

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF LOUISIANA

-----x

<b>In re:</b>	:	<b>Case No. 16-11179</b>
	:	
<b>FoodServiceWarehouse.com, LLC</b>	:	<b>Chapter 11</b>
	:	
<b>P. O. Box 630047</b>	:	<b>Section "A"</b>
<b>Littleton, Colorado 80163</b>	:	
<b>Tax ID Number: xx -xxx2620</b>	:	
	:	
<b>Debtor</b>	:	

-----x

**MOTION FOR ORDER GRANTING THE DEBTOR THE  
AUTHORITY TO ENTER INTO ASSET PURCHASE AGREEMENT AND  
ASSUMPTION OF UNEXPIRED LEASES  
BETWEEN THE DEBTOR, SUB-TECH HOLDINGS, LLC D/B/A SUB-  
TECHNOLOGIES, INC. AND PKS SUBTECH, LLC, FREE AND CLEAR OF ALL  
LIENS, MORTGAGES AND ENCUMBERANCES**

NOW INTO COURT, through undersigned counsel, comes FoodServiceWarehouse.com, LLC (the "Debtor"), who files this *Motion for Authority Granting the Debtor the Authoring to Enter Into the Asset Purchase Agreement and Assumption of Unexpired Leases Between the Debtor, Sub-Tech Holdings, LLC d/b/a Sub-Technologies, Inc. and PKS Subtech, LLC Free and clear of all Liens, Mortgages and Encumbrances* (the "Motion") pursuant to 11 U.S.C. §§ 105, 363 and 365 seeking an order (the "Order") authorizing the Debtor to execute the attached Asset Purchase and Assumption of Unexpired Leases Agreement (the "APA") attached hereto and incorporated herein as Exhibit A, in globo, between the Debtor, the Debtor's wholly owned subsidiary, FSW SubTech Holdings, LLC d/b/a Sub-Technologies, Inc., ("SubTech Holdings"), (Subtech Holdings and the Debtor may sometimes be referred to collectively as "Seller"), and the buyer, PKS SubTech, LLC, (the "Buyer") seeking to purchase all of SubTech Holdings rights, title and interest in the assets listed in the APA, (the "Property"). In support of the Motion, the Debtor respectfully represents that:

**JURISDICTION AND STATUTORY PREDICATES**

1. Pursuant to 28 U.S.C. §§ 157(b) and 1334, this Court has jurisdiction: (i) to hear and determine the Motion, and (ii) over the persons and property affected. The subject matter of the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (N). Venue for this proceeding is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. This Motion is brought pursuant to the authority of 11 U.S.C. §§ 105, 363(b)(1), 363(f) and 363(m), 365, 1107 and 1108 as complimented by and Rules 2002, and 6004 of the Federal Rules of Bankruptcy Procedure.

**BACKGROUND AND PROCEDURAL HISTORY**

3. On May 20, 2016, (the "Petition Date"), the Debtor filed the above-captioned Chapter 11 case ("Case"). The Debtor continues to operate its business and manage its property as debtor-in-possession, pursuant to §§1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed, and no official committee of creditors has been established.

4. The Debtor was formed in the fall of 2006 as an internet-based e-commerce business to enhance volume capability for the group and it is owned by many of the same dealers who are shareholders in Pride Marketing and Procurement, L.L.C.

5. The Debtor purchased bulk foodservice equipment and supplies from manufacturers, accepted delivery and stored the foodservice equipment and supplies in its main warehouse in Kansas City, Missouri. It then distributed the inventory from its main warehouse to retail internet buyers and, until recently, to dealers who would purchase inventory through the Debtor's various programs. Prior to its recent financial upheavals, the Debtor sold tens of millions of dollars of foodservice equipment and supplies to retail customers via its internet site

and also purchased tens of millions of dollars for dealers pursuant to various purchasing programs which have been discontinued.

6. The Debtor has discontinued the purchasing of foodservice equipment and supplies on behalf of dealers. After the Petition Date, the Debtor continued to sell inventory at retail from its internet site, which is “www.foodservicewarehouse.com”. However, the Debtor was granted the authority to employ HyperAMS, LLC to assist the Debtor in liquidating its inventory below costs and negotiate bulk sales. Furthermore, HyperAMS, LLC was also employed as the auctioneer to conduct an online auction of equipment located in the facility in Englewood, Colorado.

7. On July 13, 2015, the Debtor formed FSW SubTech Holdings, LLC, under the laws of Delaware, as wholly owned subsidiary of the Debtor. It was created to acquire significantly all the assets of Sub-Technologies, Inc. (“Sub-Tech, Inc.”) which included the accounts receivable, inventory, fixed assets, intellectual property, domain names, accounts payable, and customer deposits. The consideration paid for the purchase was zero because the value of the assumed liabilities exceeded the value of the assets. The Debtor owns 100% of FSW SubTech Holdings, LLC. FSW Subtech Holdings L.L.C. operates on its own revenue base and independent management and employee team. FSW Subtech Holdings, LLC operates out of a warehouse/office leased from the former owner, located in a Lee’s Summit Missouri industrial park with approximately 17,400 square feet and leases warehouse space of 2,300 square feet in Toronto, Canada to serve the Canadian market.

8. FSW SubTech Holdings, LLC is an authorized distributor through which SUBWAY® franchisees can purchase approved proprietary *small wares* for use in the SUBWAY® chain of restaurants – that is the small wares are manufactured for and can only be

purchased by a SUBWAY® franchisee. It is one of two distributors authorized to sell to the SUBWAY® restaurants. Majority of the sales are through catalogue purchases. Jason Scarborough is the primary contact with SUBWAY® and has a close relationship with SUBWAY®.

9. Also, Sub-Tech, Inc. established a Public Kitchen Supply Web-site in the first quarter of 2013 to market commercial kitchen supplies to non- SUBWAY® customers using the existing distribution supply chain. It also distributes Keurig commercial coffee to other restaurant chains. However, these non-subway sales are only a minor portion of the business.

10. Sub-Tech, Inc is a party to a lease with bcIMC Realty Corporation, a copy of which is attached to the APA as Exhibit 1. This lease was assigned to FSW SubTech Holdings, LLC. The property is located at 1535 Meyerside Drive, Unit 2, Mississauga, Ontario, Canada, L5t 1M9. The building space is used as a warehouse to store inventory and for office space. The lease with bcIMC Realty Corporation will be assigned to the Buyer under the APA. The landlord has indicated no opposition to the Seller for the assumption and assignment of the lease. To the extent that there are any costs pursuant to section 365 of the Bankruptcy Code associated with assuming the lease, such costs, if any, will be paid by the Buyer.

11. Sub-Tech, Inc is also a party to a lease with Wells Realty, L.L.C., dated August 23, 2013, a copy of which is attached to the APA as Exhibit 2. This lease was assigned to and assumed by FSW SubTech Holdings, LLC. The leased property is located at 2301 NE Independence Ave., Lee's Summit, MO 64064. This property serves as a warehouse for inventory and for office space. The lease with Wells Realty, L.L.C. will be assigned to the Buyer under the APA. The landlord has indicated no opposition to the Seller for the assumption and assignment of the lease. To the extent that there are any costs pursuant to section 365 of the

Bankruptcy Code associated with assuming the lease, such costs, if any, will be paid by the Buyer.

12. Sub-Tech, Inc. also leased a Xerox Workcentre from Balboa Capital Corporation, a copy of which is attached to the APA as Exhibit 3. This lease was assumed by FSW SubTech Holdings, LLC. The lease with Balboa Capital Corporation will be assigned to the Buyer under the APA. The lessor has indicated no opposition to the Seller for the assumption and assignment of the lease. To the extent that there are any costs pursuant to section 365 of the Bankruptcy Code associated with assuming the lease, such costs, if any, will be paid by the Buyer.

**THE SALE IS IN THE BEST INTERESTS OF THE ESTATE**

13. The Debtor is in the process of liquidating all of its assets.

14. On August 3, 2016, the Debtor filed its Plan of Liquidation, [R. Dkt. 159] and its Disclosure Statement [R. Dkt. 158]. The sale of the Property under this Motion is consistent with the Debtor's Plan, which requires the liquidation of all of the Debtor's assets with distribution of the sale proceeds to the Debtor's creditors.

15. Buyer has performed its due diligence and has negotiated the sales price with the Seller. Buyer understands that this Court will consider any third-party purchaser that is willing to pay a higher price for the Property. However, any such third-party purchaser must obtain the approval of SUBWAY® to purchase the distributorship. The Seller understands that Jason Scarborough has had a relationship with SUBWAY® since the 1980's and that SUBWAY® has already approved the Buyer to continue selling the small wares to independent SUBWAY® franchisees.

16. The APA is a straightforward asset purchase agreement and the means of presenting same to the Court are straightforward and standard for transactions of this type.

17. The business justification for the sale is obvious. The Debtor is in the process of liquidating its assets and has proposed a liquidating plan of reorganization. The Debtor and FSW SubTech Holdings, LLC have attempted to market and sell the Property which they seek to sell herein. The price obtained from the Buyer is the best price obtainable.

### **RELATIONSHIP OF PARTIES**

18. Jason Scarborough has been acting as the chief executive officer of FSW SubTech Holdings, LLC since its inception. Jason Scarborough is also a member of the Buyer and will act as the chief executive officer of Buyer when it becomes operational. Buyer has been established specifically by Jason Scarborough and Anthony Kelley for the purpose of acquiring the Property from the Seller. Anthony Kelley has served as the controller of FSW SubTech Holdings, LLC and will be employed by the Buyer as its controller subsequent to the sale. Anthony Kelley and Jason Scarborough are the members of the Buyer. FSW SubTech Holdings, LLC will cease operations after the sale.

### **SALE PROCESS**

19. If one or more offers, subject to the request herein by the Buyer, are received at or prior to the hearing on this Motion, such offer needs to be acceptable to the Debtor and the Bankruptcy Court and the Bankruptcy Court shall determine the prevailing offer. However, under the agreement with SUBWAY® to sell proprietary small wares to independent franchisees, such third party offeree must be an approved purchaser by SUBWAY®. Buyer and all of those parties that have submitted an offer may participate in the bidding to be conducted by the Court during the hearing on this Motion.

### **RELIEF REQUESTED**

20. The Debtor is seeking an order authorizing it to enter into the sale of the Property

for a total price of Two Hundred Thousand and No/100 (\$200,000.00) Dollars, or such other price if a higher price is obtained at the hearing.

