured or has not been cured by the earlier of (i) ten (10) Business Days after the giving of written notice by Buyer to Sellers of such breach and (ii) the Termination Date;

(ii) in the event (i) the Petition Date has not occurred within three (3) Business Days after the date hereof, (ii) the Sellers have not filed a motion to approve the Bid Procedures Order within two (2) days following the Petition Date, (iii) the hearing on the motion to approve the Bid Procedures Order has not been completed within twenty-four (24) days following the Petition Date, (iv) the Bankruptcy Court has not entered the Bid Procedures Order within twenty-five (25) days following the Petition Date, and/or (v) the Bid Procedures Order shall have been stayed, vacated, modified or supplemented without Buyer's prior written consent;

(iii) in the event (i) the Auction, if necessary, has not been completed within fifty-two (52) days following the Petition Date, (ii) the hearing to approve the Sale Order has not concluded within fifty-four (54) days following the Petition Date, (iii) the Bankruptcy Court has not entered the Sale Order within fifty-five days (55) following the Petition Date, (iv) the Sale Order has not become a Final Order within fifty-nine (59) days following the Petition Date, and/or (vi) the Sale Order shall have been stayed, vacated, modified or supplemented without Buyer's prior written consent;

(iv) if the Sale Order with respect to the transactions contemplated by this Agreement has been entered and (i) Buyer has provided Sellers with written notice that it is prepared to consummate the Transactions, (ii) the conditions to Closing in Article IX have been satisfied (or waived, to the extent permissible, by the Party entitled to the benefit of such condition), other than those conditions that by their nature can only be satisfied at Closing) and

(iii) the Closing Date does not occur within five (5) Business Days of Buyer providing Sellers with such notice;

(v) if, prior to the Closing, any Seller seeks to have the Bankruptcy Court enter an Order dismissing, or converting into cases under Chapter 7 of the Bankruptcy Code, any of the Bankruptcy Cases, or appointing a trustee in any Bankruptcy Case or appointing a responsible officer or an examiner with enlarged powers relating to the operation of Sellers' businesses (beyond those set forth in Section 1106(a)(3) or (4) of the Bankruptcy Code) under Bankruptcy Code Section 1106(b), or such an Order of dismissal, conversion or appointment is entered for any reason and is not reversed or vacated within fourteen (14) days after the entry thereof;

(vi) if Sellers enter into or consummate an Alternative Proposal or Buyer is not determined to be the Winning Bidder or Back-Up Bidder in accordance with the Bid Procedures Order;

(vii) if the Closing shall not have occurred on or before the close of business on the date which is fifty-nine (59) days after Petition Date or such later date as determined by Buyer in its sole discretion (the "**Termination Date**"); provided, however, that if the Closing shall not have occurred on or before the Termination Date due to a material breach of any of the representations, warranties, covenants or agreements contained in this Agreement by Buyer, which would give the Sellers a right not to close pursuant to Article IX, then the Buyer may not terminate this Agreement pursuant to this Section 4.4(c)(vii);

(viii) if any of the conditions to the obligations of Buyer set forth in Section 9.1 shall have become incapable of fulfillment other than as a result of a breach by Buyer of any covenant or agreement contained in this Agreement, and such condition is not waived by Buyer; or

(ix) if any Seller breaches the DIP Credit Agreement or if there is an Event of Default (as defined in the DIP Credit Agreement) under the DIP Credit Agreement;

(x) if, for any reason, Buyer is unable, pursuant to Section 363(k) of the Bankruptcy Code, to credit bid the Credit Bid Amount in payment of the Purchase Price as set forth in Section 3.1; or

(d) by Sellers:

(i) if any condition to the obligations of Sellers set forth in Section 9.2 shall have become incapable of fulfillment other than as a result of a breach by Sellers of any covenant or agreement contained in this Agreement, and such condition is not waived by Sellers;

(ii) if there shall be a material breach by Buyer of any representation or warranty, or any covenant or agreement contained in this Agreement which would result in a failure of a condition set forth in Section 9.2 or Section 9.3 and which breach cannot be cured or has not been cured by the earlier of (i) ten (10) Business Days after the giving of written notice by Sellers to Buyer of such breach and (ii) the Termination Date;

(iii) if Buyer is neither the Winning Bidder nor Back-Up Bidder in accordance with the Bid Procedures Order; or

(iv) if the Closing shall not have occurred on or before the close of business on the date which is ninety (90) days after Petition Date.

**Section 4.5 Expense Reimbursement; Break-Up Fee.**

(a) Subject to the entry of the Bid Procedures Order, in consideration for Buyer having expended considerable time and expense in connection with this Agreement and the negotiation thereof and the identification and quantification of assets of Sellers, (i) if this Agreement is terminated pursuant to Sections 4.4(c)(i), (iv)-(vi), (ix), or Section 4.4(d)(iii) and Sellers consummate an Alternative Proposal for all or substantially all of the Purchased Assets, Sellers shall pay the Break-Up Fee to Buyer on the date of the closing of the Alternative Proposal; and (ii) if this Agreement is terminated pursuant to Sections 4.4(c)(i)-(vi), (ix) or Section 4.4(d)(iii), and Sellers consummate an Alternative Proposal for all or substantially all of the Purchased Assets, Sellers shall pay the Expense Reimbursement to Buyer on the date of the closing of the Alternative Proposal.

(b) In the event that Buyer is entitled to payment of the Break-Up Fee and/or Expense Reimbursement pursuant to Section 4.5(a) above, such Break-Up Fee or Expense Reimbursement, as applicable, shall be Buyer's sole and exclusive remedy against Sellers with respect to all claims of any nature whatsoever relating to this Agreement or the transactions contemplated hereunder.

**Section 4.6 Effect of Termination.**

(a) In the event that this Agreement is validly terminated in accordance with Section 4.4, this Agreement shall terminate and each of the Parties shall be relieved of its respective duties and obligations arising under this Agreement after the date of such termination and such termination shall be without liability to Buyer or Sellers; provided, however, that the obligations of the Parties set forth in Section 4.5, Section 7.1, Section 8.3, Section 8.5 and Article XII hereof shall survive any such termination and shall be enforceable hereunder.

(b) Remedies. All remedies under Section 4.5(a) are cumulative and are not exclusive of any other remedies provided by Law except as otherwise specifically provided.

**ARTICLE V**  
**REPRESENTATIONS AND WARRANTIES OF SELLERS**

Sellers hereby jointly and severally represent and warrant to Buyer that:

Section 5.1 **Authorization of Agreement.** Subject to the entry of the Sale Order: (a) each Seller has all requisite power, authority and legal capacity to execute and deliver this Agreement and each Seller has all requisite power, authority and legal capacity to execute and deliver each other agreement, document, instrument or certificate contemplated by this Agreement or to be executed by any Seller in connection with the consummation of the transactions contemplated by this Agreement (the "**Seller Documents**"), to perform their



respective obligations hereunder and thereunder and to consummate the transactions contemplated hereby and thereby; and (b) this Agreement has been, and each of the Seller Documents will be at or prior to the Closing, duly and validly executed and delivered by each Seller and (assuming the due authorization, execution and delivery by the other Parties hereto and thereto and the entry of the Sale Order) this Agreement constitutes, and each of the Seller Documents when so executed and delivered will constitute, legal, valid and binding obligations of each Seller, enforceable against each Seller in accordance with their respective terms.

Section 5.2 **No Conflicts.**

(a) Except as set forth on Schedule 5.2(a), none of the execution and delivery by any Seller of this Agreement or the Seller Documents, the consummation of the transactions contemplated hereby or thereby, or compliance by any Seller with any of the provisions hereof or thereof will result in the creation of any Lien upon the Purchased Assets, or conflict with, or result in any violation of or default (with or without notice or lapse of time, or both) under, or give rise to a right of payment, termination, modification, acceleration cancellation under any provision of (i) the certificate of incorporation and by-laws or comparable organizational documents of any Seller; (ii) subject to entry of the Sale Order, any Contract or Permit to which any Seller is a party or by which any of the properties or assets of any Seller are bound; (iii) subject to entry of the Sale Order, any Order of any Governmental Body applicable to any Seller or any of the properties or assets of any Seller as of the date hereof; or (iv) subject to entry of the Sale Order, any applicable Law, other than, in the case of clauses (ii), (iii) and (iv), such conflicts, violations, defaults, terminations, modifications, accelerations or cancellations that would not reasonably be expected to be material to the ownership and operation of the Business.

