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

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK**

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In re	:
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SEASONS CORPORATE LLC, <i>et al.</i> ,	:
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Debtors. <sup>1</sup>	:
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**DEBTORS' AMENDED MOTION FOR ORDERS PURSUANT TO SECTIONS 105(a), 363, 365 AND 503 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 2002, 6004 AND 6006: (A)(i) ESTABLISHING BIDDING PROCEDURES AND BID PROTECTIONS IN CONNECTION WITH THE SALE OF CERTAIN OF THE ASSETS OF THE DEBTORS, (ii) APPROVING THE FORM AND MANNER OF NOTICES, (iii) APPROVING THE ASSET PURCHASE AGREEMENT SUBJECT TO HIGHER AND BETTER OFFERS AND (iv) SETTING A SALE HEARING DATE; AND (B)(i) APPROVING THE SALE OF CERTAIN ASSETS OF THE DEBTORS FREE AND CLEAR OF LIENS, CLAIMS AND ENCUMBRANCES, (ii) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN UNEXPIRED LEASES AND EXECUTORY CONTRACTS; AND (iii) GRANTING RELATED RELIEF**

**TO THE HONORABLE CARLA E. CRAIG,  
CHIEF UNITED STATES BANKRUPTCY JUDGE:**

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<sup>1</sup> The Debtors in these Chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Blue Gold Equities LLC (7766), Central Avenue Market LLC (7961), Amsterdam Avenue Market LLC (7988), Wilmot Road Market LLC (8020), Seasons Express Inwood LLC (1703), Seasons Lakewood LLC (0295), Seasons Maryland LLC (1895), Seasons Clifton LLC (3331), Seasons Cleveland LLC (7367), Lawrence Supermarket LLC (8258), Upper West Side Market LLC (8895) and Seasons Corporate LLC (2266). The mailing address for the Debtors, solely for purposes of notices and communications, is: 5 Doughty Boulevard, Inwood, NY 11096.

Seasons Corporate LLC (“Corporate”) and its affiliated debtors and debtors in possession (collectively, the “Debtors”), by and through their proposed counsel, Zeichner Ellman & Krause LLP, hereby submit this amended motion (the “Amended Motion”) for entry of orders:

- a. Substantially in the form attached hereto as **Exhibit A** (the “Bidding Procedures Order”) (a) establishing bidding procedures and bid protections (the “Bidding Procedures”) substantially in the form attached to the Bidding Procedures Order as Schedule 1, (b) setting a hearing on November 29, 2018 (the “Sale Hearing”) to consider approval of an amended sale transaction (the “Amended Sale Transaction”), and (c) approving the form and manner of notice of sale (the “Sale Notice”), substantially in the form attached to the Bidding Procedures Order as Schedule 2;
- b. Substantially in the form attached hereto as **Exhibit B** (the “Sale Order”) (a) approving the Amended Asset Purchase Agreement, dated October 15, 2018 (the “Amended APA”), substantially in the form attached hereto as **Exhibit C**, among the Debtors and SSNS Express LLC (the “New Purchaser”), pursuant to which the Debtors propose to sell certain of their assets to New Purchaser free and clear of any and all liens, claims and encumbrances (other than certain liens noted in the Amended APA (the “Excepted Liens”)), subject to higher and better offers (b) approving certain procedures in the Amended Sale Transaction with respect to the Debtors’ assumption and assignment of certain executory contracts and unexpired leases, and approving the form and manner of notice of assumption and assignment of executory contracts substantially in the forms attached hereto as **Exhibits D and E**, (c) approving the sale of the Acquired Assets (as defined in the Amended APA) free and clear of liens, claims and encumbrances (other than the Excepted Liens), and (d) granting related relief.

In support of the Amended Motion, the Debtors incorporate the statements contained in the Declaration of Joel Getzler pursuant to Local Bankruptcy Rule 1007 dated September 16, 2018 [Docket No. 4] (the “First Day Declaration”) and respectfully represent and allege as follows:

### **PRELIMINARY STATEMENT**

The Debtors’ principal business is the ownership and operation of eight (8) retail kosher food stores under the name of “Seasons” in New York, New Jersey and Maryland. Blue Gold Equities LLC, (“Blue Gold”) operates a store in Queens, New York, Central Ave. Market LLC (“Central Avenue”) operates a store in Lawrence, New York, Amsterdam Ave. Market LLC

(“Amsterdam Avenue”) operates a store in New York, New York, Wilmot Road Market, LLC (“Wilmot Road”) is a tenant under a lease for a store in Scarsdale, New York which is on the verge of opening, Seasons Express Inwood LLC (“Inwood”) operates a store in Inwood, New York, Seasons Lakewood, LLC (“Lakewood”) operates a store in Lakewood, New York, Seasons Maryland LLC (“Maryland”) operates a store in Baltimore, Maryland<sup>2</sup>, Seasons Clifton LLC (“Clifton”) operates a store in Clifton, New Jersey, Lawrence Supermarket LLC (“Lawrence”) is the nominal tenant under a lease for the Lawrence store operated by Central Avenue, and Upper West Side Supermarket LLC, (“Upper West Side”, and collectively with Blue Gold, Central Avenue, Amsterdam Avenue, Wilmot Road, Inwood, Lakewood, Maryland, Clifton and Lawrence the “Operating Entities”) is the nominal tenant for the New York store operated by Amsterdam Avenue.<sup>3</sup>

The consummation of value-maximizing, job-preserving, going-concern sales of the Debtors’ stores is the cornerstone of these Chapter 11 Cases. To that end, the Debtors have identified the New Purchaser, who is willing to expeditiously consummate the transaction set forth in the Amended APA providing for the sale of substantially all of the Debtors’ assets free and clear of all liens, claims and encumbrances (other than the Excepted Liens) to the New Purchaser for a cash purchase price of \$10,250,000 (the “Cash Purchase Price”) plus assumption of the Cure Costs under the Transferred Contracts not to exceed \$3,450,000 (the “Assumed Cure Costs”). The

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<sup>2</sup> Seasons Property Management LLC (“Seasons Property”) owns the building and the parking lot adjacent to the Maryland store (the “Maryland Property”). Seasons Property did not file a voluntary petition for relief under chapter 11 on the Petition Date but may file such a petition. The Amended APA contemplates that Seasons Property will sell the Maryland Property to the New Purchaser.

<sup>3</sup> Debtor Seasons Cleveland LLC (“Cleveland”) is the tenant for a store that is under construction in Cleveland, Ohio. The Debtors have moved to reject the Cleveland lease and do not propose to sell any of Cleveland’s assets.

Amended Sale Transaction is subject to higher and better offers pursuant to the Bidding Procedures. The Debtors believe that the timely consummation of the Amended Sale Transaction is in the best interests of the estates and their creditors.

For all of these reasons and those set forth below, the Debtors respectfully request approval of the Amended Motion and authority to consummate the Amended Sale Transaction or a better transaction.

### **JURISDICTION AND VENUE**

1. This Court has jurisdiction over this Amended Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue of this case is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are sections 105, 363, 365 and 503 of Title 11 of the United States Code (the “Bankruptcy Code”) rules 2002, 6004, and 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), rules 6004-1, 6006-1 and 9006-1 of the Local Bankruptcy Rules for the Eastern District of New York (the “Local Rules”), and Administrative Order No. 557 of the Bankruptcy Court for the Eastern District of New York (“Administrative Order 557”).

### **BACKGROUND**

#### **A. Bankruptcy Cases**

9. On September 16, 2018 (the “Petition Date”), each of the Debtors commenced a voluntary case under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of New York (the “Court”).

10. The Debtors are authorized to continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

11. No trustee or examiner has been appointed in these Chapter 11 Cases. A committee of creditors has been appointed and has selected counsel.

12. On September 18, 2018, the Court entered an Order providing for joint administration of the Chapter 11 Cases pursuant to Bankruptcy Rule 1015(b) [Docket No. 19].

13. The Court and interested parties are respectfully referred to the First Day Declaration for a detailed discussion regarding the Debtors, their operations, and the events leading to the filing of the Bankruptcy Cases.