21. At the Closing, the Buyer shall assume, and thereafter pay, perform and discharge only such liabilities that relate to the Property being acquired and the leases being assumed.

22. Debtor shall retain, and remain liable and obligated for any of its respective liabilities not otherwise expressly included in the Assumed Liabilities.

23. The Debtor respectfully requests that the Court find that: (1) the Buyer is not a successor to the Debtor or FSW SubTech Holdings, LLC, (2) the sale of the Property pursuant to the Order does not constitute a de facto merger or consolidation of the Debtor, FSW SubTech Holdings, LLC and/or Buyer, or a continuation of the Debtor's or SubTech Holdings' business, and (3) Buyer shall have no successor, transferee or similar liability as a result of the acquisition of the Property. The finding that the Buyer shall have no successor, transferee or similar liability as a result of the acquisition of the Property is consistent with applicable law regarding the effect of sales under 11 U.S.C. § 363(b). *See e.g. In Re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003); *Cibulka v. Trans World Airlines, Inc.*, 92 Fed.Appx. 366, 368 (8th Cir. 2004); *United Mine Workers v. Leckie Smokeless Coal Co.*, 99 F.3d 573 (4<sup>th</sup> Cir. 1996), certiorari denied 520 U.S. 1118, 117 S.Ct. 1251, 137 L.Ed.2d 332 (1997).

24. No successor, transferee or similar liability claim shall bear against or attach or otherwise affect the Property or the Buyer. The holders of all successor, transferee or similar liability claims shall be permanently enjoined from pursuing any such successor, transferee or similar liability claim against the Property or the Buyer.

25. The Buyer shall have no successor liability with respect to claims or administrative expenses arising or accruing prior to or on the Closing Date, unless otherwise

expressly assumed by Buyer, and shall not be deemed a successor of Sellers within the meaning of any revenue, pension, ERISA, COBRA, tax, labor or environmental law, rule or regulation or any products liability.

26. This Motion is brought pursuant to the authority of 11 U.S.C. §§105 and 363(b)(1), 363(f) and 363(m) and 365 and Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedure.

27. The Debtor asserts that section 363 of the Bankruptcy Code should apply. Section 363(b)(1) of the Bankruptcy Code provides that a debtor “after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). Although the Property being sold herein and assigned may not be considered property of the estate, because of the relationship between FSW SubTech Holdings, LLC and the Debtor, the Debtor seeks court approval to authorize the sale contemplated in the APA.

28. As a general matter, a judge determining a Section 363(b) application [should] find from the evidence presented before him at the hearing a good business reason to grant such an application.” *In re Lionel Corp.*, 722 F.2d 1-063, 1071 (2d Cir. 1983). Certain factors pertinent to this analysis have been articulated; specifically, the Court should consider whether:

- (1) a sound business purpose justifies the sale;
- (2) accurate and reasonable notice of the sale was provided;
- (3) the price to be paid is adequate, i.e., fair and reasonable; and
- (4) the sale is in good faith, i.e., there is an absence of any lucrative or improper deals with insiders.

*In re Industrial Valley Refrig. and Air Cond. Supplies, Inc.*, 77 B.R. 15, 21 (Bankr. E.D. Pa. 1987); *In re Wilde Horse Enterprises, Inc.*, 136 B.R. 830, 841-2 (Bankr. C.D. Cal. 1991); *In re The Landing*, 156 B.R. 246, 249 (Bankr. E.D. Mo. 1993); *In re George Walsh Chevrolet, Inc.*,



118 B.R. 99, 102 (Bankr. E.D. Mo. 1990). The proposed sale by the Debtor and SubTech Holdings to the Buyer comports with each of these requirements.

29. The proposed sale of the Property and the Purchase Price thereof are fair and reasonable and are the result of arm's-length negotiations between the parties. The agreement represents the best offer received to date by the Debtor. The Debtor does not believe that there will be a higher offer. Attached hereto as **Exhibit B**, *in globo*, is: (i) the balance sheet of the FSW SubTech Holdings, dated July 31, 2016<sup>1</sup>, (ii) the Income Statement of the SubTech Holdings for 2016 through July 31, 2016, indicating a net loss for the time period; and (iii) SubTech Holdings valuation summary.

30. It is the Debtor's understanding that majority of the inventory of SubTech Holdings can only be purchased by SUBWAY® franchisees. An analysis of the inventory indicates that approximately half of the items turn over less than once per year. There are items that are for sale to other restaurant chains, but such items are a small percentage of the over-all inventory. Thus, as certain items can only be purchased by SUBWAY® franchisees and little inventory available for a public liquidation, a global sale is a better option over a liquidation of the inventory.

31. If a buyer is in good faith, section 363(m) protects the parties in the event of a reversal or modification on appeal of the authorization of a sale under section 363(b). In determining whether a Buyer has acted in good faith, courts look to the integrity of the Buyer's conduct in the course of the legal proceedings.<sup>2</sup> The Debtor submits that Buyer has acted in good faith and the transaction should be afforded protection under section 363(m).

---

<sup>1</sup> Balance sheet lists an amount payable to the Debtor. This amount generates from the funds used to pay the accounts payable due to the purchase in 2015 and initial funds for operating expenses. These funds were booked as a loan, but are considered an investment by the Debtor in the subsidiary.

<sup>2</sup> See, e.g., *In re Abbots Dairies of Pa., Inc.*, 788 F.2d 143, 147-48 (3rd Cir. 1986).

32. Considering the good faith of the Buyer and the reasonableness of the Purchase Price, the Debtor requests that this Court find that good cause exists to authorize the consummation of the sale of the Property and assignment of leases without subjecting the Order to a stay of execution, as permitted under Federal Rules of Bankruptcy Procedure 7062 and 6004(h).

33. The Debtor requests that the Court find that the terms and conditions of the APA are an integral part of the sale of the Property. In view of: (i) the good faith of the Buyer, (ii) the reasonableness of the Purchase Price, and (iii) the fact that the terms and conditions of the APA are an integral part of the sale of the Property, the Debtor also requests that the Order authorizing the sale provide, pursuant to 11 U.S.C. § 363(m), that the reversal or modification on appeal of the Order authorizing the sale hereunder shall not affect the validity or enforceability of the sale or any of the terms and conditions of the APA. *See In re Trism*, 328 F.3d 1003 (8<sup>th</sup> Cir. 2003).

34. The Debtor requests that this Court declare that, without limiting the generality of the foregoing, the Order shall constitute all approvals and consents, if any, required by law, with respect to the implementation and consummation of the APA and the Order and the transactions contemplated therein and authorize Katherine Young, as CEO of the Debtor, to execute any and all documentation contemplated by the APA on behalf of the Seller.

35. The Debtor requests that this Court declare that the Debtor and SubTech Holdings, by and through Katherine Young, be authorized to execute and deliver to Buyer any and all conveyance and transfer documents and other agreements described in the APA and, upon Closing, the Order will be construed and constitute for any and all purposes a full and complete general assignment, conveyance and transfer of the Property or a bill of sale transferring good and marketable title in such Property to Buyer and ordering and directing each

and every federal, state and local governmental agency or department to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the APA and the Order.

36. The Debtor requests that this Court declare that the APA and all other documents, agreements and instruments necessary to effectuate and consummate the transactions contemplated by the APA together with the terms and provisions of the Order are specifically enforceable against and binding upon, and shall not be subject to rejection or avoidance by the Seller, its creditors and all other parties in interest and any assigns, including without limitation any trustee, responsible person, estate administrator, representative or similar person hereinafter appointed for or in connection with any of the Debtor's estate or affairs in this or any subsequent or converted case under the Bankruptcy Code involving the Debtor.

**DISTRIBUTION OF SALE PROCEEDS  
OR FURTHER ORDER OF THE COURT**

37. All of the proceeds from the sale shall be paid to the Debtor by the Buyer and shall be distributed in accordance with further order of the Court or pursuant to a confirmed plan of reorganization. The Debtor is not aware of a security interest asserted against the Seller as filed by IberiaBank and/or Pride. The Debtor performed a UCC-1 search for Colorado, Delaware and Missouri which indicated no filed UCC-1 or liens against SubTech Holdings. See attached **Exhibit C**. Accordingly, the Debtor, as the owner of SubTech Holdings is the proper party to receive the proceeds of the sale, free and clear of any liens or encumbrances.

**WAIVER OF RULE 6004(h)**

38. The Debtor requests that this Court provide for a waiver of the fourteen-day stay of the order approving the sale of the Purchased Assets under Federal Rules of Bankruptcy Procedure 6004(h) such that the sale of the Property to the Buyer can close as quickly as possible

and so that the sale can close without the Debtor having to seek further consent for the authority to use cash collateral.

39. Katherine Young is the CEO of the Debtor. The Seller requests that Katherine Young be authorized to execute any and all documents necessary to consummate the sale and transactions described herein on behalf of the Debtor and SubTech Holdings.

**WHEREFORE**, the Debtor hereby moves this Honorable Court, after notice and hearing, to make all findings requested in this Motion and, considering those findings and applicable law, to enter the Order:

(1) Approving the APA and the terms and conditions thereof and the sale of the Property to the Buyer, PKS SubTech, LLC, and the assumption and assignment of the identified leases with any costs of assumption to be paid by the Buyer;

(2) Authorizing the Debtor, by Katherine Young, the Chief executive Officer, without any further corporate or other action by the Debtor or FSW SubTech Holdings, LLC or any officer, person or board of directors thereof, to execute and to perform the APA and, in connection therewith, to sell the Property to Buyer or its assignee as permitted by the APA (or any winning bidder at the hearing on this Motion), for the sum of \$200,000.00 (or such higher price determined at the hearing), free and clear of all liens, mortgages and encumbrances and free of any successor, transferee or similar liability claim against the Property or the Buyer, and on the terms and conditions set forth in the APA and in this Motion;

(3) Authorizing the Seller to consummate the sale of the Property and the assumption and assignment of the leases, pursuant to this Motion and the APA immediately, without delay, to the Buyer, without the Order being subject to an automatic stay, as permitted under Federal Rules of Bankruptcy Procedure 7062 and 6004(h) or otherwise;

(4) Directing that the purchase and assignment funds be paid to the Debtor.