(b) Subject to entry of the Sale Order, and except as set forth on Schedule 5.2(b), no consent, waiver, approval, Order, Permit or authorization of, or declaration or filing with, or notification to any Person or Governmental Body is required on the part of any Seller in connection with the execution and delivery of this Agreement or the Seller Documents, the compliance by any Seller with any of the provisions hereof or thereof, the consummation of the transactions contemplated hereby or thereby or the taking by such Seller of any other action contemplated hereby or thereby, except for such consents, waivers, approvals, Orders, Permits, authorizations, declarations, filings and notifications, the failure of which to obtain or make would not be material to the ownership and operation of the Business.

Section 5.3 **Title to Purchased Assets.** Other than the real property subject to the Real Property Leases and the personal property subject to the Personal Property Leases, Sellers have good title to the Purchased Assets and, at the Closing, the Buyer, pursuant to the Sale Order, shall acquire good title in, to and under (subject to the Purchased Contracts (other than Purchased Contracts assumed or assigned post-Closing) being assumed and assigned in accordance with Section 2.1) all of such Purchased Assets, in each case free and clear of all Liens, other than Permitted Exceptions, to the fullest extent permissible under Section 363(f) of the Bankruptcy Code. The Purchased Assets constitute all of the assets, rights, interests and properties of every nature and kind whatsoever used or held for use by Sellers in connection with the Business, or otherwise necessary for Buyer to conduct and operate the Business immediately after the Closing. No Person other than Sellers are engaged in the operation of, or hold rights,

title and interest in, the Purchased Assets or assets that are used or useful in the operation of the Business.

Section 5.4 **Real Property Leases.** Schedule 1.1(a) sets forth a complete list of all real property and interests in real property leased by Sellers (individually, a “**Real Property Lease**” and collectively, the “**Real Property Leases**”) as lessee or lessor in connection with the Business and which are part of the Purchased Assets. Sellers have a valid and enforceable leasehold interest under each Real Property Lease under which it is a lessee, free and clear of all Liens of any nature whatsoever except Permitted Exceptions. Buyer has received true and complete copies of the Real Property Leases and any and all amendments, modifications, supplements, exhibits and restatements thereto and thereof in effect as of the date hereof. Each Real Property Lease is in full force and effect, and is valid and enforceable in accordance with its terms. To the Knowledge of the Sellers, except as set forth on Schedule 5.4, no Seller has received any written notice of any default or event that with notice or lapse of time, or both, would constitute a default by any Seller under any of the Real Property Leases that are currently in effect and eligible to be assumed by Buyer. Except as set forth on Schedule 5.4, there has been no default or event that with notice or lapse of time, or both, would constitute a default by the Company or any Subsidiary under any of the Real Property Leases.

Section 5.5 **Tangible Personal Property.** Schedule 1.1(a) sets forth all leases of personal property (“**Personal Property Leases**”) relating to personal property used by Sellers or to which any Seller is a party or by which the properties or assets of any Seller are bound, in each case relating to the Business. Each Seller has a valid and enforceable leasehold interest under each Personal Property Lease under which it is a lessee. No Seller has received any written notice of any default or event that with notice or lapse of time or both would constitute a default by any Seller under any of the Personal Property Leases.

Section 5.6 **Intellectual Property.** Schedule 1.1(c) sets forth an accurate and complete list of all Intellectual Property. Sellers exclusively own all right, title and interest to, or are licensees with respect to, the Purchased Intellectual Property, and can convey such property free and clear of Liens pursuant to the Sale Order. To the Knowledge of Sellers, (i) no Person is engaging in any activity that infringes any Purchased Intellectual Property and (ii) no claim has been asserted to any Seller that the use of any Purchased Intellectual Property or the operation of the Business infringes or violates the Intellectual Property of any third party. The Purchased Intellectual Property and the rights under the Purchased Contracts include the rights to use all Intellectual Property required to operate the Business as currently conducted.

Section 5.7 **Financial Statements.** Sellers have delivered to Buyer true and correct copies of (i) the audited consolidated balance sheets of Sellers as of December 31, 2015 and December 31, 2104 and the related audited consolidated statements of income and of cash flows of Sellers for the years then ended, and (ii) the unaudited consolidated balance sheet of the Sellers as of August 31, 2016, and the related consolidated statement of income and cash flows of Sellers for the eight (8) months then ended (such audited and unaudited statements, including the related notes and schedules thereto, are referred to herein as the “**Financial Statements**”). Each of the Financial Statements has been prepared in accordance with GAAP consistently applied without modification of the accounting principles used in the preparation thereof throughout the periods presented and presents fairly in all material respects the consolidated

financial position, results of operations and cash flows of Sellers as of the dates and for the periods indicated therein, subject to normal year-end adjustments and the absence of complete notes in the case of the unaudited statements. No Seller has any material Liabilities that would be required by GAAP to be reflected on a consolidated balance sheet (or the notes thereto) of the Company and its Subsidiaries, except for liabilities and obligations (a) reflected or reserved against in the Company's consolidated balance sheet as of December 31, 2015 (or the notes thereto) included in the Financial Statements, (b) incurred in the ordinary course of business since January 1, 2016, (c) which have been discharged or paid in full prior to the date of this Agreement, or (d) incurred pursuant to the transactions contemplated by this Agreement. Since January 1, 2014, to the Knowledge of Sellers, no Seller has received any complaint, allegation, assertion or claim regarding the accounting or auditing practices, procedures, methodologies or methods of Sellers or their respective internal accounting controls.

Section 5.8 **Financial Advisors.** No Person has acted, directly or indirectly, as a broker, finder or financial advisor for Sellers in connection with the transactions contemplated by this Agreement, and no Person is entitled to any fee or commission or like payment from Buyer or Sellers in respect thereof, in each case other than as set forth on Schedule 5.8.

Section 5.9 **Litigation.** Except as set forth on Schedule 5.9 and other than in connection with the Bankruptcy Cases, there is no suit, action, litigation, arbitration proceeding or governmental proceeding or audit, including appeals and applications for review, in progress, pending or, to the best of Sellers' Knowledge, threatened against or relating to any Seller or any judgment, decree, injunction, deficiency, rule or order of any court, governmental department, commission, agency, instrumentality or arbitrator which, in any case, might adversely affect the ability of any Seller to enter into this Agreement or to consummate the transactions contemplated hereby and Sellers have no Knowledge of any existing ground on which any such action, suit or proceeding may be commenced with any reasonable likelihood of success.

Section 5.10 **Compliance with Laws.** Except as set forth on Schedule 5.10, Sellers have conducted and are presently conducting the Business in material compliance with all applicable Laws. Except as set forth in Schedule 5.10, no Seller has received any written notice of or been charged with the violation of any Laws, except where such violation would not reasonably be expected to be material to the ownership and operation of Business.

Section 5.11 **Permits.** Schedule 5.11 sets forth all material Permits used by Sellers in the Business. Sellers are in compliance with the material terms of all such Permits, and all such Permits are valid and in full force and effect, and no Proceeding is pending or, to the Knowledge of Sellers, threatened, the object of which is to revoke, limit or otherwise affect any such Permit. No Seller is in material default or violation (and no event has occurred which, with notice or the lapse of time or both, would constitute a default or violation) of any term, condition or provision of any Permit to which it is a party, except where such default or violation would not be material to the ownership and operation of the Business.

Section 5.12 [Intentionally Omitted].

Section 5.13 **Purchased Inventory.**

- (a) No Purchased Inventory is materially damaged in any significant way;
- (b) The Purchased Inventory has not been part of a current or past product recall;
- (c) The Purchased Inventory is in material compliance with United States federal guidelines for such products as of the date hereof; and
- (d) The Purchased Inventory is in working condition or in a condition fit for sale in accordance with all applicable Laws, as the case may be, except for such failure to be in such condition which would not have a Material Adverse Effect on the Purchased Inventory taken as a whole.