**B. Secured Debt**

14. In February 2018, SKNY LLC (“SKNY”) loaned \$1 million (the “February 2018 Secured Loan”) to the Operating Entities, evidenced by a promissory note and a security agreement (“Prepetition Security Agreement”) pursuant to which the Operating Entities granted SKNY a security interest in all their assets. In March 2018, SKNY loaned an additional \$1 million to the Operating Entities subject to the Prepetition Security Agreement and the original promissory note was replaced by an Amended and Restated Promissory Note in the amount of \$2 Million (the “March 2018 Secured Loan”). On September 5, 2018, pursuant to a Second Amended and Restated Promissory Note and the Prepetition Security Agreement, SKNY made an additional \$1,000,000 available to the Debtors and funded \$250,794.64 for payroll and \$400,000 (the “September 5, 2018 Secured Loan”) to the Debtors to provide them with the necessary funds to retain Zeichner Ellman & Krause LLP as counsel to the Debtors, Getzler Henrich & Associates LLC (“GHA”) as restructuring consultants to the Debtors (as well as retention of Joel Getzler as Chief Restructuring Officer and other GHA employees) and Omni Management Group as Claims Agent for the Debtors. On September 7, 2018, SKNY advanced another \$165,000 for the purpose of allowing the Debtors to pay insurance premiums, which were due on September 10, 2018 (the “September 7, 2018 Secured Loan”), and collectively with the February 2018 Secured Loan, the March 2018 Secured Loan and the September 5, 2018 Secured Loan, the “Prepetition Secured Loan”).

15. As of the Petition Date the Operating Entities owed \$3,250,000 to SKNY on account of the Prepetition Secured Loan (the “Prepetition Indebtedness”).

16. The Prepetition Indebtedness is secured by a blanket lien on substantially all of the Operating Entities’ assets pursuant to the terms and conditions of the Prepetition Secured Loan documents.

**D. DIP Financing Facility**

17. On September 18, 2018, the Court entered an Interim Order authorizing SKNY to provide interim DIP financing under a proposed DIP Facility in the aggregate sum of \$3.7 million [Docket No. 14]. On October 5, 2018, the Court authorized an additional interim advance under the SKNY DIP Facility in the amount of \$500,000. On October 11, 2018, the Court authorized an extension of the use of cash collateral until the final hearing on the motion, currently scheduled for October 17, 2018. At that time, the Debtors’ will make a request for a final order authorizing total advances of \$6.5 million.

**E. Pre-Petition Marketing and Sales Process**

18. The Debtors concluded that it was in the best of interest of the estate and creditors to sell their business assets. In order to avoid a complete collapse of their business and preserve the value thereof and the jobs of approximately 400 employees, the Debtors determined that they required a substantial DIP financing facility to restock the stores and, thereby, generate store traffic and sales. The Debtors obtained SKNY’s pre-petition commitment for a DIP Facility in exchange for which the Debtors agreed to present SKNY as a stalking horse bidder for the Debtors’ assets at a price of \$12,000,000. Simultaneous with their bankruptcy filings, the Debtors filed a motion (the “Sale Motion”) seeking orders setting procedures for the Initial Sale Transaction in which SKNY would be the “stalking horse” purchaser in a sale subject to higher and better offers, and approving an Asset Purchase Agreement with SKNY (the “SKNY APA”), pursuant to which the

Debtors proposed to sell substantially all of their assets to SKNY and SKNY agreed to assume certain liabilities of the Debtors (the “Initial Sale Transaction”) [Docket No. 12].

19. Prior to the Petition Date, the Debtors had been in discussions with other parties who expressed interest in possibly providing DIP funding and/or being a stalking horse bidder. Shortly before the First Day Hearing, the Debtors obtained a competing offer for a DIP loan and stalking horse bid from DC Brothers II LLC (“DC Brothers”). DC Brothers’ stalking horse bid was for \$13,000,000 without the payment of the Assumed Cure Costs. The Debtors did not deem the terms of the DC Brothers’ DIP loan to be better than the SKNY DIP Facility and, therefore, proceeded with the SKNY DIP Facility.

20. Thereafter, various parties objected to the Sale Motion. Between October 3 and 5 2018, SKNY, DC Brothers, the Debtors and the Official Committee (the “Committee”) of Unsecured Creditors (appointed on September 26, 2018) engaged in negotiations concerning the Sale Transaction. As a result of those negotiations, DC Brothers and TSAAR, LLC (“TSAAR”) decided to present a combined stalking horse bid in the sum of \$10,250,000 and payment of the Assumed Cure Costs, which included a breakup fee of 3%.

21. Attached hereto as **Exhibit C** is the Amended APA presented by SSNS Express LLC, the entity formed by DC Brothers and TSAAR to proceed with the stalking horse bid. The Debtors submit that the terms of the Amended Sale Transaction are substantially more favorable to the estate than the terms of the original SKNY APA. Specifically, the Debtors perceive the Amended APA as adding approximately \$1.9 million of additional value above the SKNY APA.

### **RELIEF REQUESTED**

#### **A. The Proposed Sale**

22. The Amended APA sets forth the terms of the sale of certain of the Debtors’ assets and business and related transactions, subject to higher and better offers, free and clear of liens,

claims, interests and encumbrances. Pursuant to the terms and conditions of the Amended APA, the Debtors agreed to sell, transfer and assign to New Purchaser all of their right, title and interest in and to the Transferred Contracts, including leases, and certain inventory, equipment, furnishings, fixtures, customer data, and goodwill related to the following stores (the “Stores”):

<b>Debtor</b>	<b>Premises Description</b>	<b>Leased/ Owned</b>	<b>Premises Address</b>
Seasons Corporate LLC	Inwood Store	Leased	5 Doughty Boulevard Inwood, NY 11096
Blue Gold Equities, LLC	Queens Store	Leased	68-18 Main Street Flushing, NY 11367
Central Avenue Market LLC	Lawrence Store	Leased	330 Central Ave. Lawrence, NY 11559
Seasons Express Inwood LLC	Inwood Store	Leased	50 Doughty Boulevard Lawrence, NY 11559
Amsterdam Avenue Market LLC	New York Store	Leased	661 Amsterdam Ave. New York, NY 10025
Wilmot Road Market LLC	Scarsdale Store	Leased	1136 & 1104 Wilmot Road Scarsdale, NY 10583
Seasons Clifton LLC	Clifton Store	Leased	761 Allwood Road Clifton, NJ 07012
Seasons Lakewood LLC	Lakewood Store	Leased	711 Cedarbridge Avenue, Lakewood, NJ 08701
Seasons Maryland LLC	Maryland Store	Leased	1630 Reistertown Road Pikesville, MD 21208
Lawrence Supermarket LLC	Tenant of Lawrence Store	Leased	330 Central Ave. Lawrence, NY 11559
Upper West Side Supermarket LLC	Tenant of New York Store	Leased	661 Amsterdam Ave. New York, NY 10025

23. In addition to the above, the Amended APA provides for the transfer of the Maryland Property owned by Seasons Property to New Purchaser.

24. In exchange, New Purchaser has agreed to pay to the Debtors a purchase price of, among other things, \$10,250,000 and payment of the Assumed Cure Costs (the “Purchase Price”). Excluded from the definition of Transferred Contracts is Concession Agreements.



25. The Amended APA requires a closing to occur no later than December 15, 2018 and entitles New Purchaser to certain Bidding Protections (as defined herein).

26. In addition, New Purchaser may agree to assume the Labor Agreement or meet and confer with the Union representatives and negotiate in good faith to reach mutually satisfactory modifications to the Labor Agreement and enter into a Modified Labor Agreement with the Union. If New Purchaser does not reach an agreement with the Union on a Modified Labor Agreement, then New Purchaser has the right to deem the Labor Agreement an Excluded Asset.

27. As a result, the Amended Sale Transaction provides for the continuation of business operations, preservation of attendant jobs to the extent employees of the Debtors become employees of New Purchaser, most of which are expected to be offered employment by the New Purchaser, and maximization of value for the benefit of the Debtors, their creditors and the estates.

**B. Extraordinary Provisions**

28. In accordance with General Order 557, the Debtors disclose the following Extraordinary Provisions provided for in the Amended APA:

(a) Agreements with Management: New Purchaser intends to offer employment to Mayer Gold, an insider of the Debtors.

(b) Deadlines that Effectively Limit Notice: The Amended APA includes provisions requiring entry of the Bidding Procedures Order on or before October 18, 2018, and entry of the Sale Order on or before November 30, 2018. The Amended APA allows New Purchaser to terminate the Amended APA if either of these benchmarks are not met.