(5) Providing that no encumbrance, liens or mortgages; and no successor, transferee or similar liability claim, shall attach or otherwise affect the Property or the Buyer;

(6) Authorizing the Seller, by Katherine Young, to execute any and all conveyance and transfer documents, assignments, resolutions, agreements, releases and other agreements described in the APA, and to take any and all such actions necessary and appropriate in its discretion to accomplish the transactions authorized therein without any further order of this Court;

(7) Declaring that, upon Closing, the Order will be construed and constitute for any and all purposes a full and complete general assignment, conveyance and transfer of title to the Property and a bill of sale transferring good and marketable title in such Property to Buyer and appropriate to consummate the transactions contemplated by the APA and the Order;

(8) Declaring that the APA and all other documents, agreements and instruments necessary to effectuate and consummate the transactions contemplated by the APA together with the terms and provisions of the Order are specifically enforceable against and binding upon, and shall not be subject to rejection or avoidance, by the Debtor or FSW SubTech Holdings, LLC, its creditors and all other parties in interest and any assigns, including without limitation any trustee, responsible person, estate administrator, representative or similar person hereinafter appointed for or in connection with the Debtor's estate or affairs in this or any subsequent or converted case under the Bankruptcy Code involving the Debtor;

(9) Declaring that the terms and conditions of the APA are an integral part of the sale of the Property and that, in view of: (i) the good faith of the Buyer, (ii) the reasonableness of the purchase price, and (iii) the fact that the terms and conditions of the APA are an integral part of

the sale of the Property, the reversal or modification on appeal of the Order authorizing the sale hereunder shall not affect the validity or enforceability of the sale or any of the terms and conditions of the APA, pursuant to 11 U.S.C. § 363(m); and

(10) All other relief requested above and as is just and equitable.

Baton Rouge, Louisiana this 6<sup>th</sup> day of September, 2016.

Respectfully submitted,

**HELLER, DRAPER, PATRICK, HORN  
& DABNEY, L.L.C.**

/s/ Barry W. Miller

---

Barry W. Miller, La. Bar No. 09678  
9311 Bluebonnet Blvd.  
Baton Rouge, LA 70810  
Telephone: 225-767-1499 // Fax: 225-761-0760  
Email: [bmiller@hellerdraper.com](mailto:bmiller@hellerdraper.com)

Greta M. Brouphy, (La. Bar No. 26216)  
650 Poydras Street, Suite 2500  
New Orleans, Louisiana 70130-6175  
Telephone: 504-299-3300 // Fax: 504-299-3399  
E-mail: [gbrouphy@hellerdraper.com](mailto:gbrouphy@hellerdraper.com)

**Counsel for Debtor**

Exhibit -A-

**ASSET PURCHASE AGREEMENT AND  
ASSUMPTION OF LEASES**

**by and among**

**FOODSERVICEWAREHOUSE.COM, L.L.C.  
("Debtor")**

**FSW SUBTECH HOLDINGS, L.L.C.  
(d/b/a Sub-Technologies, Inc.)  
("Seller")**

**And**

**PKS-SUBTECH, L.L.C.  
("Buyer")**

**Dated**

**September 6, 2016**

**ASSET PURCHASE AGREEMENT AND  
ASSUMPTION OF LEASES**

This ASSET PURCHASE AGREEMENT AND ASSUMPTION OF LEASES is dated as of September 6, 2016, by and among FoodServiceWarehouse.com, LLC, a Colorado limited liability company (“**Debtor**”), its wholly owned subsidiary, FSW Subtech Holdings, LLC d/b/a Sub-Technologies, Inc., a company incorporated in Delaware (“**SubTech Holdings**”); (SubTech Holdings and Debtor may be referred to collectively as “**Seller**”) and PKS-Subtech, LLC, a Missouri limited liability company, (“**Buyer**”). Buyer, SubTech Holdings and Debtor are sometimes referred to collectively herein as the “**Parties**” and singularly as a “**Party**.”

**RECITALS**

WHEREAS, Debtor is or was engaged in the business of selling foodservice equipment and supplies online, as well as providing training services, order management solutions, and an online education center including photos, videos, articles, profiles, buying guides, and training services (the “*Debtor’s Business*”);

WHEREAS, on May 20, 2016 (the “**Petition Date**”), Debtor filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the Eastern District of Louisiana (the “**Bankruptcy Court**”), which case is being administered under Case No. 2:16-BK-11179 (the “**Bankruptcy Case**”); and

WHEREAS, Subtech Holdings is a wholly owned subsidiary of Debtor and engages in the sale of small wares primarily to the Subway restaurant chain of restaurants.

WHEREAS, upon the terms and subject to the conditions set forth in this Agreement, and as authorized under Sections 105, 363 and 365 of the Bankruptcy Code, Seller desires to sell to Buyer, and Buyer desires to purchase from Seller, all of the Transferred Assets (as hereinafter defined), as well as the assumption of the leases described herein.

NOW, THEREFORE, in consideration of the mutual promises, representations and warranties made herein and other good and valuable consideration, the receipt and sufficiency of which are hereby mutually acknowledged, the Parties hereto, intending to be legally bound and subject only to the required approvals of the Bankruptcy Court, agree as follows:

**ARTICLE I.**

**DEFINITIONS AND INTERPRETIVE MATTERS**

1.1 **Definitions.** The following terms, as used herein, have the following meanings: “*Affiliate*” means, with respect to any Person, any other Person directly or indirectly controlling, controlled by, or under common control with such other Person. For such purposes, the term “control” means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.



“**Agreement**” means this Asset Purchase Agreement, as the same may be amended from time to time in accordance with the terms hereof.

“**Applicable Law**” means, with respect to any Person, any federal, state or local law (statutory, common or otherwise), constitution, ordinance, code, rule, regulation, order, injunction or judgment adopted or promulgated by a Governmental Authority that is binding upon or applicable to such Person, as amended unless expressly specified otherwise.

“**Assumed Leases**” shall mean those leases of real or personal property of Seller which shall be assigned to Buyer, for which Buyer shall obtain the right to use, occupy or enjoy such leased property and Buyer shall assume all obligations under such assumed leases including the obligation to cure any existing defaults or breaches of such leases and the requirements of the Bankruptcy Code.

“**Bankruptcy Case**” has the meaning set forth in the recitals hereto.

“**Bankruptcy Code**” has the meaning set forth in the recitals hereto.

“**Bankruptcy Court**” has the meaning set forth in the recitals hereto.

“**Bankruptcy Rules**” means the Federal Rules of Bankruptcy Procedure, the Official Bankruptcy Forms, the Federal Rules of Civil Procedure, the Local Rules of the United States District Court for the Eastern District of Louisiana and the Local Rules of the United States Bankruptcy Court for the Eastern District of Louisiana, each as now in effect or as hereafter amended, to the extent applicable to the Bankruptcy Case or proceedings therein, as the case may be.

“**Business**” means the operations and the business of the Seller.

“**Business Day**” means any day, excluding Saturdays, Sundays or “legal holidays” (as referenced in Bankruptcy Rule 9006(a)), on which nationally chartered commercial banks are open for business.

“**Buyer**” has the meaning set forth in the opening paragraph of this Agreement.

“**Chosen Courts**” is the Bankruptcy Court defined in the recitals.

“**Claim**” means a claim as defined in Section 101(5) of the Bankruptcy Code.

“**Closing**” is defined in Section 2.6(a).

“**Closing Date**” means the date of the Closing.

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

“**Consideration**” means the values exchanged by the parties in this Agreement.

“**Content Library**” means the image, video and content library of Seller, including (i) Seller’s image content, Web-optimized product images and other lifestyle/blog shots, (ii) Seller’s video library within Live Clicker, a true and complete listing of which has been delivered to Buyer, (iii) Seller’s blog and education center content, consisting of articles and guides with all original content, and (iv) Seller’s product library.

“**Contract**” means any contract, agreement, lease, license, indenture, note, bond, sale and purchase order, instrument or other commitment, whether oral or written (including any amendments or modifications thereto).

“**Copyrights**” means, in connection with the Brands and the Content Library, (i) all copyright registrations and applications for registration of Seller, (ii) works of authorship whether or not copyrightable in published and unpublished works, and (iii) any other copyrights and works, together with all copyrightable materials and common law rights, and any applications and registrations therefor, owned by SubTech Holdings or to which SubTech Holdings has a legal right to use and including any license or other rights of SubTech Holdings, whether as a licensor, a licensee or otherwise, relating to any of the foregoing.

“**Customer List**” means SubTech Holdings current and historical customer lists.

“**Debtor**” has the meaning set forth in the opening paragraph of this Agreement.

“**Domain Names**” means any and all domain names, uniform resource locators, and social media “pages” including those maintained on Facebook or Twitter, owned, licensed or controlled by SubTech Holdings.

“**Final Order**” means an order or judgment of the Bankruptcy Court, or other court of competent jurisdiction with respect to the subject matter, (i) which has not been reversed, stayed, modified, amended, enjoined, set aside, annulled or suspended, (ii) with respect to which no request for a stay, motion or application for reconsideration or rehearing, notice of appeal or petition for certiorari is filed within the deadline provided by applicable statute or regulation or as to which any appeal that has been taken or any petition for certiorari that has been or may be filed has been resolved by the highest court to which the order or judgment was appealed or from which certiorari was sought, and (iii) as to which the deadlines for filing such request, motion, petition, application, appeal or notice referred to in clause (ii) above have expired.

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

“**Governmental Authority**” means any trans-national, domestic or foreign governmental or regulatory agency, authority, bureau, commission department, official or similar body or instrumentality thereof, or any governmental court, arbitral tribunal or other body administering alternative dispute resolution.

“**Intellectual Property Rights**” means, collectively, (i) all Copyrights, (ii) all Trademarks, (iii) all Domain Names, (iv) all Inventions, (v) the Brands, (vi) the Content Library, (vii) all moral rights (droit moral), rights of integrity and paternity, neighboring rights, rental and lending rights, name, image and bio of the creator/author, publicity rights and other rights of authors,

including the right to authorize, prohibit and/or control the fixation, reproduction and/or other exploitation of the Transferred Assets by any media and means now known or hereafter devised as may be conferred upon SubTech Holdings or its employees or contractors under Applicable Law, regulations or directives, (ix) all derivatives and improvements arising out of or related to any of the above described items, including all translations, adaptations and compilations of any of the foregoing, (x) all rights to obtain and rights to apply for patents, and to register trademarks and copyrights with respect to any of the foregoing, (xii) all rights in all of the foregoing provided by treaties, conventions and common law, and (xiii) all rights to sue or recover and retain damages and costs and attorneys' fees for past, present and future infringement or misappropriation of any of the foregoing.