Section 5.14 **Contracts.** Schedule 1.1(a) contains a complete list of all Contracts, including any and all amendments, modifications, supplements, exhibits and restatements thereto and thereof in effect as of the date of this Agreement. Except as set forth in Schedule 1.1(a), no Seller has assigned, delegated or otherwise transferred to any third party any of its rights or obligations with respect to any such Contract. The Purchased Contracts include all Contracts material to the ownership and/or operation of the Business. Sellers have not, and, to the best of Sellers' Knowledge, no other party to any Purchased Contract has, commenced any action against any of the parties to any Purchased Contract or given or received any written notice of any default or violation under any Purchased Contract that has not been withdrawn or dismissed except to the extent such default or violation will be cured as a result of the payment of the applicable Cure Amounts. Each Purchased Contract is, or will be upon the Closing, valid, binding and in full force and effect in accordance with its terms.

Section 5.15 **Taxes.** Except as such payment or any enforcement action is stayed as a result of the Bankruptcy Case:

- (a) All Tax Returns required to have been filed by Sellers have been duly filed, all such Tax Returns are true, correct and complete in all material respects, and all Taxes required to be paid have been paid;
- (b) No federal or state income Tax Return audits are pending with respect to any Seller, except for those set forth on Schedule 5.15;
- (c) No Seller has received written notice from any Governmental Body of future federal or state income Tax Return audits;
- (d) There are no material liens with respect to Taxes upon any of the Purchased Assets, other than Liens for Taxes not yet due and payable; and

(e) No Seller has (i) waived any statute of limitations in respect of any Tax Returns that have not been filed as of the date hereof or (ii) agreed to any extension of time with respect to the assessment of Taxes for which such Taxes have not been paid as of the date hereof.

Section 5.16 **Labor Matters.** No Seller is a party to any labor or collective bargaining agreement or workplace rules with respect to its Employees. No Employee of any Seller is represented by any labor organization and no labor organization or group of Employees of any Seller has made a pending demand for recognition or request for certification. There are no representation or certification proceedings or petitions seeking a representation election presently pending or, to the Knowledge of Sellers, threatened, to be brought or filed with the National Labor Relations Board or other labor relations tribunal involving any Seller.

Section 5.17 **Wind Down Payments and Designation Rights Budget.** The Wind Down Payments have been prepared and the Designation Rights Budget will be prepared on a reasonable basis and in good faith and is based on assumptions believed by Sellers to be reasonable at the time made and from the best information then available to the Sellers.

Section 5.18 **No Other Agreements to Purchase.** Sellers have not entered into any agreement with any other Person (written or oral) which grants such third party the right or option purchase or acquire from Sellers any Purchased Asset, other than purchase orders for Inventory accepted by Sellers in the Ordinary Course of Business.

## **ARTICLE VI**

### **REPRESENTATIONS AND WARRANTIES OF BUYER**

Buyer hereby represents and warrants to Sellers that:

Section 6.1 **Organization and Good Standing.** Buyer is a limited liability company duly organized, validly existing and in good standing under the Laws of the State of Delaware.

Section 6.2 **Authorization of Agreement.** Buyer has full limited liability company power and authority to execute and deliver this Agreement and each other agreement, document, instrument or certificate contemplated by this Agreement or to be executed by Buyer in connection with the consummation of the transactions contemplated hereby and thereby and to consummate the transactions contemplated hereby and thereby. The execution, delivery and performance by Buyer of this Agreement and each Buyer Document have been duly authorized by all necessary action on behalf of Buyer. This Agreement has been, and each Buyer Document will be at or prior to the Closing, duly executed and delivered by Buyer, and (assuming the due authorization, execution and delivery by the other parties hereto and thereto) this Agreement constitutes, and each Buyer Document when so executed and delivered will constitute, legal, valid and binding obligations of Buyer, enforceable against Buyer, in accordance with their respective terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

Section 6.3 **Financial Advisors.** Other than as set forth on Schedule 6.3, no Person has acted, directly or indirectly, as a broker, finder or financial advisor for Buyer in connection with the transactions contemplated by this Agreement and no person is entitled to any fee or commission or like payment in respect thereof.

Section 6.4 **Litigation.** There is no suit, action, litigation, arbitration proceeding or governmental proceeding or audit, including appeals and applications for review, in progress, pending or, to the best of Buyer's knowledge, threatened against or relating to Buyer or any judgment, decree, injunction, deficiency, rule or order of any court, governmental department, commission, agency, instrumentality or arbitrator which, in any case, might materially and adversely affect the ability of Buyer to enter into this Agreement or to consummate the transactions contemplated hereby.

## **ARTICLE VII**

### **BANKRUPTCY COURT APPROVAL**

Section 7.1 **Competing Transaction.** This Agreement is subject to approval by the Bankruptcy Court and the consideration by Sellers of higher or better competing bids (each a "**Competing Bid**") without the consent of Buyer. From the date of this Agreement until the completion of the Auction or as otherwise directed by the Bankruptcy Court, Sellers are permitted to cause their representatives and Affiliates to initiate contact with, solicit or encourage submission of any inquiries, proposals or offers by, any Person (in addition to Buyer and its Affiliates, agents and representatives) in connection with any sale or other disposition of the Purchased Assets. In addition, Sellers shall be permitted to respond to any inquiries or offers to purchase all or any part of the Purchased Assets (each, an "**Alternative Proposal**"), provided that such Person enters into a non-disclosure agreement in favor of Sellers and perform any and all other acts related thereto which are required under the Bankruptcy Code or other applicable law, including supplying information relating to the Business and the assets of Sellers to prospective buyers. Within twenty-four (24) hours of Sellers' determination that an Alternative Proposal is a Qualified Bid as such term is defined in the Bid Procedures Order, Sellers shall provide to Buyer a copy of any such Alternative Proposal and any written response of Sellers thereto and regularly update Buyer as to the status of any negotiations in connection therewith.

Section 7.2 **Bankruptcy Court Filings.** Sellers shall (A) file the Sale and Bid Procedures Motion with the Bankruptcy Court within two (2) days of the Petition Date, (B) use commercially reasonable efforts to obtain entry of the Bid Procedures Order within twenty-five (25) days following the Petition Date and (C) use commercially reasonable efforts to obtain entry of the Sale Order within fifty-five (55) days following the Petition Date. Buyer agrees that it will promptly take such actions as are reasonably requested by Sellers to assist in obtaining the Bid Procedures Order and the Sale Order, including furnishing affidavits or other documents or information for filing with the Bankruptcy Court for the purposes, among others, of demonstrating that Buyer is a "good faith" Buyer under Section 363(m) of the Bankruptcy Code. Sellers shall consult with Buyer and its representatives concerning any Order of the Bankruptcy Court relating to this Agreement and the Bankruptcy Cases and provide Buyer with copies of applications, pleadings, notices, proposed Orders and other documents relating to such proceedings as soon as reasonably practicable prior to any submission thereof to the Bankruptcy Court. If any Order of the Bankruptcy Court relating to this Agreement shall be appealed by any

Person (or a petition for certiorari or motion for reconsideration, amendment, clarification, modification, vacation, stay, rehearing or re-argument shall be filed with respect to any such Order), Sellers agree to take all reasonable steps, and use their reasonable best efforts, including incurring reasonable expenses, to defend against such appeal, petition or motion, and shall use its reasonable best efforts to obtain an expedited resolution of any such appeal, petition or motion; provided, that Sellers shall consult with Buyer regarding the status of any such actions and Buyer shall reasonably cooperate in such efforts. Any changes to the form of the Bid Procedures Order or the Sale Order must be approved by Buyer. Sellers further covenant and agree that, after the Closing, the terms of any reorganization plan submitted to the Bankruptcy Court or any other court by or with the support of Sellers for confirmation shall not conflict with, supersede, abrogate, nullify or restrict the terms of this Agreement, or in any way prevent or interfere with the consummation or performance of the transactions contemplated by this Agreement.