(c) Record Retention: After the Closing Date, New Purchaser shall provide Sellers and their representatives reasonable access to the books and records of Sellers included in the Acquired Assets during normal business hours and on reasonable prior notice, to enable Sellers to prepare tax returns, deal with tax audits and administer claims in the Chapter 11 Cases. The Debtors believe these provisions are sufficient to allow the Debtors to administer their estates.

(d) Use of Proceeds: Other than payment of the Bidding Protections, if any, at the Closing Sellers shall be required to use the

proceeds of the Purchase Price to satisfy in full Sellers' obligations under the DIP Financing Facility.

(e) Successor Liability: The proposed form of Sale Order contains findings and provisions limiting New Purchaser's successor liability.

(f) Relief from Bankruptcy Rule 6004(h): The proposed form of Sale Order contains a waiver of the stay imposed by Bankruptcy Rule 6004(h). The Debtors submit such relief is appropriate under the circumstances.

(g) Sale and Release of Avoidance Actions. The Amended APA provides for the sale of Avoidance Actions to the New Purchaser, provided, however, that simultaneously upon acquisition of such Causes of Action, New Purchaser and Sellers shall waive and release any and all such Causes of Action.

### **PROPOSED BIDDING PROCEDURES, AUCTION AND AUCTION PROCEDURES**

29. Consistent with the Amended APA, the Debtors are proposing the Bidding Procedures, which are designed to maximize the value of the Acquired Assets for the Debtors' estates, creditors and other interested parties. Specifically, as discussed in more detail below, the Amended Sale Transaction is subject to higher and better offers. In that regard, New Purchaser has expended considerable time, effort and resources conducting due diligence, negotiating the Amended APA, and taking steps necessary to acquire necessary licenses, permits and insurance if it becomes the successful purchaser of the Acquired Assets. Accordingly, the New Purchaser required certain break-up fees and expenses reimbursements to the extent it is outbid.

30. The Debtors propose that competing offers ("Competing Offers") for the Acquired Assets be governed by the following Bidding Procedures:<sup>4</sup>

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<sup>4</sup> The summary description of the Bidding Procedures provided herein is provided for the convenience of the Court and parties in interest. To the extent that there are any discrepancies between this summary and the Bidding Procedures Order, the terms and language of the Bidding Procedures Order shall govern. Unless otherwise defined herein, capitalized terms defined in the Bidding Procedures shall have the meaning ascribed to them in the Bidding Procedures Order or the Amended APA.

(a) Any entity that wishes to make a bid for all or a portion of the Acquired Assets (the “Competing Bidder”) must provide the Debtors with sufficient and adequate information to demonstrate, to the absolute satisfaction of the Debtors, that such entity (a) has the financial wherewithal and ability to consummate the Amended Sale Transaction, including evidence of adequate financing and any proposed conditions to Closing and (b) can provide all non-debtor contracting parties to the Transferred Contracts with adequate assurance of future performance as contemplated by section 365 of the Bankruptcy Code. The bid presented by the Competing Bidder (i) will be on substantially the same terms and conditions as the Amended APA except for price; (ii) will require the payment of a closing cash payment of not less than \$10,911,000, plus payment of the Assumed Cure Costs (the “Minimum Bid”); and (iii) will be accompanied by an earnest money deposit of 10% of the initial purchase price set forth in any Modified Purchase Agreement, plus the amount of the Bidding Protections (the “Deposit”). Any bid satisfying such criteria shall be designated as a “Qualified Bid.” Except as provided for in the Amended APA, the bid must not contain any contingencies of any kind, including, but not limited to (a) obtaining financing or shareholder, board of directors or other approval, or (b) the outcome or completion of due diligence. Each Competing Bidder must also affirmatively acknowledge that the Competing Bidder (x) had an opportunity to conduct due diligence regarding the Acquired Assets prior to making its offer and does not require further due diligence, (y) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Acquired Assets in making its bid, and (z) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied, by operation of law or otherwise, regarding the Acquired Assets, or the completeness of any information provided in connection therewith, except as expressly stated in the Bidding Procedures.

(b) Competing Offers must (a) be in writing and (b) be received by proposed counsel to the Debtors, Zeichner Ellman & Krause LLP, 1211 Avenue of the Americas, 40<sup>th</sup> Floor, New York, New York 10036, Attn: Nathan Schwed so as to be actually received no later than **Noon (prevailing Eastern Time) on November 21, 2018** (the “Bid Deadline”). Parties who do not submit Competing Offers by the Bid Deadline shall not be permitted to participate at the Auction.

(c) Competing Offers must be accompanied by the Deposit in the form of a wire transfer or a certified check payable to Zeichner Ellman & Krause LLP, as attorneys. All such deposits shall be retained by the Debtors pending the hearing to consider the Amended Sale Motion and shall be returned to a Competing Bidder (x) as soon as practicable if the Competing Bidder is not determined to be a Qualified Bidder or (y) no later than five (5) business days after entry of the Sale Order if the Competing Bidder is deemed to be a Qualified Bidder (who has not otherwise forfeited

its Deposit), but is not the Successful Bidder or the Backup Bidder; provided, however, that in the event New Purchaser is not the Successful Bidder, its Deposit shall be returned to it promptly upon termination of the Amended APA, but in no event later than five (5) business days from the date of that termination. The Debtors will maintain any Deposit in a non-interest bearing account.

(d) Any Competing Offer by a Qualified Party conforming to the within requirements shall be considered at the auction to be held at the Offices of Zeichner Ellman & Krause LLP, 1211 Avenue of the Americas, 40<sup>th</sup> Floor, New York, New York 10036 commencing on **November 27, 2018, at 10:00 a.m. (EST)**, or in such manner and at such alternative location as the Debtors may determine or the Court may direct (the “Auction”).

(e) The Debtors shall, after the Bid Deadline and prior to the Auction, in consultation with the Creditors’ Committee evaluate all bids received, and determine which bid reflects the highest or best offer for the Acquired Assets. The Debtors shall announce such determination at the commencement of the Auction and then the Debtors shall conduct the Auction among the parties submitting Competing Offers to determine if any higher or better offer might be obtained. Any further bids for all of the Acquired Assets made at the Auction shall be in increments of at least \$100,000 greater than the preceding bid.

(f) The Amended APA shall be deemed a Qualified Bid and the New Purchaser shall be deemed a Qualified Bidder. If no Qualified Bid other than New Purchaser’s is submitted by the Bid Deadline, the Debtors shall not hold the Auction, but may proceed with the Sale Hearing and seek approval of the Amended APA and the transactions contemplated thereby. In the event there is an Auction and New Purchaser determines to stop bidding at any point, the individual members of New Purchaser shall each be deemed a Qualified Bidder and shall be entitled to submit bids for the Acquired Assets.

(g) If there is a successful Competing Offer for the Acquired Assets (an “Alternate Transaction”), such successful bidder(s) shall have such rights and responsibilities of New Purchaser, as set forth in the Modified Purchase Agreement, or the Amended APA, as applicable with appropriate modifications for (i) the identity of the successful bidder and (ii) the purchase price as the same shall have been increased at the Auction.

(h) In the event that the Court enters a Final Order approving an Alternate Transaction, then New Purchaser shall be entitled to and Debtors shall pay to New Purchaser at the consummation of an Alternate Transaction 3% of the Cash Purchase Price and Assumed Cure Costs (the “Breakup Fee”). The Breakup Fee is intended to cover opportunity costs

incurred by New Purchaser in pursuing and negotiating this Agreement and the transactions contemplated hereby, and is considered by the Parties to be reasonable for such purposes. The Breakup Fee shall be paid from the first sale proceeds of an Alternate Transaction. The claims of New Purchaser to the Breakup Fee shall constitute an administrative expense against the Debtors' bankruptcy estates under the applicable provisions of the Bankruptcy Code.

(i) In addition to any Breakup Fee that may be payable pursuant to the Amended APA, upon (i) any event in which the Breakup Fee is payable, or (ii) the Amended APA is terminated by New Purchaser pursuant to Sections 8.1, other than Section 8.1(m) and 8.1(q), the Debtors shall reimburse New Purchaser the actual and necessary expenses, including reasonable attorney's fees, incurred in connection with negotiation and entry into the Amended APA, due diligence with respect to the transactions contemplated by the Amended APA, and obtaining Bankruptcy Court approval of the Amended APA, in an amount not to exceed \$400,000 (the "Expense Reimbursement"). The claims of New Purchaser to the Expense Reimbursement shall constitute an administrative expense against the Debtors' bankruptcy estate under the applicable provisions of the Bankruptcy Code.