**“Interest”** means any right, title, interest, ownership, indicia of title or ownership, right of possession, or other legal, equitable or possessory interest of any kind.

**“Inventory”** shall mean all merchandise, goods and products owned by SubTech Holdings to be sold to third party purchasers during the normal course of business of SubTech Holdings.

**“Liabilities”** means any direct or indirect liability, indebtedness, obligation, commitment, expense, claim, deficiency, guaranty or endorsement of or by any Person of any kind or nature, whether accrued or not accrued, absolute or contingent, matured or unmatured, liquidated or unliquidated, known or unknown, asserted or not asserted, determined, determinable or otherwise.

**“Licensed Intellectual Property Rights”** means all Intellectual Property Rights owned by a Third Party and licensed or sublicensed to SubTech Holdings..

**“Lien”** means, with respect to any property or asset, any mortgage, lien, interest pledge, charge, security interest, or encumbrance, mechanics' lien, materialman's lien, statutory lien or right, and other consensual or non-consensual lien, whenever granted and including, without limitation, those charges or interests in property within the meaning of “lien” under section 101(37) of the Bankruptcy Code.

**“Marketing Materials”** means all marketing materials, marketing research data, customer and sales information, product literature, promotional materials and data, advertising and display materials (including all underlying designs, samples, charts, diagrams, photos and electronic files related to the foregoing) and all training materials, in each case in whatever form or medium (for example, audio, visual, digital or print) owned or used by SubTech Holdings in connection with the Transferred Asset.

**“Organizational Documents”** means, with respect to any Person, the certificate or articles of incorporation, bylaws, certificate of formation or organization, partnership agreement, operating agreement, limited liability company agreement or any other similar organizational documents of such Person.

**“Owned Intellectual Property Rights”** means all Intellectual Property Rights owned by SubTech Holdings.

“**Party**” or “**Parties**” has the meaning set forth in the opening paragraph of this Agreement.

“**Permits**” means all governmental (whether federal, state or local) permits, licenses, franchises, certificates, authorizations, approvals or other similar authorizations, as well as all pending applications therefore and renewals related thereto.

“**Person**” means any person, entity or Governmental Authority of any nature whatsoever, specifically including an individual, firm, company, corporation, partnership, trust, joint venture, association, joint stock company, limited liability company, estate, unincorporated organization or other entity or organization.

“**Petition Date**” has the meaning set forth in the recitals hereto.

“**Proceeding**” means any action, claim, demand, audit, hearing, complaint, investigation, litigation, or suit commenced, brought, conducted, or heard by or before any Governmental Authority.

“**Representatives**” means, with respect to any Person, the officers, directors, employees, members, managers, partners, investment bankers, attorneys, accountants, consultants or other advisors, agents or representatives of such Person, when acting in such capacity on behalf of such Person.

“**Sale Motion**” shall mean the motion to be filed by the Debtor with the Bankruptcy Court seeking, among other things, entry of the Sale Order.

“**Sale Order**” shall mean an order of the Bankruptcy Court authorizing this agreement.

“**Software**” means, in connection with the Intellectual Property Rights, 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 tools, templates, menus, buttons and icons, and (iv) documentation, including user manuals and other training documentation, related to any of the foregoing.

“**Tax**” means (i) any tax, governmental fee or other like assessment or charge of any kind whatsoever (including withholding on amounts paid to or by any Person), together with any interest, penalty, addition to tax or additional amount imposed by any Governmental Authority (a “**Taxing Authority**”) responsible for the imposition of any such tax (domestic or foreign), and any liability for any of the foregoing as transferee, (ii) in the case of the Debtor, liability for the payment of any amount of the type described in clause (i) as a result of being or having been before the Closing Date a member of an affiliated, consolidated, combined or unitary group, or a party to any agreement or arrangement, as a result of which liability of the Debtor to a Taxing Authority is determined or taken into account with reference to the activities of any other Person, and (iii) liability of the Debtor for the payment of any amount of the type described in (i) or

(ii) as a result of any existing express or implied agreement or arrangement (including an indemnification agreement or arrangement).

“**Tax Asset**” means any net operating loss, net capital loss, investment tax credit, foreign tax credit, charitable deduction or any other credit or tax attribute that could be carried forward or back to reduce Taxes (including without limitation deductions and credits related to alternative minimum Taxes).

“**Tax Return**” means any return, declaration, report, claim for refund, or information return or statement relating to Taxes, including any Schedule or attachment thereto, and including any amendment thereof.

“**Third Party**” means any Person other than a Party or its Affiliates.

“**Trademarks**” means all trade names, logos, slogans, designs, common law trademarks and service marks, trademark and service mark registrations and applications therefor, in each case owned by SubTech Holdings and related to the Transferred Assets, including in connection with the Brands and the Content Library, and all goodwill appurtenant to any or all of the foregoing.

“**Transaction Documents**” means this Agreement and any other agreement between Buyer, Subtech Holdings and the Debtor that expressly states that it constitutes a Transaction Document for purposes of this Agreement, and all other agreements, documents and instruments entered into by Buyer, on the one hand, and SubTech Holdings and the Debtor, on the other hand, as of or after the date hereof and at or prior to Closing in connection with the transactions contemplated hereby (as each such document, agreement and instrument may be amended, supplemented or modified).

“**Transactions**” means the transactions contemplated by this Agreement and the other Transaction Documents.

“**Transferred Assets**” is defined in Section 2.1 and the exhibits attached hereto.

**1.2 Accounting Terms; Utilization of GAAP for Purposes of Calculations Under Agreement.** Except as otherwise expressly provided in this Agreement, all accounting terms not otherwise defined herein shall have the meanings assigned to them in conformity with GAAP. Calculations in connection with the definitions, covenants and other provisions of this Agreement shall utilize GAAP, except as otherwise expressly set forth herein.

**1.3 Other Definitional and Interpretative Provisions.** The words “hereof”, “herein” and “hereunder” and words of like import used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement. The headings and captions herein are included for convenience of reference only and shall be ignored in the construction or interpretation hereof. References to Articles, Sections, Exhibits and Schedules are to Articles, Sections, Exhibits and Schedules of this Agreement unless otherwise specified. 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 capitalized terms used in any

Exhibit or Schedule but not otherwise defined therein and defined herein, shall have the meaning as defined in this Agreement. Any singular term in this Agreement shall be deemed to include the plural, and any plural term the singular. Whenever the words “include”, “includes” or “including” are used in this Agreement, they shall be deemed to be followed by the words “without limitation”, whether or not they are in fact followed by those words or words of like import. “Writing”, “written” and comparable terms refer to printing, typing and other means of reproducing words (including electronic media) in a visible form. References to any Person include the successors and permitted assigns of that Person. References from or through any date mean, unless otherwise specified, from and including or through and including, respectively. References to “law”, “laws” or to a particular statute or law shall be deemed also to include any and all Applicable Law. The word “or” will have the inclusive meaning represented by the phrase “and/or.” The phrase “and/or” when used in a conjunctive phrase, shall mean any one or more of the Persons specified in or the existence or occurrence of any one or more of the events, conditions or circumstances set forth in that phrase; *provided, however*, that when used to describe the obligation of one or more Persons to do any act, it shall mean that the obligation is the obligation of each of the Persons but that it may be satisfied by performance by any one or more of them. “Shall” and “will” have equal force and effect. The Parties and their counsel have reviewed the provisions of this Agreement and have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Parties and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any of the provisions of this Agreement. All references to immediately available funds or dollar amounts contained in this Agreement shall mean United States dollars. THE PARTIES AGREE THAT THE BOLD AND/OR CAPITALIZED LETTERS IN THIS AGREEMENT CONSTITUTE CONSPICUOUS LEGENDS.

## PURCHASE AND SALE

2.1 **Purchase and Sale of Assets.** Subject to, and on the terms and conditions of, this Agreement, effective at the Closing, the Buyer shall purchase, acquire and accept from SubTech Holdings, and SubTech Holdings shall sell, convey, transfer, assign and deliver to the Buyer, as of the Effective Time, all of the SubTech Holding’s right, title and interest in and to the assets, properties, rights and interests set forth below (the “*Transferred Assets*”): Customer Lists;

(b) all Owned Intellectual Property Rights and the goodwill associated therewith, including Domain names ( a list of the Domain names are attached hereto as Exhibit 4);

(c) all Licensed Intellectual Property Rights;

(d) to the extent related to the Transferred Assets (i) all rights, claims, rebates, discounts and credits, performance and other bonds, security and other deposits, advance payments and prepayments, prepaid license fees and other prepaid assets, refunds, causes of action, rights of recovery, rights of setoff and rights of recoupment in favor of SubTech Holdings, including any such rights of the SubTech Holdings under any insurance policy, any insurance proceeds or condemnation award payable to the SubTech Holdings or any transferable or assignable claim therefor, (ii) all rights in and under all express or implied guarantees, warranties (including manufacturers’ warranties), representations, covenants, indemnities and

similar rights (including guarantees and indemnity or warranty obligations of subcontractors and professional consultants), in favor of SubTech Holdings to the extent transferable under the terms thereof, and (iii) all rights to any legal proceeding available to or being pursued by SubTech Holdings, whether arising by way of counterclaim or otherwise;

(e) all Software, files, data, books and records of any kind or type, wherever located, related to the Customer List, the Owned Intellectual Property Rights, the Licensed Intellectual Property Rights, and the Permits;

(f) any proceeds arising from the sale of any assets by SubTech Holdings subsequent to the date hereof that would have otherwise been included in the Transferred Assets had such sold assets existed immediately prior to this sale;

(g) all books and records of the SubTech Holdings, wherever located, relating to the Transferred Assets, including, but not limited to, the following: sales records, customer files, books of account, invoices, accounting records, Tax Returns with respect to the Transferred Assets, product specifications, drawings, engineering, maintenance and operating records, advertising materials, customer lists, cost and pricing information, supplier lists, business plans, catalogues, quality control records and manuals, research and development files, patent and trademark files; *provided, however*, that the Debtor and SubTech Holdings shall retain a right to have a reasonable access to and copying of (including through its Representatives) the provisions within such materials related to Retained Assets or Retained Liabilities, the SubTech Holdings and Debtor's rights under the Transaction Documents or that are reasonably required with respect to any audit, investigation or inquiry of any Governmental Authority including Taxing Authorities with respect to periods prior to the Closing;