## **ARTICLE VIII**

### **COVENANTS**

#### **Section 8.1    Access to Information.**

(a) Sellers agree that, prior to the Closing Date, Buyer shall be entitled, through its officers, employees and representatives (including their respective legal advisors and accountants), to make such investigation and inspection of any and all properties, businesses and operations of Sellers and the Business and such examination of the books, records and financial condition of Sellers, the Business, the Purchased Assets and the Assumed Liabilities as they reasonably request and to make extracts and copies of such books and records. Any such investigation and examination shall be conducted during regular business hours upon reasonable advance notice and under reasonable circumstances and shall be subject to restrictions under applicable Law. Sellers shall cause their respective officers, employees, consultants, agents, accountants, attorneys and other representatives to cooperate with Buyer and Buyer's representatives in connection with such investigation and examination, and Buyer and its representatives shall cooperate with Sellers and their respective representatives and shall use their reasonable efforts to minimize any disruption to the Business.

(b) In order to facilitate Sellers' efforts to administer and close the Bankruptcy Cases (including, without limitation, the preparation of filings in the Bankruptcy Cases and state, local and federal tax returns and other filings, reconciliation of claims filed in the Bankruptcy Cases, removal of corporate and other records and information relating or belonging to entities other than Sellers), for a period of three (3) years following the Closing, (i) the Buyer shall permit Sellers' counsel and other professionals and counsel for any successor to Sellers and its respective professionals (collectively, "**Permitted Access Parties**") reasonable access to the financial and other books and records relating to the Property or the Business and the systems containing such information, books and records, which access shall include (x) the right of such Permitted Access Parties to copy or remove, as applicable, at such Permitted Access Parties' expense, such documents and records as they may request in furtherance of the purposes described above, and (y) Buyer's copying and delivering to the relevant Permitted Access Parties such documents or records as they may request, but only to the extent such Permitted Access Parties furnish Buyer with reasonably detailed written descriptions of the materials to be so copied and the applicable Permitted Access Party reimburses the Buyer for the

reasonable costs and expenses thereof, and (ii) Buyer shall provide the Permitted Access Parties (at no cost to the Permitted Access Parties) with reasonable access to Buyer's personnel during regular business hours to assist Sellers and the other Permitted Access Parties in their post-Closing activities (including, without limitation, preparation of tax returns), provided that such access does not unreasonably interfere with the Buyer's business operations, and provided further, however, that nothing in this Section shall require Buyer to retain Documents for a period longer than as set forth in Section 2.7(b).

## Section 8.2 **Further Assurances.**

(a) Further Assurances. Each of Sellers and Buyer shall use commercially reasonable efforts to (i) take all actions necessary or appropriate to consummate the transactions contemplated by this Agreement on or prior to the Termination Date and (ii) cause the fulfillment at the earliest practicable date of all of the conditions to their respective obligations to consummate the transactions contemplated by this Agreement.

(b) Notwithstanding anything to the contrary set forth in this Agreement, in no event shall Buyer or any of its Affiliates be required to (A) proffer to, or agree to, sell, divest, lease, license, transfer, dispose of or otherwise encumber or hold separate and agree to sell, divest, lease, license, transfer, dispose of or otherwise encumber before or after the Closing, any of the Purchased Assets or any material assets, licenses, operations, rights, product lines, businesses or interest therein of Buyer or any of its Affiliates (or to consent to any sale, divestiture, lease, license, transfer, disposition or other encumbrance by Sellers of any of the Purchased Assets or to any agreement by any Seller to take any of the foregoing actions) or to agree to any material change (including without limitation, through a licensing arrangement) or restriction on, or other impairment of Buyer's ability to own or operate any of the Purchased Assets, (B) take any other action under this Section 8.2 if the U.S. Department of Justice or the U.S. Federal Trade Commission authorizes its staff to seek a preliminary injunction, restraining order or other Legal Proceeding to enjoin consummation of the transactions contemplated by this Agreement, or (C) make any material payments, other than filing fees required by Law, or provide any other material consideration in connection with any waiver or consent reasonably necessary, proper or advisable to consummate and make effective the transactions contemplated hereby (or to consent to any material payment, other than filing fees required by Law, or provide any other material consideration in connection with such waivers or consents).

(c) Notwithstanding anything to the contrary set forth in this Agreement, in no event shall Sellers or any of their Affiliates be required to (A) expend any non-de minimis amount, provide any consideration, incur any Liability, or engage in litigation or other proceeding in connection with efforts under this Section 8.2, or (B) take any other action under this Section 8.2 if the U.S. Department of Justice or the U.S. Federal Trade Commission authorizes its staff to seek a preliminary injunction, restraining order or other Legal Proceeding to enjoin consummation of the transactions contemplated by this Agreement.

## Section 8.3 **Confidentiality.**

(a) Buyer acknowledges that the confidential information provided to Buyer in connection with this Agreement, including under Section 8.1, and the consummation of the



transactions contemplated hereby, is subject to the terms and conditions of the confidentiality provision set forth in the DIP Credit Agreement.

(b) Following the completion of the Auction, Sellers agree to maintain, and shall cause their respective Affiliates to maintain, unless disclosure is required by applicable Law, the confidentiality of any confidential information regarding the Business which is in Sellers' or any of their respective Affiliate's possession or of which Sellers or any of their respective Affiliates are aware. Sellers hereby further agree, unless disclosure is required by applicable Law, to take all appropriate steps, consistent with Sellers' past practice, and to cause each of their respective Affiliates to take all appropriate steps, consistent with Sellers' past practice, to safeguard such confidential information and to protect it against disclosure, misuse, espionage, loss and theft. In furtherance and not in limitation of the foregoing, Sellers shall not, and shall cause their respective Affiliates not to, unless required by applicable Law, disclose to any Person (i) any confidential information regarding the Business, or (ii) any of the discussions or negotiations conducted with Buyer in connection with this Agreement, provided, that Sellers shall be entitled to disclose (A) any information required to be disclosed by Sellers to the Bankruptcy Court, the United States Trustee, parties in interest in the Bankruptcy Cases, other Persons bidding on assets of Sellers, (B) any information required to be disclosed by Sellers pursuant to any applicable Law (including, without limitation, the Bankruptcy Code), Legal Proceeding or Governmental Authority, or (C) any information to Sellers' counsel; provided, that, in each case, such disclosure shall be limited to the information that is so required to be disclosed and the Person(s) to whom such disclosure is required. Notwithstanding anything in this Section 8.3 to the contrary, unless disclosure is required by applicable Law, the confidentiality of any Trade Secrets of the Business or Buyer shall be maintained for so long as such Trade Secrets continue to be entitled to protection as Trade Secrets of the Business and Buyer, respectively.

Section 8.4 **Preservation of Records.** Sellers (or any subsequently appointed bankruptcy estate representative, including, but not limited to, a trustee, a creditor trustee or a plan administrator) and Buyer agree that each of them shall preserve and keep the books and records held by it or their respective Affiliates relating to the pre-Closing Business for a period of eighteen (18) months from the Closing Date and shall make such books and records available to the other parties (and permit such other party to make extracts and copies of such books and records at its own expense) as may be reasonably required by such party in connection with, among other things, any insurance claims by, Legal Proceedings or Tax audits against or governmental investigations of Sellers or Buyer or any of their Affiliates or in order to enable Sellers or Buyer to comply with their respective obligations under this Agreement and each other agreement, document or instrument contemplated hereby or thereby. In the event Sellers, on the one hand, or Buyer, on the other hand, wish to destroy such records during such eighteen (18) month period, such Party shall first give thirty (30) days' prior written notice to the other and such other Party shall have the right at its option and expense, upon prior written notice given to such Party within that thirty (30) day period, to take possession of the records within thirty (30) days after the date of such notice.

Section 8.5 **Publicity.** Neither Sellers, on the one hand, nor Agent or Buyer, on the other hand, shall issue any press release or public announcement concerning this Agreement or the transactions contemplated hereby without obtaining the prior written approval of the other

Parties hereto, which approval will not be unreasonably withheld or delayed, unless, in the sole judgment of Buyer or Sellers, disclosure is otherwise required by applicable Law or with respect to filings to be made with the Bankruptcy Court in connection with this Agreement. Notwithstanding the foregoing, the Parties may publicly disclose the existence of this Agreement.