(j) In the event that a Competing Offer is the Successful Bidder and such Successful Bidder fails to consummate the proposed transaction by the Closing Date, such bidder's deposit shall be forfeited to the Debtors (but not as liquidated damages, the Debtors reserving the right to pursue all remedies that may be available to them) and the Debtors shall be free to consummate the proposed transaction with the next highest bidder at the final price bid by such bidder at the Auction (or, if that bidder is unable to consummate the transaction at that price, the Debtors may consummate the transaction with the next higher bidder, and so forth) without the need for an additional hearing or order of the Bankruptcy Court.

(k) All bids for the purchase of the Debtors' assets shall be subject to approval of the Bankruptcy Court.

(l) No bids shall be considered by the Debtors or the Bankruptcy Court unless a party submitted a Competing Offer in accordance with the Bidding Procedures and participated in the Auction. The Debtors, in their absolute discretion, may reject any Competing Offers not in conformity with the requirements of the Bankruptcy Code, the Bankruptcy Rules or the Local Bankruptcy Rules of the Court, or contrary to the best interests of the Debtors and parties of interest.

(m) All bids (other than those of the Successful Bidder and Backup Bidder) are irrevocable until the earlier of (A) ninety (90) days

following entry of the Sale Order (defined below) and (B) closing with the Successful Bidder.

(n) All bids are subject to such other terms and conditions as are announced by the Debtors at the outset of the Auction.

(o) Any overbid by the New Purchaser at the Auction will be credited with the full amount of the Bidding Protections.

### **BIDDING PROTECTIONS**

31. The proposed Amended APA contemplates the payment of certain protections, including the Breakup Fee and Expense Reimbursement (collectively, the “Bidding Protections”), in certain circumstances. The Debtors request the Court grant the proposed Bidding Protections administrative expense priority pursuant to sections 503(b) and 507(b) of the Bankruptcy Code, which shall be payable solely from the first proceeds of an Alternate Transaction or as otherwise provided for in the Amended APA. The Amended APA provides that if the proposed Bidding Protections are not approved by the Court, New Purchaser shall have the right, but not the obligation, to not enter into the Amended APA and none of the parties shall have any further obligations to the other.

32. The Debtors submit that (a) approval of the proposed Bidding Protections is an integral part of the Amended APA, (b) in the absence of the Debtors’ obligation to pay the Bidding Protections, New Purchaser will not enter into the Amended APA, (c) the entry into the Amended APA is necessary for the preservation of the Debtors’ estates and is beneficial to the Debtors, their estates, creditors and other parties in interest, and (d) the Bidding Protections are reasonable in relation to New Purchaser’s efforts and the amount of consideration contemplated by the Amended APA.

33. The efforts of New Purchaser have increased the chances that the Debtors will receive the highest or otherwise best offer for the Acquired Assets by establishing a minimum bid

for other bidders, subjecting the Acquired Assets to an open auction and serving as a catalyst for other potential or actual bidders. Thus, the Bidding Protections benefit the Debtors, their estates, their creditors and all other parties in interest.

34. As stated above, New Purchaser is unwilling to commit to hold open its offer to purchase the Acquired Assets under the terms of the Amended APA unless the Bidding Protections are approved. Accordingly, the Debtors request that the Court approve the Bidding Protections and authorize payment of the Breakup Fee and Expense Reimbursement pursuant to the terms and conditions of the Amended APA.

**ASSUMPTION AND ASSIGNMENT AND REJECTION OF EXECUTORY  
CONTRACTS AND LEASES**

**A. Transferred Contracts**

35. There are only 11 potential Transferred Contracts, comprising eight (8) nonresidential real property leases and three (3) equipment leases. The Debtors and/or the New Purchaser will seek to engage in good-faith negotiations with the relevant counterparties in connection with the assumption and assignment of the applicable contracts and leases. The Debtors, however, may seek to reject any such contracts and/or leases in their reasonable business judgment (subject to the terms of the Amended APA) to the extent that the parties are unable to agree to significant economic concessions from the applicable counterparties. The Debtors reserve any and all rights with respect to any of their contracts, leases, other agreements, and related documents (including, without limitation, the Transferred Contracts and the Cure Costs).

36. In connection with the Amended Sale Transaction, the Debtors seek authority under section 365 of the Bankruptcy Code to (a) assume and assign the Transferred Contracts, and (b) execute and deliver to New Purchaser (or the Successful Bidder, as the case may be) such

documents or other instruments as may be necessary to assign and transfer the Transferred Contracts as of the date of the Closing on the Amended APA (and expressly subject to Closing).

37. By and through this Amended Motion, the Debtors are seeking authority to assume any and all Transferred Contracts (as defined in the Amended APA) following and subject to the Closing, and to assign all such contracts to New Purchaser. The Debtors seek the authority to assume and assign to New Purchaser any and all of the Transferred Contracts which New Purchaser in its sole discretion elects to assume and gives notice of the same to the Debtors.

38. To effectuate the assumption/assignment process, the Debtors propose to serve a notice on the non-debtor parties to the Transferred Contracts of the potential assumption and assignment of the Transferred Contracts (the “Assignment Notice”), advising each such party of the Debtors’ interest to assume and assign such executory contract. The Assignment Notice shall be served no later than fifteen (15) days prior to the Sale Objection Deadline (defined herein). The list of Transferred Contracts attached to the Assignment Notice, which comprises all of the Debtors’ executory contracts, except for those specifically excluded from the Acquired Assets, will set forth (a) the name and address of the counterparties to the executory contracts proposed to be assumed and assigned to New Purchaser or its designee and (b) the nature of the contract. Further, on or before the date that is two (2) business days after the Auction, the Debtors shall file a notice setting forth the amount of any Cure Costs that the Debtors believe to be due and owing as reflected on their books and records (such notice, the “Cure Notice”), which notice shall be served on all non-Debtor parties to the Transferred Contracts that are impacted by the Cure Notice. However, the inclusion of any agreement as a contract or lease on the Assumption Schedule and/or Cure Notice does not constitute an admission by the Debtors that such agreement actually constitutes an executory contract or unexpired lease under the Bankruptcy Code, and the Debtors



expressly reserve the right to challenge the status of any agreement included as an Transferred Contract.

39. Under the terms of the Amended APA, New Purchaser is responsible for the Assumed Cure Costs.

40. Any non-Debtor party who objects to the assumption of any Transferred Contract solely on the basis of adequate assurance of future performance, state with specificity the nature of the objection not later than the Sale Objection Deadline as provided for below (any such objection, an “Adequate Assurance Objection”). Any Adequate Assurance Objections must be (a) filed with the Court and (b) served upon (i) the proposed attorneys for the Debtors, Zeichner Ellman & Krause LLP, 1211 Avenue of the Americas, 40<sup>th</sup> Floor, New York, New York 10036 (Attn: Nathan Schwed), (ii) the attorneys for the New Purchaser, (a) Klestadt Winters Jureller Southard & Stevens, LLP, 200 West 41<sup>st</sup> Street, 17<sup>th</sup> Floor, New York, New York 10036 (Attn: Tracy L. Klestadt) and (b) Norton Rose Fulbright US LLP, 1301 Avenue of the Americas, New York, New York 10019-6022 (Attn. Samuel S. Kohn and James A. Copeland), (iii) the Office of the United States Trustee for the Eastern District of New York, U.S. Federal Office Building, 201 Varick Street, Room 1006, New York, New York 10014 (Attn: William Curtin) and (iv) proposed counsel for the Committee, Goldberg Weprin Finkel Goldstein LLP, 1501 Broadway, 22nd Floor, New York, NY 10036 (Attn: Kevin Nash) (collectively, the “Notice Parties”), so as to be actually received no later 4:00 p.m. on November [13], 2018 (the “Sale Objection Deadline”).

41. With respect to the Cure Notice, all non-Debtor parties to the Transferred Contracts shall have until the date that is seven (7) business days after the filing of the Cure Notice (the “Cure Objection Deadline”) to file and serve on each of the Notice Parties an objection to the proposed Cure Costs, if any, with respect to any Transferred Contracts (a “Cure Objection”), and such

counterparty's Cure Objection must set forth (i) the basis for the objection, and (ii) with specificity, the amount the party asserts as the correct Cure Cost; provided, that, to the extent a counterparty files a Cure Objection, such counterparty shall also provide to the Debtors appropriate documentation in support of the alleged alternative Cure Cost.