(h) all prepaid claims, prepaid expense items and deferred charges, credits, advance payments, security and other deposits made by SubTech Holdings to any other Person relating to the Transferred Assets other than to the extent exclusively relating the Retained Assets or Retained Liabilities;

(i) all third party indemnities related to the Transferred Assets where SubTech Holdings is an indemnified party and the proceeds afforded thereby, in each case other than to the extent exclusively relating to the Retained Assets or Retained Liabilities;

(j) all Permits relating to the Transferred Assets, to the extent transfer is permitted under Applicable Law, including the Bankruptcy Code;

(k) all claims, rights, defenses, offsets, recoupments, causes of action, credits, immunities or rights of set-off against Buyer, any Affiliates of Buyer and/or Third Parties arising prior to the Effective Time and related to the Transferred Assets;

(l) SubTech Holdings Domain Names (Exhibit 4) and all software, content, and technology used in or related to such website, and all related rights, privileges and assets related to such website;

(m) all Marketing Materials of SubTech Holdings, including the Content Library of Subtech Holdings;

(n) all inventory owned by SubTech Holdings, or as may be acquired by SubTech Holdings in the ordinary course of business that exists on the date of the closing;

(o) Sub Technologies Inc. is a party to a lease with bcIMC Realty Corporation, a copy of which is attached hereto as Exhibit 1. This lease has been assigned to and assumed by SubTech Holdings. The property is located at 1535 Meyerside Drive, Unit 2, Mississauga, Ontario, Canada, L5t 1M9. The building space is used as a warehouse to store inventory and for office space. This lease will be assigned to the Buyer under this Agreement and all obligations thereunder will be assumed by the Buyer, including the costs to cure any defaults or breaches of the lease agreement;

(p) Sub Technologies, Inc. is also a party to a lease with Wells Realty, L.L.C., dated August 23, 2013, a copy of which is attached hereto as Exhibit 2. This lease has been assigned to and assumed by SubTech Holdings. The leased property is located at 2301 NE Independence Ave. Lee's Summit, MO 64064. This property also serves as a warehouse for inventory and for office space. The lease of this property will be assigned to the Buyer and all obligations thereunder will be assumed by the Buyer including the costs to cure any defaults or breaches of the lease agreement;

(q) Sub Technologies, Inc. also leases a Xerox WorkCentre from Balboa Capital Corporation, a copy of which is attached hereto as Exhibit 3. This lease has been assigned to and assumed by SubTech Holdings. This lease will also be assigned to Buyer and Buyer shall assume all obligations under this lease including the costs to cure any defaults or breaches of the lease agreement; and

(r) all cash and cash equivalents of SubTech Holdings. .

2.2 **Retained Assets.** Notwithstanding the foregoing, Buyer shall not acquire, and the Debtor and SubTech holdings shall retain all other assets not otherwise included as a Transferred Asset, including the following assets (the "***Retained Assets***"):

(a) the Organizational Documents of the SubTech Holdings and its minute books, stock and ownership records and corporate seals and all other documents and records relating to the organization, maintenance, existence and federal income taxation of the Seller;

(b) all Tax Assets;

(c) all business and financial records, books, ledgers, files, plans, documents, correspondence, lists, and reports that relate solely to Retained Assets or Retained Liabilities;

(d) all ERISA Plans and assets maintained pursuant or in connection therewith; and

(e) all claims against third parties unless specifically transferred herein.



2.4 **Retained Liabilities.** The Buyer does not assume the liabilities described in Exhibit 5 attached hereto.

2.5 **Consideration.** The consideration for the transfer of the Transferred Assets (the “*Consideration*”), will be cash in the amount of \$200,000 (the “*Cash Consideration*”), plus the assumed liabilities. At the Closing, the Buyer will pay or cause to be paid by wire transfer of immediately available funds to such bank account or accounts of the Debtor as specified in writing by the Debtor or its Representatives to Buyer, an amount equal to the Cash Consideration.

2.6 **Closing.**

(a) The closing of the Transactions (the “*Closing*”) shall take place at the offices of Heller, Draper, Patrick, Horn & Dabney, LLC, 9311 Bluebonnet Boulevard, Baton Rouge, Louisiana 70810, commencing at 10:00 a.m., on the date that is three (3) Business Days following the satisfaction or written waiver of the conditions of Closing set forth herein (other than those conditions which by their terms are not to be satisfied until the Closing, but subject to the waiver or fulfillment of those conditions), or such other date or location as the Parties may mutually determine. The Closing and all documentation delivered at Closing shall be effective as of the Effective Time.

(b) At the Closing, the following shall occur:

- (i) The Debtor shall deliver to the Buyer a copy of the Sale Order;
- (ii) The Seller shall have delivered possession of the Transferred Assets;
- (iii) The Buyer shall deliver to the Debtor the various certificates, instruments and documents required to be delivered by Buyer under this Agreement;
- (iv) The Debtor shall deliver to the Buyer the various certificates, instruments and documents required to be delivered by Debtor under this Agreement; and
- (v) The Buyer and Seller shall deliver or cause to be delivered to one another such other instruments and documents necessary or appropriate to evidence their respective due execution, delivery and performance of this Agreement.

2.7 **Transfer Taxes.** All federal, state and local sales and transfer taxes, including all state and local taxes in connection with the transfer of the Transferred Assets, and all recording and filing fees (collectively, “*Transaction Taxes*”) that may be imposed by reason of the sale, transfer, assignment and delivery of the Transferred Assets, and are not exempt under Section 1146(a) of the Bankruptcy Code shall be borne by the Buyer. Transaction Taxes do not include any Tax in the nature of an income tax, including any capital gains, franchise, excise, inheritance, estate, succession, or gift taxes. The Seller shall cooperate to minimize any such Transaction Taxes and to determine appropriate taxing authorities and amount of Transaction Taxes, if any, payable in connection with the transactions contemplated under this Agreement. Each Party shall assist reasonably the other Party in the preparation and filing of any and all required returns

for which such other Party is responsible and for or with respect to such Transaction Taxes with any and all appropriate taxing authorities.

## REPRESENTATIONS AND WARRANTIES OF SELLER

The Seller represents and warrant to Buyer, as of the date hereof and as of the Closing Date, that:

3.1 **Corporate Existence and Power.** SubTech Holdings and Debtor are duly organized and existing under the laws of their respective jurisdictions of organization. **Debtor-in-Possession Status.** The Debtor is a debtor-in-possession under chapter 11 of the Bankruptcy Code.

3.3 **Corporate Authorization.** Subject to the entry of the Sale Order by the Bankruptcy Court, the execution, delivery and performance by the Seller of this Agreement and the other Transaction Documents dated the date hereof to which the Seller is a party and the consummation of the Transactions have been duly authorized. Subject to the entry of the Sale Order by the Bankruptcy Court, this Agreement and each other Transaction Document dated as of the date hereof to which the SubTech Holdings is a party (assuming in each case due authorization, execution and delivery thereof by the other parties thereto) constitutes a valid and binding agreement of the Parties, enforceable against the Parties in accordance with its terms. Subject to the entry of the Sale Order by the Bankruptcy Court, all other Transaction Documents executed and delivered by the Seller (assuming in each case due authorization, execution and delivery thereof by the other parties thereto) shall, when executed by the Seller constitute valid and binding agreements of the Seller, enforceable against the Seller in accordance with their terms.

3.4 **Compliance with Laws.** The Seller has complied, and is now complying, in all material respects with the requirements of Applicable Laws, except where compliance with such law is excused or stayed by the Bankruptcy Code or by order of the Bankruptcy Court. Seller has obtained, and is in compliance in all material respects with the terms and conditions of all Permits required in connection with the Transferred Assets and all such Permits are in full force and effect.

3.5 **Legal Proceedings.** Except (a) the Bankruptcy Case and (b) any matters that otherwise will not be resolved by the Sale Order without any liability or restriction applicable to (or adverse effect on) Buyer or the Transferred Assets, there is no claim, action, suit, proceeding or governmental investigation of any nature pending or, to Seller's Knowledge, threatened against or by Seller (a) relating to or affecting the Transferred Assets; or (b) that challenges or seeks to prevent, enjoin or otherwise delay the Transactions contemplated by this Agreement.

3.6 **Absence of Restrictions and Conflicts.** Subject to and taking into account the effect of entry of the Sale Order in the Bankruptcy Case, the execution, delivery and performance of this Agreement and the Transaction Documents, the consummation of the Transactions contemplated hereby and thereby, and the fulfillment of and compliance with the terms and conditions hereof and thereof, do not or will not (as the case may be), with the passing of time or the giving of notice or both, violate or conflict with, constitute a breach of or default under, result in the loss of any benefit under, permit the acceleration of any obligation under or create in any

party the right to terminate, modify or cancel, (a) any term or provision of the Organizational Documents of Seller, (b) any Transferred Asset, (c) any judgment, decree or order of any court or Governmental Authority or agency to which Seller is a party or by which any such Person or any of their respective properties are bound or (d) in any material respect, any Applicable Law or arbitration award applicable to Seller. No consent, approval, order or authorization of, or registration, declaration or filing with, any Governmental Authority is required with respect to Seller in connection with the execution, delivery or performance of this Agreement or the Transaction Documents, or the consummation of the Transactions contemplated hereby or thereby. **Intellectual Property.** All required filings and fees related to the Intellectual Property Rights included in the Transferred Assets have been timely filed with and paid to the relevant Governmental Authority and authorized registrars, if any, and all Intellectual Property Rights are otherwise in good standing. Seller has provided Buyer with true and complete copies of file histories, documents, certificates, office actions, correspondence and other materials related to all Intellectual Property Rights included in the Transferred Assets.

(b) To Seller's Knowledge, no other party thereto is in breach of or default under (or is alleged to be in breach of or default under) in any material respect, or has provided or received any notice of breach or default of or any intention to terminate, any license or other agreement with respect to the Intellectual Property Rights included in the Transferred Assets. No event or circumstance has occurred that, with notice or lapse of time or both, would constitute an event of default under any such agreement or result in a termination thereof or would cause or permit the acceleration or other changes of any right or obligation or the loss of any benefit thereunder.