Section 8.6 **Operation of Business.** Until the Closing, Sellers shall, except as otherwise required, authorized or restricted pursuant to the Bankruptcy Code or an Order of the Bankruptcy Court, operate the Business in the Ordinary Course of Business and in accordance with the Approved Budget (among other things, Sellers will not incur unreasonable liabilities, including, without limitation, inappropriate increases in Inventory or factoring of Accounts Receivable). Sellers shall (A) preserve intact their respective business organizations, (B) maintain the Business and the Purchased Assets (normal wear and tear excepted), (C) keep available the services of their respective officers and Employees, (D) maintain satisfactory relationships with licensors, licensees, suppliers, contractors, distributors, consultants, customers and others having business relationships with Sellers in connection with the operation of the Business (other than payment of pre-petition claims), (E) pay all of their respective post-petition obligations in the Ordinary Course of Business and in accordance with the Approved Budget, and (F) continue to operate the Business in all material respects in compliance with all Laws applicable to the Business and Sellers. Without limiting the generality of the foregoing, and except (i) as otherwise expressly provided in or contemplated by this Agreement, or (ii) required, authorized or restricted pursuant to the Bankruptcy Code or an Order of the Bankruptcy Court, on or prior to the Closing Date, Sellers may not, without the prior written consent of Buyer, take any of the following actions with respect to the Business:

(a) (i) modify in any manner the compensation of any of the directors, Employees, or officers, or accelerate the payment of any such compensation (other than in the Ordinary Course of Business), (ii) grant any unusual or extraordinary bonus, benefit or other direct or indirect compensation to any director, Employee or officer, or (iii) change the title, authority or duties of any director, Employee or officer;

(b) engage any new Employee other than in the Ordinary Course of Business, provided, however, that Sellers shall not engage any new Employee whose aggregate annual compensation exceeds \$50,000;

(c) remove or permit to be removed from any building, facility, or real property any Purchased Asset or any Inventory (other than de minimis amounts in the Ordinary Course of Business or in connection with the sales of Inventory in the Ordinary Course of Business);

(d) sell, lease or otherwise dispose of, mortgage, hypothecate or otherwise encumber any Purchased Asset (other than sales of Inventory in the Ordinary Course of Business and other than any Liens provided for in the DIP Order);

(e) amend, terminate or renew any Purchased Contract, Designation Rights Asset that is a Contract, or Real Property Lease;

(f) fail to pay any required filing, processing or other fee, or fail to maintain the validity of Sellers' rights in, to or under any Purchased Intellectual Property;

(g) fail to maintain all Permits of Sellers, including those used in the operation of the Business;

(h) make any unusual or extraordinary efforts to collect any outstanding Accounts Receivable or intercompany obligation, liability or Indebtedness, give any discounts or concessions for early payment of such Accounts Receivable or intercompany obligation, liability or Indebtedness, other than the usual discounts given by the Business in the Ordinary Course of Business and make any sales of, or, other than Liens provided for in the DIP Order, convey any interest in, any Accounts Receivable or intercompany obligation, liability or Indebtedness to any third party;

(i) other than transactions pursuant to agreements or arrangements in effect on the Petition Date as set forth on Schedule 8.6(i), engage in any transaction with any Affiliate, subsidiary, shareholder, officer or director of any Seller (other than in the Ordinary Course of Business), incur or assume any long term or short term debt with or on behalf of any such Person or guarantee, endorse or otherwise be liable or responsible (whether directly, indirectly, contingently or otherwise) for the obligations of any such Person;

(j) make any change in their method of accounting, except in accordance with GAAP;

(k) other than with respect to a Competing Bid, enter into any Contract that would survive the Closing (other than in the Ordinary Course of Business and provided that the term of such Contract does not exceeds one (1) year and that such Contract does not create an obligation of any Seller in excess of \$50,000);

(l) return Inventory with an aggregate value of more than \$5,000 to any single vendor unless defective;

(m) fail to maintain any insurance policy in effect on the date hereof or amend any such policy;

(n) accelerate the payment of any obligation, Liability or Indebtedness of any Seller;

(o) subject any of the Purchased Assets to any Lien, except for Permitted Exceptions or any Liens created consistent with the DIP Financing;

(p) acquire any material properties or assets or sell, assign, license, transfer, convey, lease or otherwise dispose of any material properties or assets (except pursuant to an existing Contract for fair consideration in the Ordinary Course of Business or for the purpose of disposing of obsolete or worthless assets);

(q) (i) except with respect to remodeling, enter into any commitment for any expenditures in excess of \$50,000 for any individual commitment and \$125,000 for all commitments in the aggregate, or (ii) enter into any commitment with respect to remodeling;

(r) compromise, settle or agree to settle any pending or threatened action, suit or Legal Proceeding, or consent to the same, other than compromises, settlements or agreements that involve only the payment of money damages not in excess of \$50,000 in the aggregate; and

(s) agree, whether in writing or otherwise, to do any of the foregoing.

Nothing contained in this Agreement shall give Buyer, directly or indirectly, the right to control or direct Sellers' operations prior to the Closing, and nothing contained in this Agreement shall give Sellers, directly or indirectly, the right to control or direct Buyer's operations prior to the Closing. Prior to the Closing, each of Sellers and Buyer shall exercise, consistent with the terms and conditions of this Agreement, complete control and supervision over its respective operations.

Section 8.7 **WARN Act Notices.** The Sellers shall issue or have issued all WARN Act notices (or similar notices under any applicable state Law) to the Employees in accordance with applicable Law.

Section 8.8 **Section 363(b)(1)(A).** Buyer shall honor and observe any and all policies of Sellers in effect on the Petition Date prohibiting the transfer of personally identifiable information about individuals and otherwise comply with the requirements of Section 363(b)(1)(A) of the Bankruptcy Code.

Section 8.9 **Adequate Assurances Regarding Purchased Contracts and Certain Real Property Leases.** With respect to each Purchased Contract and Real Property Lease set forth on Schedule 1.1(c), Buyer shall provide adequate assurance of the future performance of such Purchased Contract and Real Property Lease by Buyer as required by Sections 365(b)(1)(C) and/or 365(f)(2)(B) of the Bankruptcy Code, as applicable.

Section 8.10 **Notification of Certain Matters.** Sellers shall promptly inform Buyer in writing of (i) the occurrence or non-occurrence of any event, the occurrence or non-occurrence of which would cause any of the representations or warranties in this Agreement of any Seller to be untrue or inaccurate in any material respect at or prior to the Closing Date and (ii) any material failure of any Seller to comply with or satisfy any covenant, condition or agreement to be complied with or satisfied by it under this Agreement; provided, however, that the delivery of any notice pursuant to this Section 8.10 shall not limit or otherwise affect the remedies available to Buyer under this Agreement.

Section 8.11 **Prospective Employees.**

(a) Prior to the Closing and as long as Sellers are in compliance with the Approved Budget, Buyer shall offer to employ, commencing immediately following the Closing, not less than sixty-five percent (65%) of all employees of Sellers engaged in staffing the Business as of the Closing Date ("**Prospective Employees**") at their salaries, compensation levels and terms and conditions of employment similar to their employment by Sellers

immediately prior to the Closing. Such employees who become employees of Buyer shall be collectively referred to as the “**Buyer Employees.**” Sellers shall reasonably assist Buyer to engage, in Buyer’s sole and absolute discretion, the services of the Prospective Employees. Sellers shall not, and shall not attempt to, engage or transfer the services of any of the Prospective Employees to any other business operated by Sellers or their successors for a period ending one year after the Closing Date; provided, however, that in the event Buyer engages and then later terminates the services of any Prospective Employee, Sellers may later re-engage the services of such individuals. Buyer shall, in consultation with Sellers, be provided access to, and be allowed to communicate with, such Prospective Employees. Buyer shall identify the names of the Prospective Employees whose services it wishes to engage at least five (5) days prior to the Closing Date.

(b) Sellers shall, subject to restrictions imposed by the Bankruptcy Code, as such may be modified by order of the Bankruptcy Court, be responsible for payment of all compensation due to Prospective Employees with respect to the period prior to the Closing Date, including, but not limited to any unpaid wages, salary, unused vacation or sick leave earned and accrued (to the extent not paid), health benefits, severance, WARN Act Liability, or change of control obligations.