42. If no objection to the assumption and assignment (including any objection based on adequate assurance of future performance or Cure Costs) is timely received in accordance with the preceding paragraphs, or if a timely objection is received but is not in compliance with the foregoing requirements, any non-Debtor party to a Transferred Contract shall be barred and permanently enjoined from asserting any amounts in excess of the Cure Cost set forth in its Assignment Notice.

43. The Assignment Notice may be amended at any time prior to the Closing Date to add or remove a Transferred Contract. In such event, the Debtors shall give and serve a notice of amendment (the "Amendment Notice"), reflecting appropriate changes to the Assumption Schedule, on all counter-parties to the Transferred Contracts removed or added to, or otherwise modified by, the amendment to the Assumption Schedule.

44. In an effort to provide the most up-to-date information to non-debtor parties to the Transferred Contracts, in the event New Purchaser is not the Successful Bidder at the Auction, the Debtors will use their reasonable best efforts to provide non-Debtor parties to the Transferred Contracts with the identity of the Successful Bidder prior to the Sale Hearing. Otherwise, the non-Debtor parties to the Transferred Contracts may wish to plan to attend the Sale Hearing.

45. Any non-Debtor party to a Transferred Contract shall have the right to request adequate assurance of performance by New Purchaser of such Transferred Contract either by contacting New Purchaser through its attorneys, or filing, prior to the deadline for objecting to the

proposed Sale Order, such request with the Court and serving the Notice Parties, so as to be actually received no later than the Sale Objection Deadline, indicating what adequate assurance it requires from New Purchaser.

46. If no such requests for adequate assurance are timely made or filed, New Purchaser shall be deemed to have provided adequate assurance as required by section 365(f)(2)(B) of the Bankruptcy Code. If any such requests are filed, the Court, at the Sale Hearing, shall determine whether New Purchaser has provided adequate assurance as required by section 365(f)(2)(B) of the Bankruptcy Code.

47. The Debtors believe that the suggested procedures and deadlines are fair and reasonable, and will provide sufficient notice to the non-Debtor parties to the Transferred Contracts. These procedures are designed to provide certainty to the Debtors and the non-Debtor parties to the Transferred Contracts regarding their obligations and rights in respect of section 365 of the Bankruptcy Code. Accordingly, the Debtors request that the Court approve the foregoing procedures and deadlines.

#### **NOTICE OF SALE, AUCTION AND BIDDING PROCEDURES**

48. The Debtors, no later than three (3) business day after entry of the Bidding Procedures Order, will serve a copy of the Bidding Procedures Order and all exhibits attached thereto upon the following persons by first-class mail, postage prepaid: (i) the Office of the United States Trustee; (ii) the attorneys for the Committee; (iii) the attorneys for New Purchaser; (iv) all counterparties to the Transferred Contracts; (v) all parties who have made an expression of interest in acquiring the Acquired Assets or the Business within twelve (12) months prior to the date of the Amended Motion; (vi) all known persons holding a lien on any of the Acquired Assets and/or their attorneys; (vii) all taxing authorities that have jurisdiction over the Acquired Assets; and (viii) all

parties who have requested notice in the Chapter 11 Cases (collectively, the “Bidding Procedures Parties”).

49. In addition, no later than three (3) business days after entry of the Bidding Procedures Order, the Debtors shall cause the form of auction notice, a copy of which is annexed to the Bidding Procedures Order as Schedule 2 to be (i) served upon the Bidding Procedures Parties, and (ii) served upon all known creditors and all known parties in interest in these Chapter 11 Cases (collectively, the “Auction Notice Parties”).

50. The Debtors believe that the foregoing notice to the Auction Notice Parties is sufficient to provide effective notice of the Bidding Procedures, the Auction and the proposed Sale to potentially interested parties in a manner designed to maximize the chance of obtaining the broadest possible participation in the Auction while minimizing the costs to the estates. Accordingly, the Debtors request that the Court find that notice in this manner is sufficient and that no further notice of the Auction, the Bidding Procedures or the proposed Sale is required.

### **BASIS FOR RELIEF REQUESTED**

#### **A. The Proposed Sale is Within the Debtors’ Sound Business Judgment and Should Therefore Be Approved**

51. The Debtors submit that ample authority exists for the approval of the Amended Sale Transaction to New Purchaser pursuant to the Amended APA, or to such other purchaser submitting a higher and better offer for the Acquired Assets. Section 363(b) of the Bankruptcy Code permits a debtor to sell assets outside the ordinary course of its business. That section provides in pertinent part, “[t]he trustee,<sup>5</sup> 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). While Section

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<sup>5</sup> Pursuant to Section 1107(a) of the Bankruptcy Code, the debtor in possession has all of the powers of a trustee (except the power to investigate the debtor’s own financial affairs).

363(b) does not provide any standards to be applied to a debtor's request to sell assets, a wide body of case law has evolved containing the judicial standards governing sales of assets.

52. In In re Lionel Corp., 722 F.2d 1063 (2d Cir. 1983), one of the seminal and most widely followed cases dealing with asset sales, the Second Circuit determined that a sale of assets could be approved if the debtor could demonstrate an "articulated business justification" for the sale. 722 F.2d at 1070. The Second Circuit further held that the factors to be considered in determining whether a sound business reason exists include the following:

the proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-à-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, *most importantly perhaps, whether the asset is increasing or decreasing in value.*

Id. at 1071 (emphasis supplied).

53. The Lionel decision has been widely accepted and applied by numerous other courts facing a debtor's request to sell assets, including requests to approve a sale of certain of the assets of a debtor's estate. See, e.g., In re the Delaware & Hudson Ry. Co., 124 B.R. 169 (D. Del. 1991); In re Eng'g Prod. Co., 121 B.R. 246 (Bankr. E.D. Wis. 1990); In re Thomson McKinnon Sec., Inc., 120 B.R. 301 (Bankr. S.D.N.Y. 1990); In re Channel One Communications, Inc., 117 B.R. 493 (Bankr. E.D. Mo. 1990); In re Brethren Care, 98 B.R. 927 (Bankr. N.D. Ind. 1989). As will be demonstrated below, application of the above-listed factors demonstrates that approval of the Amended APA is warranted at this time.

54. In addition to requiring sound business reasons to approve a sale pursuant to section 363(b) of the Bankruptcy Code, many courts have required a showing that the price to be obtained for assets be fair and reasonable; that the sale to the proposed purchaser was negotiated in good faith; and that it does not unfairly benefit insiders, the purchaser, or a certain creditor or class of

creditors. See, e.g., In re Channel One Communications, 117 B.R. at 494-97; In re Indus. Valley Refrig. & Air Cond. Supplies, Inc., 77 B.R. 15 (Bankr. E.D. Pa. 1987).

55. The Debtors and New Purchaser negotiated in good faith, at arms' length, and with a view towards maximizing the value of the Debtors' estates for all creditors, rather than to benefit insiders or a particular creditor.

56. The Amended APA is subject to higher and better offers, thereby ensuring that the best possible offer has been or will be received.

57. Many courts require that "fair and accurate notice" be given of the proposed sale under section 363(b) of the Bankruptcy Code. See, e.g., In re Delaware & Hudson Ry., 124 B.R. 169, 176 (D. Del. 1991); Channel One 117 B.R. at 496 (Bankr. E.D. Mo. 1990); Naron & Wagner, Chartered, 88 B.R. 85, 88 (Bankr. D.Md. 1988). Fair and accurate notice should inform all interested parties of the liquidation of the debtor's business; disclose accurately the terms of the sale; explain the effect of the sale upon the debtor's business; and explain why the sale is in the best interests of the debtor's estate. Delaware & Hudson, 124 B.R. at 180; see also, Naron & Wagner, 88 B.R. at 88.

58. The Debtors submit that the notice given here alerted parties in interest to the sale contemplated by the Amended APA, described and explained all material terms thereof, and explained the effect of the sale on the Debtors' business.

**B. The New Purchaser is a Good Faith Purchaser and is Entitled to the Protections of Section 363(m) of the Bankruptcy Code**

59. Section 363(m) of the Bankruptcy Code provides: "[t]he reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the

appeal, unless such authorization and such sale or lease were stayed pending appeal.” 11 U.S.C. § 363(m).

60. Although the Bankruptcy Code does not define “good faith,” in In re Colony Hill Assocs., 111 F.3d 269 (2d Cir. 1997) the Second Circuit held that:

The “good faith” component of the test under § 363(m) speaks to the equity of [the bidder’s] conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser’s good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

111 F.3d at 276 (quoting In re Rock Industries Machinery Corp., 572 F.2d 1195, 1198 (7th Cir. 1978)) (internal quotations omitted).