(c) SubTech Holdings is the sole and exclusive legal and beneficial, and with respect to any registered Intellectual Property Rights, record owner of all right, title and interest in and to the Intellectual Property Rights included in the Transferred Assets.

(d) The consummation of the Transactions contemplated hereunder will not result in the loss or impairment of or payment of any additional amounts with respect to, nor require the consent of any other Person in respect of, the Buyer's right to own, use or hold for use any Intellectual Property Rights included in the Transferred Assets as owned, used or held for use by SubTech Holdings.

(e) The Intellectual Property Rights included in the Transferred Assets as currently or formerly owned, licensed or used by SubTech Holdings, have not infringed, misappropriated, diluted or otherwise violated, and have not, do not and will not infringe, dilute, misappropriate or otherwise violate, the intellectual property rights or other rights of any Person. To Seller's Knowledge, no Person has infringed, misappropriated, diluted or otherwise violated, or is currently infringing, misappropriating, diluting or otherwise violating, any Intellectual Property Rights included in the Transferred Assets.

(f) There is no claim, action, suit, proceeding or governmental investigation of any nature (including any oppositions, interferences or re-examinations) settled, pending or threatened (including in the form of offers to obtain a license): (i) alleging any infringement, misappropriation, dilution or violation of the intellectual property rights of any Person by Seller in connection with the Business; (ii) challenging the validity, enforceability, registrability or ownership of any Intellectual Property Rights or SubTech Holdings' rights with respect to any

Intellectual Property Rights; or (iii) by Seller or any other Person alleging any infringement, misappropriation, dilution or violation by any Person of any Intellectual Property Rights included in the Transferred Assets. Seller is not subject to any outstanding or prospective proceeding (including any motion or petition therefor) that does or would restrict or impair the use of any Intellectual Property Rights to be transferred und this Agreement.

3.8 **Full Disclosure**. No representation or warranty by Seller in this Agreement and no statement contained in the Exhibits or Schedules to this Agreement or any certificate or other document furnished or to be furnished to Buyer pursuant to this Agreement contains any untrue statement of a material fact, or omits to state a material fact necessary to make the statements contained therein, in light of the circumstances in which they are made, not misleading.

3.9 **Assumed Leases**. Buyer shall assume the leases listed and described in Exhibits 1, 2 and 3 attached hereto and incorporated herein. Buyer shall be responsible for the performance of all of Seller's obligations under said leases and executory contracts and shall assume all liabilities associated with the assumed leases. Buyer shall be responsible for curing any defaults or breaches of the assumed leases and all other obligations of Seller under the assumed leases and as required by the Bankruptcy Code.

#### ARTICLE IV.

#### REPRESENTATIONS AND WARRANTIES OF BUYER

Buyer represents and warrants to Seller, as of the date hereof and as of the Closing Date, that:

4.1 **Corporate Existence and Power**. Buyer is a Missouri limited liability company existing and in good standing under the laws of the State of Missouri and has full power and authority to carry on its business as now conducted.

4.2 **Authorization**. The execution, delivery and performance by Buyer of this Agreement and the other Transaction Documents to which it is or will be a party and the consummation of the Transactions are within the powers of Buyer and will have been duly authorized by all necessary action on the part of Buyer. This Agreement and the other Transaction Documents, dated as of the date hereof, to which Buyer is a party have been duly executed and delivered on behalf of Buyer, and (assuming in each case due authorization, execution and delivery thereof by the other parties thereto) constitutes a valid and binding agreement of Buyer, enforceable against Buyer in accordance with its terms (subject to applicable bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and other laws affecting creditors' rights generally and general principles of equity). All other Transaction Documents executed and delivered by Buyer shall, when executed and delivered by Buyer (assuming in each case due authorization, execution and delivery thereof by the other parties thereto), constitute valid and binding agreements of Buyer, enforceable against Buyer in accordance with their terms (subject to applicable bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and other laws affecting creditors' rights generally and general principles of equity).**Governmental Authorization**. The execution, delivery and performance by Buyer of this Agreement and each other Transaction Document to which Buyer is or will be a

party and the consummation by Buyer of the Transactions require no action by or in respect of, or filing with or notification to, any Governmental Authority other than as specifically provided in this Agreement. **Noncontravention.** The execution, delivery and performance by Buyer of this Agreement and the other Transaction Documents to which Buyer is or will be a party and the consummation by Buyer of the Transactions do not and will not (i) contravene, conflict with, or result in any violation or breach of any provision of the Buyer's Organizational Documents, (ii) assuming compliance with the matters referred to in Section 4.3, contravene, conflict with or result in a violation or breach of any provision of any Applicable Law, or (iii) assuming compliance with the matters referred to in Section 4.3, require any consent or other action by any Person under, constitute a default, or an event that, with or without notice or lapse of time or both, would constitute a default, under, or cause or permit the termination, cancellation, acceleration or other change of any right or obligation or the loss of any benefit to which Buyer is entitled under any provision of any Contract binding upon Buyer or by which its assets may be bound or any Permit affecting, or relating in any way to, Buyer or the assets or business of Buyer, with only such exceptions, in the case of each of clauses (i) through (iii), as has not had and would not reasonably be expected to have, individually or in the aggregate, a Buyer Material Adverse Effect.

## COVENANTS OF SELLER

The Seller agrees that:

5.1 **Bankruptcy Court Approval.** Notwithstanding any conflicting or inconsistent provisions of this Agreement, the Seller's obligations under this Agreement and the Transactions are subject to and contingent upon the approval and authorization of the Bankruptcy Court.

## ARTICLE VI.

### COVENANTS OF SELLER AND THE BUYER

The Seller and Buyer agree that:

6.1 **Commercially Reasonable Efforts; Further Assurances.** Subject to the terms and conditions of this Agreement and subject to the Bankruptcy Code and any orders of the Bankruptcy Court, Buyer and Seller each agree to use reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary or desirable to consummate the Transactions, including (i) finalizing, executing and delivering all Transaction Documents prior to the Closing, (ii) preparing and filing as promptly as practicable with any Governmental Authority or other Third Party all documentation to effect all necessary filings, notices, petitions, statements, registrations, submissions of information, applications and other documents, and (iii) obtaining and maintaining all approvals, consents, registrations, permits, authorizations and other confirmations required to be obtained from any Governmental Authority or other Third Party that are necessary, proper or advisable to consummate the Transactions; *provided, however*, that the Parties hereto understand and agree that the reasonable efforts of any Party hereto shall not be deemed to include (A) except as expressly set forth in this Agreement, entering into any settlement, undertaking, consent decree, stipulation or agreement with any Governmental Authority in connection with the Transactions or (B) divesting or otherwise holding separate

(including by establishing a trust or otherwise) any assets of the Seller or Buyer. The Seller and Buyer agree to execute and deliver or cause to be executed and delivered such other documents, certificates, agreements and other writings and to take such other actions as may be necessary or desirable in order to consummate or implement expeditiously the Transactions in accordance with the terms and conditions of this Agreement. **Certain Filings.** The Seller and Buyer shall cooperate with one another (i) in determining whether any action by or in respect of, or filing with, any Governmental Authority is required, or any actions, consents, approvals or waivers are required to be obtained from parties to any material contracts, in connection with the consummation of the Transactions and (ii) in taking such actions or making any such filings, furnishing information required in connection therewith and seeking timely to obtain any such actions, consents, approvals or waivers.**Notices of Certain Events.** The Seller on the one hand and Buyer, on the other hand, shall promptly notify the other of: any written notice or other communication received by it from any Person alleging that the consent of such Person is or may be required in connection with the Transactions;

(b) any written notice or other communication received by it from any Governmental Authority in connection with the Transactions;

(c) any Proceedings commenced or, in the case of the Seller, to Seller's Knowledge, or in the case of Buyer, to its Knowledge, threatened against, relating to or involving or otherwise affecting the Seller or Buyer, respectively, as the case may be, that, if pending on the date of this Agreement, would have been required to have been disclosed pursuant to any section of this Agreement or that relate to the consummation of the Transactions;

(d) in the case of the Seller, the damage or destruction by fire or other casualty of any material assets that would be included as a Transferred Asset or any material asset that would be included as a Transferred Asset becomes the subject of any Proceeding or, to Seller's Knowledge, threatened Proceeding for the taking thereof or any part thereof or of any right relating thereto by condemnation, eminent domain or other similar governmental action; and

(e) any inaccuracy of any representation or warranty contained in this Agreement at any time during the term hereof that could reasonably be expected to cause the conditions set forth in this Agreement not to be satisfied, in the case of Buyer, to its Knowledge, or in the case of the Seller, to Seller's Knowledge.

## ARTICLE VII.

### CONDITIONS TO CLOSING

7.1 **Conditions to Obligations of Buyer, Seller and Debtor.** The obligations of Buyer and Seller to consummate the Closing are subject to the satisfaction of each of the following conditions: No Applicable Law shall prohibit the Transactions or the consummation of the Closing.

(b) The Bankruptcy Court shall have entered the Sale Order, which Sale Order shall have become a Final Order and in full force and effect.

(c) All actions by or in respect of or filings with any Governmental Authority required to permit the consummation of the Closing shall have been taken, made or obtained.

(d) No Proceeding instituted by any Governmental Authority shall be pending and no injunction, order, decree or judgment of any Governmental Authority of competent jurisdiction shall be in effect, in each case which seeks to or does, as applicable, prohibit, restrain or enjoin the consummation of the Transactions; *provided, however*, that the Party seeking not to consummate the Closing based upon this section must have used commercially reasonable efforts to cause such Proceeding to have been dismissed or resolved in favor of the Parties or to prevent the entry of such injunction, order, decree or judgment.

7.2 **Conditions to Obligations of Buyer.** The obligation of Buyer to consummate the Closing is subject to the satisfaction (or waiver by Buyer) of each of the following further conditions: Seller shall have performed in all material respects all of its covenants and other obligations hereunder required to be performed by it on or prior to the Closing Date;

(b) the representations and warranties of Seller set forth in this Agreement shall be true and correct in all material respects at and as of the date hereof and the Closing Date.;

(c) Seller shall have delivered or be prepared to deliver all of the items required to be delivered by Seller as of the Closing Date pursuant to the terms and conditions of this Agreement; and

(d) The Sale Order, together with any other order of the Bankruptcy Court required to consummate the Transactions, in form and substance reasonably acceptable to Buyer, shall have been entered by the Bankruptcy Court and each such order shall be a Final Order and in full force and effect.