(c) Nothing herein expressed or implied is intended to confer on any Person other than the Parties hereto or their respective successors and assigns any rights, remedies, obligations or liabilities under or by reason of this Section 8.11.

(d) Nothing contained in this Section 8.11 or elsewhere in this Agreement shall be construed to prevent the termination of employment of any individual Buyer Employee or any change in the employee benefits available to any individual Buyer Employee, except as expressly set forth in this Section 8.11. Nothing herein shall obligate Buyer to employ any Buyer Employee for any particular length of time following the Closing Date.

(e) With respect to any welfare benefit plans maintained by Buyer for the benefit of Buyer Employees on and after the Closing Date, Buyer shall (i) cause there to be waived any eligibility requirements or pre-existing condition limitations, and (ii) give effect, in determining any deductible and maximum out-of-pocket limitations, amounts paid by such Buyer Employees with respect to benefit plans heretofore maintained by the Sellers.

(f) Buyer shall provide group health plan continuation coverage, pursuant to the requirements of COBRA, to all Sellers’ employees, former employees of Sellers receiving group health plan continuation coverage from Sellers on the Closing Date, and former employees of Sellers who are in a COBRA-election period on the Closing Date, each only to the extent that such persons: (i) properly request such coverage; (ii) will not be hired by Buyer; and (C) timely pay for such coverage. Buyer shall give Buyer Employees full credit for purposes of eligibility and vesting and benefit accrual (other than benefit accrual under a defined benefit pension plan) under the employee benefit plans or arrangements maintained by the Buyer in which such Buyer Employees participate for such Buyer Employees’ service with the Sellers.

Section 8.12 **Name Change.** Within fourteen (14) days after the Closing, Sellers shall take all steps necessary to effect a change in their respective corporate names to remove the

words “Delivery Agent”, “MusicToday”, “Shop the Shows”, and “The Band” (collectively, the “**Seller Names**”) from such names. Sellers agree that they shall (i) as soon as practicable after the Closing Date and in any event within fourteen (14) days following the Closing Date, cease to make any use of the Seller Names or any service marks, trademarks, trade names, identifying symbols, logos, emblems, signs or insignia related thereto or any of the Purchased Intellectual Property or containing or comprising the foregoing, including any name or mark confusingly similar thereto (collectively, the “**Seller Marks**”), and (ii) immediately after the Closing, cease to hold themselves out as having any affiliation with the Business, provided, however, that Sellers shall be permitted to use the Seller Names in connection with matters relating to the Bankruptcy Cases as their former names for legal and noticing purposes and for other administrative purposes while subject to the jurisdiction of the Bankruptcy Court, and in connection with Sellers’ efforts to dispose of Excluded Assets. As promptly as practicable but in no event later than thirty (30) days following the Closing Date, Sellers shall remove, strike over, cover, block or substantially obliterate all Seller Marks from any vehicles, displays, signs, promotional materials or other similar materials then owned by them. Sellers shall not file a motion in the Bankruptcy Court to convert the Bankruptcy Cases to cases under Chapter 7 of the Bankruptcy Code after the Closing until they have complied in full with their obligations set forth in this Agreement and have provided fourteen (14) days’ written notice to Buyer.

## ARTICLE IX CONDITIONS TO CLOSING

Section 9.1 **Conditions Precedent to Obligations of Buyer.** The obligation of Buyer to consummate the transactions contemplated by this Agreement is subject to the fulfillment, on or prior to the Closing Date, of each of the following conditions (any or all of which may be waived by Buyer in whole or in part to the extent permitted by applicable Law):

(a) The representations and warranties of Sellers set forth in this Agreement qualified as to materiality shall be true and correct and those not so qualified shall be true and correct in all material respects at and as of the Closing, except to the extent such representations and warranties expressly relate to an earlier date (in which case such representations and warranties qualified as to materiality shall be true and correct and those not so qualified shall be true and correct in all material respects, on and as of such earlier date), and Buyer shall have received a certificate signed by an authorized officer of each Seller, dated the Closing Date, to the forgoing effect;

(b) Sellers shall have performed and complied in all material respects with all obligations and agreements required in this Agreement to be performed or complied with by them prior to the Closing Date, and Buyer shall have received a certificate signed by an authorized officer of each Seller, dated the Closing Date, to the forgoing effect;

(c) Sellers shall have delivered, or caused to be delivered, to Buyer all of the items set forth in Section 4.2;

(d) From the date hereof through the Closing Date, (i) there shall have been no Material Adverse Effect and (ii) each Seller shall have delivered to Buyer a certificate, dated as of the Closing Date, to such effect;

(e) The Purchased Assets shall be assumed, assigned and sold to Buyer, as the case may be, by Order of the Bankruptcy Court satisfactory to Buyer in its sole and absolute discretion;

(f) The aggregate Cure Amounts as determined by the Bankruptcy Court shall not be more than 110% of the aggregate Cure Amounts set forth on Schedule 2.4(j), unless otherwise agreed in writing by Buyer in its sole and absolute discretion;

(g) The period to challenge or contest the validity, amount, perfection, or priority of the claims of the DIP Lender under the DIP Credit Agreement and the Debenture Lender under each of the Hillair Debenture and Hillair Secured Note shall have expired with no such challenge or contest having been asserted, or any such challenge or contest having been resolved to the satisfaction of the Buyer in its sole and absolute discretion;

(h) So long as the Buyer obtains the protections of 363(m) of the Bankruptcy Code, the Bid Procedures Order shall not have been stayed, vacated, modified or supplemented (unless this condition shall have been waived in writing by Buyer);

(i) So long as the Buyer obtains the protections of 363(m) of the Bankruptcy Code, the Bid Procedures Order shall not have been stayed, vacated, modified or supplemented (unless this condition shall have been waived in writing by Buyer), the Sale Order shall not have been stayed, vacated, modified or supplemented (unless this condition shall have been waived in writing by Buyer); and

(j) The Closing shall have occurred on or prior to the date that is 59 days following the Petition Date.

Section 9.2 **Conditions Precedent to Obligations of Sellers.** The obligations of Sellers to consummate the transactions contemplated by this Agreement are subject to the fulfillment, prior to or on the Closing Date, of each of the following conditions (any or all of which may be waived by Sellers in whole or in part to the extent permitted by applicable Law):

(a) The representations and warranties of Buyer set forth in this Agreement qualified as to materiality shall be true and correct, and those not so qualified shall be true and correct in all material respects, at and as of the Closing, except to the extent such representations and warranties expressly relate to an earlier date (in which case such representations and warranties qualified as to materiality shall be true and correct, and those not so qualified shall be true and correct in all material respects, on and as of such earlier date), and to the extent that any inaccuracy in such representations and warranties, individually or in the aggregate would not reasonably be expected to materially and adversely affect Buyer's ability to consummate the transactions contemplated by this Agreement; and Sellers shall have received a certificate signed by an authorized officer of Buyer, dated the Closing Date, to the foregoing effect;

(b) Buyer shall have performed and complied in all material respects with all obligations and agreements required by this Agreement to be performed or complied with by Buyer on or prior to the Closing Date; and Sellers shall have received a certificate signed by an authorized officer of Buyer, dated the Closing Date, to the foregoing effect;

(c) So long as the Buyer obtains the protections of 363(m) of the Bankruptcy Code, the Bid Procedures Order shall not have been stayed, vacated, modified or supplemented (unless this condition shall have been waived in writing by Sellers);

(d) So long as the Buyer obtains the protections of 363(m) of the Bankruptcy Code, the Sale Order shall not have been stayed, vacated, modified or supplemented (unless this condition shall have been waived in writing by Sellers);

(e) The Closing shall have occurred on or prior to the date that is 59 days following the Petition Date; and

(f) Buyer shall have delivered, or caused to be delivered, to Sellers the Purchase Price in accordance with Section 3.1.