61. As set forth above, New Purchaser was selected by the Debtors after engaging several parties and determining that the terms of New Purchaser’s bid were the only viable option. The Amended APA is a product of extensive arms-length negotiations and was not in any way tainted by fraud, collusion or bad faith. Accordingly, the Debtors request that the Court make a finding that New Purchaser is entitled to the protections of section 363(m) of the Bankruptcy Code.

**C. The Sale Satisfies the Requirements of Section 363(f) of the Bankruptcy Code for a Sale Free and Clear of Liens, Claims, Encumbrances and Interests**

62. The Debtors seek authorization to sell the Acquired Assets to New Purchaser free and clear of all liens, claims and encumbrances, except as expressly permitted by the Amended APA. Nonetheless, the Acquired Assets may be sold free and clear of liens in accordance with section 363(f) of the Bankruptcy Code, which provides, in pertinent part:

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

(1) applicable non-bankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

63. Because section 363(f) of the Bankruptcy Code is drafted in the disjunctive, satisfaction of any one of its five requirements will be sufficient to permit the Amended Sale Transaction free and clear of liens, claims, encumbrances, pledges, mortgages, security interests, charges, options, and other interests. See In re Grubb & Ellis Co., Case No. 12-10685 (MG), 2012 Bankr. LEXIS 1279, at \*31 (Bankr. S.D.N.Y. Mar. 27, 2012) (discussing Bankruptcy Code § 363(f)); In re Borders Group, Inc., 453 B.R. 477, 483–84 (Bankr. S.D.N.Y. 2011) (discussing Bankruptcy Code § 363(f)). The Debtors submit that the Amended APA provides that the proposed Purchase Price is greater than the aggregate value of all such liens. As such, the rights of secured creditors are preserved. Thus, the Acquired Assets may be sold free and clear of such liens pursuant to section 363(f)(3) of the Bankruptcy Code. In re General Bearing Corp., 136 B.R. 361 (Bankr. S.D.N.Y. 1992); In re Oneida Lake Development, Inc., 114 B.R. 352 (Bankr. N.D.N.Y. 1990).

**D. The Court Should Waive or Reduce the Fourteen-Day Stay Periods Required by Rules 6004(g) and 6006(d) of the Federal Rules of Bankruptcy Procedure**

64. Pursuant to Bankruptcy Rule 6004(g), unless the court orders otherwise, all orders authorizing the sale of property pursuant to section 363 of the Bankruptcy Code are automatically stayed for 14 days after entry of the order. See FED. R. BANKR. P. 6004(g). The purpose of Bankruptcy Rule 6004(g) is to provide sufficient time for an objecting party to appeal before the order can be implemented. See Advisory Committee Notes to Fed. R. Bankr. P. 6004(g).



65. Although Bankruptcy Rule 6004(g) and the Advisory Committee Notes are silent as to when a court should “order otherwise” and eliminate or reduce the 14-day stay period, Collier suggests the 14-day stay period should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to the procedure.” 10 Collier on Bankruptcy 15<sup>th</sup> Ed. Rev., 6004.09 (L. King, 15th rev. ed. 2005). Furthermore, Collier provides that if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to file such appeal. Id.

66. Similarly, Bankruptcy Rule 6006(d) stays all orders authorizing a debtor to assign an executory contract or unexpired lease pursuant to section 365(f) of the Bankruptcy Code for 14 days, unless the court orders otherwise.

67. To preserve the value of the Acquired Assets and limit the costs of administering and preserving the Acquired Assets, it is critical that the Debtors close the Amended Sale Transaction as soon as possible after all closing conditions have been met or waived. Accordingly, the Debtors hereby requests that the Court waive the 14-day stay periods under Bankruptcy Rules 6004(g) and 6006(d), or in the alternative, if an objection to the sale or to the assignment of a contract or lease is filed, reduce the stay period to the minimum amount of time needed by the objecting party to file its appeal to allow the sale to close as provided under the Amended APA.

**E. The Assumption and Assignment of Transferred Contracts Should be Authorized**

68. Under section 365(a) of the Bankruptcy Code, a debtor, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). Section 365(f) of the Bankruptcy Code provides that a debtor in possession may assign an executory contract or unexpired lease of the debtor only if (a) the debtor in possession assumes

such contract or lease in accordance with the provisions of section 365, and (b) adequate assurance of future performance by the assignee of such contract or lease is provided. 11 U.S.C. § 365(f)(2).

69. Section 365(b)(1) of the Bankruptcy Code, in turn, codifies the requirements for assuming an unexpired lease or executory lease or executory contract of a debtor. This subsection provides:

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

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

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

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

11 U.S.C. § 365(b)(1).

70. The meaning of “adequate assurance of future performance” depends on the facts and circumstances of each case, but should be given “practical, pragmatic construction.” EBG Midtown South Corp. v. McLaren/Hart Env'tl. Eng'g Corp. (In re Sanshoe Worldwide Corp.), 139 B.R. 585, 592 (S.D.N.Y. 1992) (citations omitted), aff'd, 993 F.2d 300 (2d Cir.1993).

71. When an executory contract or lease is to be assumed and assigned, adequate assurance may be provided by, among other things, demonstrating the financial health of the assignee and its experience and ability in managing the type of enterprise or property assigned. See e.g., In re Bygaph, Inc., 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (stating that adequate assurance of future performance is present when a prospective assignee of a lease from debtor has financial resources and has expressed a willingness to devote sufficient funding to the business in order to give it a strong likelihood of success).

72. To the extent that any defaults exist under any Transferred Contracts, the New Purchaser will cure (in an amount not to exceed \$3,450,000 of the Cure Costs), or provide adequate assurance of cure of, such defaults within the meaning of section 365(b)(1)(A) and in accordance with the Amended APA. Moreover, the Debtors will demonstrate facts at the Sale Hearing that show New Purchaser's (or the Successful Bidder's, as the case may be) financial credibility, experience in the industry, and willingness and ability to perform under the Transferred Contracts. Therefore, the Sale Hearing will provide the Court and other interested parties with an opportunity to evaluate and, if necessary, challenge the ability of New Purchaser (or the Successful Bidder, as the case may be) to provide adequate assurance of future performance under the Transferred Contracts. Accordingly, the Debtors submit that the assumption and assignment of the Transferred Contracts as set forth herein should be approved.

**F. Conducting an Auction Pursuant to the Bidding Procedures is in the Best Interests of the Debtors' Estates and Their Creditors**

73. In order to maximize the value of the Acquired Assets for the benefit of the Debtors, their creditors and their chapter 11 estates, the Debtors seek to implement a competitive bidding process typical for transactions of this size and nature and designed to generate a maximum recovery. The Debtors believe that the Auction and proposed Bidding Procedures will encourage participation by financially capable bidders that demonstrate the ability to close a transaction. Furthermore, the Bidding Procedures are consistent with other procedures previously approved within this district, and are appropriate under the relevant standards governing auction proceedings and bidding incentives in bankruptcy proceedings. See e.g., In re Kmart, Case No. 02-B02474 (SPS) (Bankr. N.D. Ill. May 10, 2002); In re Global Crossing, Case No. 02-40188 (S.D.N.Y. March 25, 2002) (REG); In re Randall's Island Family Golf Ctrs., Inc., 261 B.R. 96 (S.D.N.Y. 2001); In re Integrated Resources, Inc., 147 B.R. 650 (S.D.N.Y. 1992).

**G. Bidding Protections Are Warranted**

74. The Debtors propose that if overbidding occurs at the Auction, New Purchaser shall have the right, but not the obligation, to participate in the overbidding subject only to the limitations provided by the Bidding Procedures. However, to compensate New Purchaser for serving as a “stalking horse,” thereby subjecting its bid to better or higher offers, the Debtors and New Purchaser seek authority for the Debtors to pay New Purchaser the Breakup Fee and Expense Reimbursement if an Alternate Transaction is approved or consummated or there is a material breach by the Debtors preventing a Closing as provided in the Amended APA. The Debtors and New Purchaser believe that the Bidding Protections are (a) fair and reasonable, given the benefits to the estates of having a definitive Amended APA and the risk to New Purchaser that a third-party offer may ultimately be accepted and (b) are necessary to preserve the value of the Debtors’ estates.