7.3 **Conditions to Obligations of Debtor and Seller.** The obligations of the Debtor and the Seller to consummate the Closing are subject to the satisfaction (or waiver by Debtor and Seller) of the following further conditions: Buyer shall have performed in all material respects all of its covenants and obligations hereunder required to be performed by it at or prior to the Closing Date;

(b) the representations and warranties of Buyer set forth in this Agreement shall be true and correct in all material respects at and as of the date hereof and the Closing Date, as if made at and as of the Closing Date;

(c) Buyer shall have delivered or be prepared to deliver all of the items required to be delivered by Buyer as of the Closing Date pursuant to the terms and conditions of this Agreement; and

(d) The Sale Order, together with any other order of the Bankruptcy Court required to consummate the Transactions, in form and substance reasonably acceptable to Buyer, shall have been entered by the Bankruptcy Court and each such order shall be a Final Order and in full force and effect.

## ARTICLE VIII.

### TERMINATION

8.1 **Grounds for Termination.** This Agreement may be terminated at any time prior to the Closing: by mutual written agreement of Seller and Buyer;

(b) by Debtor, Seller or Buyer if there shall be any Applicable Law that makes consummation of the Transactions illegal or otherwise prohibited or if consummation of the Transactions would violate any nonappealable final order, decree or judgment of any Governmental Authority having competent jurisdiction;

(c) by Buyer if:

(i) Seller shall have breached any of its representations and warranties, or shall have failed to perform or comply with any of its covenants and agreements, contained in this Agreement such that any condition set forth in in this Agreement shall not be satisfied, and Buyer shall have given at least ten days written notice to Seller to cure such breaches and failures, but such condition remains unsatisfied; or

(ii) any condition set forth in this Agreement shall have become incapable of being satisfied;

(iii) Seller fails to consummate the transactions contemplated hereby, Buyer has otherwise complied with all of Buyer's obligations under this Agreement, and all of the conditions contained in this Agreement have been satisfied by Buyer;

(iv) upon entry of an order of the Bankruptcy Court approving a higher or better offer by any Person other than by Buyer for the purchase of the Transferred Assets.

(d) by Seller:

(i) if Buyer shall have breached any of its representations or warranties or failed to perform or comply with any of its covenants or agreements contained in this Agreement such that the conditions for closing shall not to be satisfied or cannot be satisfied, and Seller shall have given at least ten days written notice to Buyer to cure such breaches and failures but such condition remains unsatisfied; or

(ii) if any condition set forth in this agreement shall have become incapable of being satisfied.

8.2 **Effect of Termination.**

(a) If this Agreement is terminated as permitted by this agreement and such termination did not result from and was not caused by a breach or failure to perform by any Party: (i) such termination shall be without liability of any Party (or any stockholder, owner or Representative of such Party) to any other Party to this Agreement, and (ii) this Agreement shall thereafter become void and have no effect, except as otherwise set forth in this Agreement (iii) if



the agreement is terminated as the result of the fault of any party, then the party not at fault is entitled to pursue any remedies allowed by law or equity.

- (b) The provisions of Article 8 shall survive any termination.

## ARTICLE IX.

### MISCELLANEOUS

9.1 **Notices.** All notices, requests and other communications to any party hereunder shall be in writing (including facsimile transmission) and shall be given, if to Buyer:

PKS-Subtech, LLC  
2301 N. E. Independence  
Lee's Summit, Missouri 64064

if to Debtor and Seller, to:

FoodServiceWarehouse.com, LLC  
P.O. Box 630047  
Littleton, CO 80163

with a copy to:

Barry W. Miller  
Heller, Draper, Patrick, Horn & Dabney, LLC  
9311 Bluebonnet Blvd., Suite B  
Baton Rouge, LA 70810  
Facsimile No.: (225) 767-1499  
Email: bmillier@hellerdraper.com

or such other address, facsimile number or electronic mail address as such party may hereafter specify for the purpose by notice to the other parties hereto. All such notices, requests and other communications shall be deemed received on the date of receipt by the recipient thereof if received prior to 5:00 p.m. in the place of receipt and such day is a Business Day in the place of receipt. Otherwise, any such notice, request or communication shall be deemed not to have been received until the next succeeding Business Day in the place of receipt.

9.2 **Survival.** The representations and warranties contained herein and in any certificate or other writing delivered pursuant hereto shall terminate upon and not survive the Closing and there shall be no liability thereafter in respect thereof. Each of the covenants of the Parties hereto contained in this Agreement shall terminate upon the Closing except to the extent that performance under such covenant is to take place after Closing, in which case such covenant shall survive the Closing until the earlier of (i) performance of such covenant in accordance with this Agreement and (ii) the expiration of applicable statute of limitations with respect to any claim for any failure to perform such covenant; *provided, however*, that if a written notice of

claim with respect to any covenant to be performed after Closing is given prior to the expiration of such covenant then such covenant shall survive until, but only for purposes of, the resolution of such claim by final, non-appealable judgment or settlement. **Amendments and Waivers.**

(a) Any provision of this Agreement may be amended or waived prior to Closing if, but only if, such amendment or waiver is in writing and is signed, in the case of an amendment, by each Party to this Agreement, or in the case of a waiver, by the Party against whom the waiver is to be effective.

(b) No failure or delay by any Party in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies herein provided shall be cumulative and not exclusive of any rights or remedies provided by law.

9.4 **Expenses.** Except as otherwise expressly provided herein, all costs and expenses incurred in connection with this Agreement or the Transactions shall be paid by the Party incurring such cost or expense. **Successors and Assigns.** The provisions of this Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns; *provided, however*, that no Party may assign, delegate or otherwise transfer any of its rights or obligations under this Agreement, in whole or in part, by operation of law or otherwise, without the prior written consent of each other Party hereto. To the extent of any such assignment, such assignee will have the same rights and obligations with respect to the other parties as it would have if it were a named party hereto. Notwithstanding the foregoing, Buyer may assign this Agreement and delegate the duties hereunder to an Affiliate or other third party provided that no such assignment or delegation shall relieve Buyer of its duties hereunder. **Governing Law.** THE AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF DELAWARE, WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW.

9.7 **Jurisdiction.** Each Party hereto agrees that it shall bring any action or proceeding in respect of any claim arising out of or related to the Transaction Documents and the transactions contained in or contemplated by the Transaction Documents, exclusively in (a) the Bankruptcy Court so long as the Bankruptcy Case remains open and (b) after the close of the Bankruptcy Case or in the event that the Bankruptcy Court determines that it does not have jurisdiction, the United States District Court for the Eastern District of Louisiana (together with the Bankruptcy Court, the "*Chosen Courts*"), and solely in connection with claims arising under this Agreement or any other Transaction Document or the Transactions (i) irrevocably submits to the exclusive jurisdiction of the Chosen Courts, (ii) waives any objection to laying venue in any such action or proceeding in the Chosen Courts, (iii) waives any objection that the Chosen Courts are an inconvenient forum or do not have jurisdiction over any party hereto, and (iv) agrees that service of process upon such party in any such action or proceeding shall be effective if notice is given. **WAIVER OF JURY TRIAL.** EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY WAIVES ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATED TO THE TRANSACTION DOCUMENTS OR THE TRANSACTIONS CONTEMPLATED HEREBY. **Counterparts; Effectiveness; Third Party Beneficiaries.** This Agreement may be signed in any number of

counterparts, each of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument. This Agreement shall become effective when each Party hereto shall have received a counterpart hereof signed by all of the other Parties hereto. Until and unless each Party has received a counterpart hereof signed by the other Party hereto, this Agreement shall have no effect and no Party shall have any right or obligation hereunder (whether by virtue of any other oral or written agreement or other communication). Notwithstanding anything to the contrary in this Agreement, delivery of an executed counterpart of a signature page to this Agreement or any amendment hereto by facsimile or email attachment shall be effective as delivery of a manually executed counterpart of this Agreement or such amendment, as applicable. No provision of this Agreement is intended to confer any rights, benefits, remedies, obligations or liabilities hereunder upon any Person other than the Parties hereto and their respective successors and assigns.

9.10 **Entire Agreement.** This Agreement and the other Transaction Documents constitute the entire agreement between the Parties with respect to the subject matter hereof and thereof and supersede all prior agreements and understandings, both oral and written, between the Parties with respect to the subject matter hereof and thereof.**Severability.** If any term, provision, covenant or restriction contained in this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the terms, provisions, covenants and restrictions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated; and in lieu of each such invalid, void or unenforceable provision there shall be added automatically as part of this Agreement a provision as similar in terms to such invalid, void or unenforceable provision as may be valid, binding and enforceable.**Time of Essence.** Time is of the essence in the performance of this Agreement, except as otherwise expressly provided herein.**Certain Acknowledgements and Limitations.**

(a) Any and all duties and obligations which any Party may have to any other Party with respect to or in connection with this Agreement, the other Transaction Documents or the Transactions are limited to those specifically set forth in this Agreement and the other Transaction Documents. Neither the duties nor obligations of any Party, nor the rights of any Party, shall be expanded beyond the terms of this Agreement and the other Transaction Documents on the basis of any legal or equitable principle or on any other basis whatsoever. Neither any equitable or legal principle nor any implied obligation of good faith or fair dealing nor any other matter requires any Party to incur, suffer or perform any act, condition or obligation contrary to the terms of this Agreement and the other Transaction Documents, whether or not existing and whether foreseeable or unforeseeable. Each of the Parties acknowledges that it would be unfair, and that it does not intend, to increase any of the obligations of the other Party on the basis of any implied obligation or otherwise.