Section 9.3 **Conditions Precedent to Obligations of Buyer and Sellers.** The respective obligations of Buyer and Sellers to consummate the transactions contemplated by this Agreement are subject to the fulfillment, on or prior to the Closing Date, of the following condition (any or all of which may be waived by Buyer and Sellers in whole or in part to the extent permitted by applicable Law): there shall not be in effect any Order by a Governmental Body of competent jurisdiction restraining, enjoining or otherwise prohibiting the consummation of the transactions contemplated hereby.

Section 9.4 **Frustration of Closing Conditions.** Neither Sellers nor Buyer may rely on the failure of any condition set forth in Section 9.1, Section 9.2 or Section 9.3, as the case may be, if such failure was caused by such Party's failure to comply with any provision of this Agreement.

## **ARTICLE X NO SURVIVAL**

Section 10.1 **No Survival of Representations and Warranties.** The Parties hereto agree that the representations and warranties contained in this Agreement shall not survive the Closing hereunder, and none of the Parties shall have any liability to each other after the Closing for any breach thereof. The Parties hereto agree that the covenants contained in this Agreement to be performed after the Closing shall survive the Closing hereunder, and each Party hereto shall be liable to the other after the Closing for any breach thereof.

## **ARTICLE XI TAX MATTERS**

Section 11.1 **Transfer Taxes.** Parties agree that the Purchase Price is exclusive of any Transfer Taxes. Sellers shall be responsible for and promptly pay all Transfer Taxes.

Section 11.2 **Prorations.** All real and personal property Taxes or similar ad valorem obligations levied with respect to the Purchased Assets for any taxable period that includes the Closing Date and ends after the Closing Date, whether imposed or assessed before or after the Closing Date, shall be prorated between Sellers and Buyer as of 12:01 a.m. (New York time) on the day following the Closing Date. If the exact amount of any real or personal property Taxes is



not known on the Closing Date, the apportionment shall be based upon a reasonable amount, without subsequent adjustment.

Section 11.3 **Purchase Price Allocation.** Within sixty (60) days following the Closing, Buyer shall deliver to Sellers a proposed allocation of the Purchase Price (including the Assumed Liabilities and any other amounts properly included therein) among the Purchased Assets in accordance with Section 1060 of the Code and Treasury Regulations thereunder (and any similar provision of state, local or foreign law, as applicable). Sellers shall have thirty (30) days following receipt of Buyer's proposed allocation to review and comment on such proposed allocation and Buyer shall consider such comments in good faith. If Sellers disagree with or raise objections to the Allocation Schedule, Buyer and Sellers will negotiate in good faith to resolve such objections. If the Parties are able to agree upon the allocation of the Purchase Price, Buyer and Sellers shall report and file all tax returns (including any amended tax returns and claims for refund) consistent with such mutually agreed Purchase Price allocation, and shall take no position contrary thereto or inconsistent therewith (including in any audits or examinations by any taxing authority or any other proceedings). Buyer and Sellers shall file or cause to be filed any and all forms (including U.S. Internal Revenue Service Form 8594), statements and schedules with respect to such allocation, including any required amendments to such forms. If, on the other hand, the Parties are unable mutually to agree upon the manner in which the Purchase Price should be allocated, Buyer and Sellers shall be free to make their own respective allocations of the Purchase Price for tax purposes.

## **ARTICLE XII**

### **MISCELLANEOUS**

Section 12.1 **Expenses.** Except for (a) Transfer Taxes (which shall be governed by Section 11.1, and (b) the Break-Up Fee and Expense Reimbursement that may become owed by Sellers to Buyer pursuant to Section 4.5(a), if any, each of Sellers and Buyer shall bear their own expenses incurred in connection with the negotiation and execution of this Agreement and each other agreement, document and instrument contemplated by this Agreement and the consummation of the transactions contemplated hereby and thereby.

#### Section 12.2 **Submission to Jurisdiction; Consent to Service of Process.**

(a) Without limiting any Party's right to appeal any order of the Bankruptcy Court, (i) the Bankruptcy Court shall retain exclusive jurisdiction to enforce the terms of this Agreement and to decide any claims or disputes which may arise or result from, or be connected with, this Agreement, any breach or default hereunder, or the transactions contemplated hereby, and (ii) any and all proceedings related to the foregoing shall be filed and maintained only in the Bankruptcy Court, and the parties hereby consent to and submit to the jurisdiction and venue of the Bankruptcy Court and shall receive notices at such locations as indicated in Section 12.7 hereof; provided, however, that if the Bankruptcy Cases have closed or the Bankruptcy Court refuses to exercise jurisdiction, the Parties agree to unconditionally and irrevocably submit to the exclusive jurisdiction of the United States District Court for the District of Delaware and any appellate court thereof, for the resolution of any such claim or dispute. The Parties hereby irrevocably waive, to the fullest extent permitted by applicable law, any objection which they may now or hereafter have to the laying of venue of any such dispute brought in such court or

any defense of inconvenient forum for the maintenance of such dispute. Each of the Parties hereto agrees that a judgment in any such dispute may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by Law.

(b) Each of the Parties hereto hereby consents to process being served by any Party to this Agreement in any suit, action or proceeding by delivery of a copy thereof in accordance with the provisions of Section 12.7.

Section 12.3 **Waiver of Right to Trial by Jury**. Each Party to this Agreement waives any right to trial by jury in any action, matter or proceeding regarding this Agreement or any provision hereof.

Section 12.4 **Entire Agreement; Amendments and Waivers**. This Agreement (including the Schedules and Exhibits hereto) represents the entire understanding and agreement between the Parties hereto with respect to the subject matter hereof. This Agreement can be amended, supplemented or changed, and any provision hereof can be waived, only by written instrument making specific reference to this Agreement signed by the Party against whom enforcement of any such amendment, supplement, modification or waiver is sought or, if such amendment, supplement, modification or waiver can be so construed, by both Parties. No action taken pursuant to this Agreement, including any investigation by or on behalf of any Party, shall be deemed to constitute a waiver by the Party taking such action of compliance with any representation, warranty, covenant or agreement contained herein. The waiver by any Party hereto of a breach of any provision of this Agreement shall not operate or be construed as a further or continuing waiver of such breach or as a waiver of any other or subsequent breach. No failure on the part of any Party to exercise, and no delay in exercising, any right, power or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of such right, power or remedy by such Party preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

Section 12.5 **Governing Law**. This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware applicable to contracts made and performed in the State of Delaware.

Section 12.6 **Notices**. All notices and other communications under this Agreement shall be in writing and shall be deemed given (i) when delivered personally by hand (with written confirmation of receipt), (ii) when sent by electronic mail (and no notice of failure of delivery was received within a reasonable time after such message was sent) or (iii) one (1) Business Day following the day sent by overnight courier (with written confirmation of receipt), in each case at the following addresses and e-mail addresses (or to such other address or e-mail address as a Party may have specified by notice given to the other Party pursuant to this provision):

If to Sellers, to:

Delivery Agent, Inc.  
300 California Street, Suite 300  
San Francisco, CA 94104  
Attn: Jeff Hagan, CFO  
[jhagan@deliveryagent.com](mailto:jhagan@deliveryagent.com)

with a copy to (which shall not constitute notice):

Keller & Benvenutti LLP  
650 California Street, Suite 1900  
San Francisco, CA 94108  
Attn: Tobias S. Keller, Esq. and Jane Kim, Esq.  
[tkeller@kellerbenvenutti.com](mailto:tkeller@kellerbenvenutti.com), [jkim@kellerbenvenutti.com](mailto:jkim@kellerbenvenutti.com)

If to the Buyer, to:

Hillair Capital Management LLC  
345 Lorton Avenue, Suite 303  
Burlingame, California 94010  
Attention: Sean M. McAvoy  
Email: [seanm@hillaircapital.com](mailto:seanm@hillaircapital.com)

with a copy to (which shall not constitute notice):

Olshan Frome Wolosky LLP  
1325 Avenue of the Americas  
New York, New York 10019  
Attention: Adam H. Friedman, Esq. and Jonathan H. Deblinger, Esq.  
Facsimile: (212) 451-2222  
Email: [afriedman@olshanlaw.com](mailto:afriedman@olshanlaw.com) and [jdeblinger@olshanlaw.com](mailto:jdeblinger@olshanlaw.com)

Each Party entitled to notice may change the address to which notices, requests, demands, claims and other communications hereunder are to be delivered by giving all other Parties notices in the manner herein set forth.