75. Bidding incentives such as the Breakup Fee encourage a potential purchaser to invest the requisite time, money and effort to conduct due diligence and sale negotiations with a debtor despite the inherent risks and uncertainties of the chapter 11 process. See e.g., In re 995 Fifth Ave. Assocs., L.P., 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (finding bidding incentives may be “legitimately necessary to convince a ‘white knight’ to enter the bidding by providing some form of compensation for the risks it is undertaking”) (citation omitted); In re Marrose Corp., 89 B 12171-12179 (CB), 1992 WL 33848, at \*5 (Bankr. S.D.N.Y. 1992) (stating that “[a]greements to provide breakup fees or reimbursement of fees and expenses are meant to compensate the potential acquirer who serves as a catalyst or ‘stalking horse’ which attracts more favorable offers”).

76. The Debtors submit that the Bidding Protections are a normal and necessary component of sales outside the ordinary course of business under section 363 of the Bankruptcy Code. See e.g., In re Kmart, Case No. 02 B02474 (SPS) (Bankr. N.D. Ill. May 10, 2002)

(authorizing a termination fee and bid protections for potential bidders); In re Comdisco, Inc., Case No. 01 24795 (RB) (Bankr. N.D. Ill. Aug. 9, 2002) (approving a termination fee as, *inter alia*, an actual and necessary cost and expense of preserving the debtor's estate, of substantial benefit to the debtor's estate, and a necessary inducement for, and a condition to, the proposed purchaser's entry into the Amended APA); In re Integrated Resources, Inc., 147 B.R. at 660 (noting that break-up fees may be legitimately necessary to convince a "white knight" to offer an initial bid by providing some form of compensation for the expenses such bidder incurs, and the risks such bidder faces by having its offer held open, subject to higher and better offers); In re Crowthers McCall Pattern, Inc., 114 B.R. 877 (Bankr. S.D.N.Y. 1990) (approving an overbid requirement in an amount equal to the approved break up fee); In re Kupp Acquisition Corp., Case No. 96 1223 (PJW) (Bankr. D. Del. March 3, 1997).

77. Here, the proposed Breakup Fee is 3% percent of the Cash Purchase Price and Assumed Cure Costs (or \$411,500) and the Expense Reimbursement cannot exceed \$400,000. Courts in this District have approved termination or breakup fees in approximately the same amount as measured in proportion to the proposed purchase price offered for a debtor's assets. See In re Long Beach Medical Center, et al., Case No. 14-70593 (AST) (Bankr. E.D.N.Y. Mar. 13, 2014) (approving termination fee in the amount of \$630,000); In re Personal Communications Devices, LLC, et al., Case No. 13-74303 (AST) (Bankr. E.D.N.Y. Sept. 16, 2013) (approving termination fee in the amount of \$3,500,000 in transaction with a proposed purchase price of \$105,250,000); In re Sound Shore Medical Center of Westchester, et al., Case No. 13-22840 (RDD) (Bankr. S.D.N.Y. June 25, 2013) (conditionally approving a break-up fee of 3% on a \$58.75 million purchase price); In re New York Westchester Square Medical Center, Case No. 06-13050 (SMB) (Bankr. S.D.N.Y. Feb. 1, 2013); (approving a break-up fee of 3% on a \$15.3 million assets

sale); In re Cabrini Med. Ctr., Case No. 09-14398 (AJG) (Bankr. S.D.N.Y. Dec. 30, 2009) (approving a break-up fee of 3.75% for an \$80 million sale); In re Bearingpoint, Inc. et al., No. 09-10691 (REG) (Bank. S.D.N.Y. Apr. 7, 2009) (approving a break-up fee of approximately 3% on a \$350 million sale). Additionally, courts routinely approve a purchaser's request for reasonable reimbursement of its legal and other advisor fees in connection with a stalking horse bid.

78. Thus, the Breakup Fee and Expense Reimbursement are within the range of fees typically paid in other significant sales transactions that have been consummated in a bankruptcy setting. Further, the amount of the Breakup Fee and Expense Reimbursement is reasonably calculated to compensate New Purchaser (a) for committing the time to perform due diligence, (b) for lost opportunity in being bound to a transaction that could be topped in a competitive auction process and (c) for serving as a "stalking horse" to encourage the submission of other bids. Accordingly, the Debtors believe that the Bidding Protections should be approved.

### **NOTICE**

79. No trustee or examiner has been appointed in these Chapter 11 Cases. Notice of this Amended Motion will be given to (i) the Office of the United States Trustee; (ii) the attorneys for the Committee; (iii) the attorneys for New Purchaser; (iv) all counterparties to the Transferred Contracts; (v) all parties who have made an expression of interest in acquiring the Acquired Assets or the Business within twelve (12) months prior to the date of the Amended Motion; (vi) all known persons holding a lien on any of the Acquired Assets and/or their attorneys; (vii) all taxing authorities that have jurisdiction over the Acquired Assets; and (viii) all parties who have requested notice in the Chapter 11 Cases. Additional notices will be provided in accordance with the notice provisions contained herein. The Debtors submit that such notice is sufficient and requests that this Court find that no other or further notice is necessary.

### **PRIOR REQUEST**

80. The Debtors previously sought approval of the SKNY APA and the Initial Sale Transaction. No other previous application for the relief requested herein has been made to this or any other court.

**WHEREFORE**, the Debtors respectfully request that this Court enter orders, substantially in the form annexed hereto, granting the Amended Motion and such other relief as may be just and proper.

Dated: New York, New York  
October 15, 2018

**ZEICHNER ELLMAN & KRAUSE LLP**

By: /s/ Nathan Schwed

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



**EXHIBIT A**



hereto, to be used in connection with the proposed sale (the “Sale”) of substantially all of the Debtors’ assets to SSNS Express LLC (the “New Purchaser”), pursuant to an Asset Purchase Agreement between the Debtors and the New Purchaser, dated October 15, 2018 (the “Amended APA”),<sup>2</sup> or to any competing bidder (or competing bidders) that submits an offer that the Debtors determine is the highest or otherwise best offer (or offers) for the Acquired Assets (any such party, the “Successful Bidder”); (b) scheduling an auction (the “Auction”) and a hearing to approve the Sale (the “Sale Hearing”); (c) approving the form and manner of the notice of the Auction and the Sale Hearing (the “Sale Notice”), substantially in the form of Schedule 2 attached hereto; and (d) approving the payment of the Breakup Fee and Expense Reimbursement (together, the “Bidding Protections”) and certain overbid procedures (collectively, the “Bidding Procedures”); and this Court having held a hearing on October 17, 2018 to consider the Bidding Procedures (the “Bidding Procedures Hearing”); and upon the Amended Sale Motion and the record of the Bidding Procedures Hearing, it now appearing that the Bidding Procedures are in the best interest of the Debtors’ estates, their creditors and other parties in interest; and after due deliberation thereon and good cause appearing therefor, it is hereby:

**FOUND AND DETERMINED THAT:**<sup>3</sup>

A. This Court has jurisdiction over the Amended Sale Motion and the Bidding Procedures pursuant to 28 U.S.C. §§ 157(b) and 1334. Consideration of the Bidding Procedures is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

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<sup>2</sup> Capitalized terms used but not otherwise defined herein shall be ascribed the meanings provided to those terms in the Amended Sale Motion or the Amended APA, as applicable.

<sup>3</sup> Findings of fact shall be construed as conclusions of law, and conclusions of law shall be construed as findings of fact, when appropriate. See Fed. R. Bankr. P. 7052.

B. Good and sufficient notice of the Bidding Procedures sought in the Amended Sale Motion has been given and no additional or further notice is required. A reasonable opportunity to object or be heard regarding the Bidding Procedures requested in the Amended Sale Motion has been afforded to interested persons and entities, including: (i) counsel for the official committee of unsecured creditors (the “Creditors’ Committee”); (ii) the Office of the United States Trustee for the Eastern District of New York (the “U.S. Trustee”); (iii) all parties in interest who requested notice pursuant to Bankruptcy Rule 2002; (iv) all counterparties to the Transferred Contracts; (v) counsel to the New Purchaser; (vi) all parties who are known to assert a Lien on the Acquired Assets; (vii) all parties who have made an expression of interest in acquiring the Acquired Assets or the Business within twelve (12) months prior to the date of the Amended Sale Motion; and (viii) all taxing authorities that have jurisdiction over the Acquired Assets (collectively, the “Bidding Procedures Parties”).