(b) **BUYER AGREES THAT, EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES MADE BY THE SELLER THAT ARE EXPRESSLY SET FORTH IN THIS AGREEMENT, NEITHER SELLER NOR ANY OF ITS REPRESENTATIVES HAVE MADE AND SHALL NOT BE DEEMED TO HAVE MADE TO BUYER OR TO ANY OF ITS REPRESENTATIVES ANY REPRESENTATION OR WARRANTY OF ANY KIND.**

(c) EXCEPT AS OTHERWISE SPECIFIED, THE ASSETS OF SUBTECH HOLDINGS ARE BEING ACQUIRED BY BUYER AT THE CLOSING AS A RESULT OF THIS AGREEMENT AND THE TRANSACTIONS CONTEMPLATED HEREBY SHALL BE ACQUIRED BY BUYER ON AN “AS IS, WHERE IS” BASIS AND IN THEIR THEN PRESENT CONDITION. IN ANY EVENT, EXCEPT AS EXPLICITLY SET FORTH HEREIN, NEITHER THE SELLER NOR ANY OF ITS REPRESENTATIVES, AS THE CASE MAY BE, HAS MADE OR IS MAKING ANY REPRESENTATION, EXPRESS OR IMPLIED, AS TO THE VALUE OF ANY ASSET BEING SO ACQUIRED, OR ANY WARRANTY OF MERCHANTABILITY, SUITABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR QUALITY, WITH RESPECT TO ANY OF THE TANGIBLE ASSETS BEING SO ACQUIRED, OR AS TO THE CONDITION OR WORKMANSHIP THEREOF, OR AS TO THE ABSENCE OF ANY DEFECTS THEREIN, WHETHER LATENT OR PATENT.

(d) SELLER AGREES THAT, EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES MADE BY BUYER THAT ARE EXPRESSLY SET FORTH IN THIS AGREEMENT, NEITHER BUYER, NOR ANY OF ITS REPRESENTATIVES HAVE MADE AND SHALL NOT BE DEEMED TO HAVE MADE TO SELLER OR TO ANY OF ITS REPRESENTATIVES ANY REPRESENTATION OR WARRANTY OF ANY KIND.

(e) NO PERSON HAS BEEN AUTHORIZED BY SELLER TO MAKE ANY REPRESENTATION OR WARRANTY RELATING TO SELLER OR ITS BUSINESS OR OPERATIONS OR ASSETS, OR OTHERWISE IN CONNECTION WITH THE TRANSACTIONS EXCEPT FOR THOSE CONTAINED HEREIN.

(f) NO PERSON HAS BEEN AUTHORIZED BY BUYER TO MAKE ANY REPRESENTATION OR WARRANTY RELATING TO BUYER OR ITS BUSINESSES OR OPERATIONS, OR OTHERWISE IN CONNECTION WITH THE TRANSACTIONS EXCEPT FOR THOSE CONTAINED HEREIN.

(g) UNDER NO CIRCUMSTANCES SHALL ANY PARTY TO THIS AGREEMENT BE LIABLE FOR ANY SPECIAL, EXEMPLARY, PUNITIVE, REMOTE, OR SPECULATIVE DAMAGES OR LIABILITIES ARISING OUT OF ANY ACTUAL, ALLEGED OR INTENTIONAL BREACH OF THIS AGREEMENT, AND NO CLAIM SHALL BE MADE OR AWARDED AGAINST ANY PARTY TO THIS AGREEMENT THEREFOR.

*[Signatures continued on following page.]*

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

**BUYER:  
PKS-SUBTECH, LLC**

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

**DEBTOR:  
FOODSERVICEWAREHOUSE.COM, LLC**

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

**FSW SUBTECH HOLDINGS, LLC**

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

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF LOUISIANA**

-----x

<b>In re:</b>	:	<b>Case No. 16-11179</b>
	:	
<b>FoodServiceWarehouse.com, LLC</b>	:	<b>Chapter 11</b>
	:	
<b>P. O. Box 630047</b>	:	<b>Section "A"</b>
<b>Littleton, Colorado 80163</b>	:	
<b>Tax ID Number: xx -xxx2620</b>	:	
	:	
<b>Debtor</b>	:	

-----x

**MOTION FOR AUTHORITY TO SELL INTELLECTUAL PROPERTY  
FREE AND CLEAR OF LIENS, INTERESTS, ENCUMBRANCES AND CLAIMS  
TO RICHARD'S RESTAURANT SUPPLY**

**NOW INTO COURT,** through undersigned counsel, comes FoodServiceWarehouse.com, LLC, as debtor and debtor in possession (the "Debtor"), who files this *Motion for Authority to Sell Intellectual Property Free and Clear of Liens, Interests, Encumbrances to Richard's Restaurant Supply* ("Motion") and in support thereof aver as follows:

**JURISDICTION AND STATUTORY PREDICATES**

1. Pursuant to 28 U.S.C. §§ 157(b) and 1334, this Court has jurisdiction: (i) to hear and determine the Motion; and (ii) over the persons and property affected. The subject matter of the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (N) and (O). Venue for this proceeding is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. This Motion is brought pursuant to the authority of 11 U.S.C. §§ 105, 363(b)(1), 363(f) and 363(m), 1107 and 1108 as complimented by and Rules 2002, 6004 and 9008 of the Federal Rules of Bankruptcy Procedure.

### **BACKGROUND**

3. On May 20, 2016 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

4. The Debtor remains in possession of its property and is managing its business as debtor in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

5. No trustee has been appointed and no official committee has been established in this case.

6. This Court is referred to the *Emergency Motion for Entry of Order Pursuant to Sections 361 and 363 of the Bankruptcy Code and Bankruptcy Rule 4001 for Interim and Final Orders: (1) Authorizing Use of Cash Collateral and Other Collateral; (2) Granting Adequate Protection; (3) Modifying the Automatic Stay; (4) Enforcing the Automatic Stay Against Paymentech, LLC; (5) Scheduling and Approving the Method of Notice of the Final Hearing; and (6) Providing Related Relief* ("Cash Collateral Motion") [R. Dkt. 9] for a detailed discussion of the factual background and circumstances surrounding the Debtor's commencement of this chapter 11 case. Capitalized terms not defined herein are as defined in the Cash Collateral Motion.

7. In October 2013, the Debtor purchased Loubat Equipment Co., Inc. ("Loubat"). Loubat is a supply business that sold glassware, equipment and small wares to restaurants. Loubat operated in the greater New Orleans area. After the acquisition, the business was not operating at a profit, and the Debtor made the business decision to cease operations.

### **RELIEF REQUESTED**

8. The Debtor is seeking the authority from this Court to sell certain intellectual property (the “Purchase Assets”) as listed herein that is associated with Loubat to Richard’s Restaurant Supply (the “Buyer”) for \$1,500.00, free and clear of liens, interests, encumbrances and claims with any such interests to attach to the proceeds of the sale.

9. In summary, the Purchase Assets include:

- a. operating names: (i) Loubat; (ii) Loubat – Zulli; (iii) Loubat Equipment Company; (iv) The Loubat Glassware & Cork Company; and (v) Loubat Hotel & Restaurant Supply Company;
- b. domain names: (i) loubat-zulli.com; (ii) loubat.com; (iii) loubatzulli.com; (iv) loubatzulli.net; (v) zoubat.com; (vi) zoubat.net; (vii) zulbat.com; and (viii) zulbat.net; and
- c. trade names registered with the Louisiana Secretary of State: (i) Loubat Caire Hotel & Restaurant Supply, Inc.; (ii) Loubat Glassware & Cork Co., Ltd.; and (iii) Loubat Hotel & Restaurant Supply Company.

### **LEGAL ARGUMENT**

10. Section 363(b)(1) of the Bankruptcy Code provides that a trustee - after notice and hearing - may “use, sell or lease, other than in the ordinary course of business, property of the estate.” *See*, 11 U.S.C. § 363(b)(1). Under section 363, a sale of property of the estate should be granted court approval when the sale is an exercise of the trustee’s reasonable business judgment. *See, e.g., In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5<sup>th</sup> Cir. 1986); and *In re Abbot Dairies of PA., Inc.*, 788 F.2d 143 (3<sup>rd</sup> Cir. 1986). Bankruptcy courts have considerable discretion in determining whether a sale satisfies the business judgment rule. *See, e.g., In re Crutch Resources Corp.*, 72 B.R. 628, 631 (Bankr. N.D. Tex 1987). The Debtor’s



business judgment should not be second guessed unless the judgment is clearly erroneous, too speculative or contrary to the provisions of the Bankruptcy Code.

11. The proposed sale of the Purchase Assets is fair and reasonable and is the result of an arms-length negotiation between the parties. The Debtor asserts that selling the Purchased Assets is an exercise of the Debtor's best business judgement. As the Debtor closed its Loubat division before the Petition Date and had suspended use of the Purchase Assets. This sale is a benefit as it provides funds for the estate.

12. Satisfaction of any of the requirements delineated in section 363(f) of the Bankruptcy Code allows the sale of property free and clear of all liens, claims, encumbrances and other interests. The Debtor submits that any lien, claim, encumbrance or other interest that is not specifically assumed - should there be such claims - will satisfy at least one of the five conditions of section 363(f) of the Bankruptcy Code. Accordingly, the Debtor requests that the Assets will be sold free and clear of all liens, claims, encumbrances and other interests, with any such claims attaching to the proceeds of the sale.

13. If a purchase is in good faith, section 363(m) of the Bankruptcy Code protects the parties in the event of a reversal or modification on appeal of the authorization of a sale under section 363(b) Bankruptcy Code. In determining whether a purchaser has acted in good faith, courts look to the integrity of the purchaser's conduct in the course of the sale proceedings. *See, e.g., In re Abbot Dairies of Pa, Inc.*, 788 F.2d, 147-48. The Debtor submits that the sale should be considered as a purchase in good faith and the transaction should be afforded protection under section 363(m) of the Bankruptcy Code.

**WHEREFORE**, based upon the foregoing, the Debtor respectfully requests that this Court enter an order approving the sale of the Purchase Assets for \$1,500 free and clear pursuant

to 11 U.S.C. § 363 to Richard's Restaurant Supply as a good faith purchaser with any claims attaching to the proceeds of the sale and for all other relief that is just and equitable.

Respectfully submitted,

**HELLER, DRAPER, PATRICK, HORN  
& DABNEY, L.L.C.**

/s/ Barry W. Miller

---

Barry W. Miller, La. Bar No. 09678  
9311 Bluebonnet Blvd.  
Baton Rouge, Louisiana 70810  
Telephone: 225-767-1499  
Fax: 225-761-0760  
Email: [bmiller@hellerdraper.com](mailto:bmiller@hellerdraper.com)

Greta M. Brouphy, (La. Bar No. 26216)  
**Heller, Draper, Patrick, Horn & Dabney, L.L.C.**  
650 Poydras Street, Suite 2500  
New Orleans, Louisiana 70130-6175  
Telephone: 504-299-3300 // Fax: 504-299-3399  
E-mail: [gbrouphy@hellerdraper.com](mailto:gbrouphy@hellerdraper.com)

**Counsel for Debtor**