Section 12.7 **Severability**. If any term or other provision of this Agreement is invalid, illegal, or incapable of being enforced by any Law or public policy, all other terms or provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to any Party. Upon such determination that any term or other provision is invalid, illegal, or incapable of being enforced, the Parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in an acceptable manner in order that the transactions contemplated hereby are consummated as originally contemplated to the greatest extent possible.

Section 12.8 **Binding Effect; Assignment.** This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns, including, without limitation, any chapter 11 trustee hereinafter appointed for Sellers' estates or any trustee appointed in a chapter 7 case if the Bankruptcy Cases are converted from chapter 11. Nothing in this Agreement shall create or be deemed to create any third party beneficiary rights in any person or entity not a party to this Agreement except as provided below. No assignment of this Agreement or of any rights or obligations hereunder may be made by either Sellers, on the one hand, or Buyer, on the other hand, (by operation of law or otherwise) without the prior written consent of the other Parties hereto and any attempted assignment without the required consents shall be void; provided, however, that Buyer intends to (and may, without the consent of Sellers) assign its rights, interests, and obligations hereunder to one or more of its assignees or designees.

Section 12.9 **[Intentionally Omitted].**

Section 12.10 **No Recourse.** The Parties acknowledge that (i) no past, present or future direct or indirect equity holder of Buyer or any of its Affiliates, (ii) no past, present or future member of any board of directors of Buyer or any of its Affiliates, and (iii) no past, present or future director, officer, member, or employee of Buyer or any of its Affiliates (such Persons described in clauses (i)-(iii) above, the "**Non-Recourse Parties**") is a party to this Agreement. The Parties further acknowledge that none of the Non-Recourse Parties, whether individually or collectively, shall have any liability whatsoever of any kind or description for any obligations or liabilities of Buyer under this Agreement or for any claim based on, in respect of, or by reason of, the transactions contemplated hereby or thereby. Accordingly, the Parties hereby agree that in the event (a) there is any alleged breach or alleged default or breach or default by any Party under this Agreement or (b) any Party has or may have any claim arising from or relating to the terms of this Agreement, no Party shall, or shall have any right to, commence any proceedings or otherwise seek to impose any Liability whatsoever of any kind or description on or against the Non-Recourse Parties, whether collectively or individually, by reason of such alleged breach, default or claim.

Section 12.11 **Counterparts.** This Agreement may be executed in one or more counterparts (including by facsimile or electronic mail), each of which will be deemed to be an original copy of this Agreement and all of which, when taken together, will be deemed to constitute one and the same agreement.

*[Signature Pages Follow]*

**IN WITNESS WHEREOF**, the Parties hereto have caused this Agreement to be executed by their respective officers thereunto duly authorized, as of the date first written above.

**SELLERS:**

**DELIVERY AGENT, INC.  
MUSICTODAY, LLC  
SHOP THE SHOWS, LLC  
CLEAN FUN PROMOTIONAL  
MARKETING, INC.**

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

**BUYER:**

**HILLAIR CAPITAL MANAGEMENT,  
LLC (as DIP Agent on behalf of the DIP  
Lender under the DIP Credit Agreement and  
not in its individual capacity)**

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

**Exhibit A**

**(Highlighted Provisions Pursuant to Del. Bankr. L.R. 6004-1)**

In accordance with Local Rule 6004-1, the Debtors respectfully represents the following:

(1) **Sale to an Insider:** The Debtors are not aware of a prospective buyer that is an insider of the Debtors.

(2) **Agreements with Management:** No proposed or prospective buyer has discussed or entered into any agreements with management or key employees regarding compensation or future employment. The Agreement provides that prior to Closing,<sup>8</sup> Buyer will offer to employ not less than 65% of all employees engaged in staffing the Business as of the Closing Date. ***Agreement § 8.11.***

(3) **Releases:** In the event the Buyer (that is, the stalking horse purchaser) is entitled to payment of the Break-Up Fee and/or Expense Reimbursement under the Agreement, Buyer agrees that such Break-Up Fee or Expense Reimbursement, as applicable, will be Buyer's sole and exclusive remedy against Sellers with respect to all claims of any nature whatsoever relating to this Agreement or the transactions contemplated hereunder. ***Agreement § 4.5(b)***

(4) **Private Sale/No Competitive Bidding:** The Sale is subject to higher or better competing bids and is being conducted pursuant to the competitive bidding process detailed in the Motion. ***Agreement § 7.1.***

(5) **Closing and Other Deadlines:** The Agreement provides that the Closing will occur in no event later than 59 days following the Petition Date (November 12, 2016). ***Agreement § 4.1.*** In addition, the Agreement provides Buyer the right to terminate if the following deadlines are not met:

- the Sellers have not filed a motion to approve the Bid Procedures Order within two (2) days following the Petition Date (November 16, 2016);
- the hearing on the motion to approve the Bid Procedures Order has not been completed within twenty-four (24) days following the Petition Date (October 7, 2016);
- the Court has not entered the Bid Procedures Order within twenty-five (25) days following the Petition Date (October 10, 2016);
- the Auction, if necessary, has not been completed within fifty-two (52) days following the Petition Date (November 6, 2016);
- the hearing to approve the Sale Order has not concluded within fifty-four (54) days following the Petition Date (November 8, 2016);
- the Court has not entered the Sale Order within fifty-five days (55) following the Petition Date (November 9, 2016); or
- the Sale Order has not become a Final Order within fifty-nine (59) days following the Petition Date (November 12, 2016). ***Agreement § 4.4(c).***

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<sup>8</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

- (6) **Good Faith Deposit:** The Bidding Procedures provide that all bidders (other than Buyer) will be required to post a good faith deposit in the form of a wire transfer (to a bank account specified by the Debtors), certified check or such other form acceptable to the Debtors, payable to the order of the Debtors (or such other party as the Debtors may determine) in an amount equal to the ten percent (10%) of the purchase price.
- (7) **Interim Arrangements with Proposed Buyer:** The Debtors have not entered into any interim arrangements with any proposed buyer.
- (8) **Use of Proceeds:** Upon Closing, the net sale proceeds shall be, to the extent permitted and appropriate, treated as cash collateral and shall not be used except to meet obligations payable in connection with the Sale, including payment of the DIP Loan and, if the Successful Bidder is not Buyer, the Break-Up Fee and Expense Reimbursement. The Agreement does not provide for a definitive allocation of sale proceeds between or among the Sellers or collateral.
- (9) **Tax Exemption:** No tax exemptions under section 1146(a) of the Bankruptcy Code are contemplated in connection with the Sale.
- (10) **Record Retention:** The Purchased Assets include Sellers' Documents, which Buyer agrees to retain and make available to Sellers for a period of eighteen (18) months following the Closing Date. *Agreement § 2.7(b).*
- (11) **Sale of Avoidance Actions:** The Agreement includes the sale of the Debtors' chapter 5 causes of action to Buyer. *Agreement § 2.1(q).*
- (12) **Requested Findings as to Successor Liability:** The Buyer will be undertaking certain Assumed Liabilities pursuant to the Agreement. The Buyer would be assuming only those liabilities, and all other liabilities not expressly assumed by Buyer under the Agreement, whether or not incurred or accrued on or after the date on which the contemplated transaction is closed, shall be retained by the Debtors.
- (13) **Sale Free and Clear of Unexpired Leases:** The Debtors are seeking to sell the Assets free and clear of all Liens, claims, encumbrances, and other interests pursuant to Section 363(f) of the Bankruptcy Code, unless otherwise provided in the Successful Bidder's purchase agreement.
- (14) **Credit Bid:** Buyer shall be permitted to credit bid the full Credit Bid Amount for purposes of the Buyer's initial Qualified Bid and in submitting any Subsequent Bid.
- (15) **Relief from Bankruptcy Rule 6004(h):** As noted in the Motion, the Debtors are requesting relief from the 14-day stay imposed by Rules 6004(h) and 6006(d).