C. The proposed Sale Notice constitutes good, appropriate, adequate and sufficient notice, and is reasonably calculated to provide all interested parties, including the Bidding Procedures Parties with timely and proper notice of the Bidding Procedures, the Bidding Protections, the Auction, the assumption and assignment of the Transferred Contracts and Cure Amounts, and the Sale, as set forth herein and in the Amended Sale Motion, and no other or further notice is required.

D. The Debtors have articulated good and sufficient reasons for this Court to grant the relief requested in the Amended Sale Motion, including this Court’s (i) approval of the Bidding Procedures, (ii) approval of payment of the Bidding Protections from the proceeds of any Alternate Transaction or as otherwise provided for under the terms of the Amended APA, (iii) determination of final Cure Amounts, and (iv) approval of the form and manner of service of the Sale Notice.

E. The Debtors have articulated good and sufficient reasons for, and the best interests of the Debtors' estates will be served by, this Court scheduling the Sale Hearing to consider whether to grant the remainder of the relief requested in the Amended Sale Motion, including approval of the proposed Sale in accordance with either (i) the Amended APA between the Debtors and the New Purchaser, attached to the Amended Sale Motion, or (ii) such other agreement or agreements by and between the Debtors and the Successful Bidder or Successful Bidders, free and clear of, among other things, any and all liens, claims, encumbrances and interests (collectively, "Liens") (other than the Permitted Liens (as defined in the Amended APA)), with the same to attach to the proceeds of the Sale pursuant to section 363 of the Bankruptcy Code.

F. The Bidding Protections to be paid in accordance with the terms set forth in the Amended APA are (i) an actual and necessary cost and expense of preserving the Debtors' estates within the meaning of section 503(b) of the Bankruptcy Code, (ii) commensurate to the real and substantial benefit conferred upon the Debtors' estates by the New Purchaser, (iii) reasonable and appropriate in light of the size and nature of the proposed Sale and comparable transactions, the commitments that have been made, and the efforts that have been and will be expended by the New Purchaser, and (iv) necessary to induce New Purchaser to continue to pursue the Sale and to continue to be bound by the terms of the proposed Amended APA.

G. The Debtors' authorization to pay the Bidding Protections is an essential inducement and condition relating to the New Purchaser's entry into, and continuing obligations under, the Amended APA. The Debtors' commitment to pay the Bidding Protections, which has induced New Purchaser to submit its bid that will serve as a minimum or floor bid for the Sale of the Acquired Assets on which the Debtors can rely, provides a material benefit to the Debtors'

estates, their creditors and other parties in interest by increasing the likelihood that the best possible purchase price for the Acquired Assets will be received.

H. The Bidding Protections and the Bidding Procedures are reasonable and appropriate.

**NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:**

1. All objections to entry of this Order or to the Bidding Procedures requested in the Amended Sale Motion that have not been withdrawn, waived, resolved or settled are hereby denied and overruled in their entirety.

**The Bidding Procedures**

2. The Bidding Procedures, as set forth on Schedule 1 attached hereto and incorporated herein by reference, are hereby approved in all respects and shall govern all bids and bid proceedings relating to the Sale of the Acquired Assets. Notwithstanding the above, any party in interest may object at the Sale Hearing to the criteria used by the Debtors in ultimately selecting the highest or otherwise best offer for the Acquired Assets.

3. The deadline for submitting bids for the Acquired Assets (the “Bid Deadline”) shall be **November 21, 2018, at Noon (EST)**.

4. Except as may be limited by the Amended APA, the Debtors are authorized to extend the deadlines set forth in this Order and/or adjourn, continue or suspend the Auction and/or the Sale Hearing for any reason, in its sole discretion.

5. The Debtors are authorized to take any and all actions necessary or appropriate to implement the Bidding Procedures.

### **The Auction**

6. The **Auction shall commence at November 27, 2018 at 10:00 a.m. (EST)**, at Zeichner Ellman & Krause LLP, 1211 Avenue of the Americas, 40<sup>th</sup> Floor, New York, New York 10036, or during such later time or at such other place as decided by the Debtors. The Debtors shall notify all Qualified Bidders of any such later time or different place; provided, however, that in the event that no Qualified Bids (other than that submitted by New Purchaser, which is hereby deemed to be a Qualified Bid) are received by the Bid Deadline, or if the aggregate value of the highest Qualified Bids that have been submitted for all or a portion of the Acquired Assets does not exceed the Minimum Bid (as defined in the Bidding Procedures), the Debtors shall not be required to conduct an Auction, and in such event the Debtors shall proceed with the approval of the Amended APA.

### **The Bidding Protections**

7. Sections 2.4 (Breakup Fee and Expense Reimbursement) and 5.4 (Bankruptcy Court Matters) of the Amended APA are approved and binding on the Debtors and their estates. The Debtors are authorized and directed to pay the Bidding Protections to the extent incurred and solely in the event of the consummation of an Alternate Transaction from the first proceeds of such transaction, or as otherwise set forth in the Amended APA, without further order of the Court.

### **Sale Hearing**

8. The Sale Hearing shall be held before the Honorable Carla E. Craig, Chief United States Bankruptcy Judge, on **November 29, 2018 at 1:00 p.m. (EST)**, at the United States Bankruptcy Court for the Eastern District of New York, 271-C Cadman Plaza East, Brooklyn, New York 11201-1800, Courtroom No. 3529, at which time this Court shall consider: (i) approval of the Sale to New Purchaser or any other Successful Bidder(s); (ii) the proposed assumption and assignment of the Transferred Contracts; (iii) the entry of the proposed sale order, substantially in

the form attached to the Amended Sale Motion (the “Sale Order”); (iv) any issues or objections that are timely interposed by any parties; and (v) such other or further relief as this Court may deem just or proper.

9. Except as may be limited by the Amended APA, the Sale Hearing may be adjourned by the Debtors without further order of this Court, by filing a notice with this Court and serving such notice on all Qualified Bidders.

### **Notice**

10. The Sale Notice, substantially in the form attached hereto as Schedule 2, is hereby approved.

11. By no later than three (3) business days after the entry of this Order, the Debtors shall cause a copy of this Order, the Bidding Procedures, and the Sale Notice to be served upon the Bidding Procedures Parties.

12. By no later than three (3) business days after the entry of this Order, the Debtors shall cause a copy of the Sale Notice to be served upon all known creditors of the Debtors and those parties who filed proofs of claim against the Debtors’ estates via first class mail.

13. The notice set forth in the preceding paragraphs shall constitute good and sufficient notice of the Amended Sale Motion, the Auction, the Sale Hearing and the proposed Sale Order, and no other or further notice of the Amended Sale Motion, the Auction, the Sale Hearing and/or the proposed Sale Order shall be necessary or required.

### **Objections to Amended Sale Motion**

14. Objections, if any, to the remaining relief sought in the Amended Sale Motion must (a) be made in writing, (b) state with particularity the reasons for the objection or response, (c) conform to the Bankruptcy Rules and the Local Bankruptcy Rules, (d) set forth the name of the objecting party, the nature and basis of the objection, and the specific grounds therefore, and (e)



be filed with the Clerk of the Court (with a copy to be delivered to the Chambers of the Honorable Carla E. Craig, Chief United States Bankruptcy Judge, United States Bankruptcy Court for the Eastern District of New York, 271-C Cadman Plaza East, Brooklyn, New York 11201-1800, and shall be served so as to be **actually received** no later than **4:00 p.m. (EST) on November 13, 2018** (the “Sale Objection Deadline”), upon: (i) the proposed attorneys for the Debtors, Zeichner Ellman & Krause LLP, 1211 Avenue of the Americas, 40<sup>th</sup> Floor, New York, New York 10036 (Attn: Nathan Schwed), (ii) the attorneys for the New Purchaser, (a) Klestadt Winters Jureller Southard & Stevens, LLP, 200 West 41<sup>st</sup> Street, 17<sup>th</sup> Floor, New York, New York 10036 (Attn: Tracy L. Klestadt), and (b) Norton Rose Fulbright US LLP, 1301 Avenue of the Americas, 26<sup>th</sup> Floor, New York, New York 10019 (Attn: Samuel S. Kohn and James A. Copeland), (iii) the Office of the United States Trustee for the Eastern District of New York, U.S. Federal Office Building, 201 Varick Street, Room 1006, New York, New York 10014 (Attn: William Curtin) and (iv) the proposed attorneys for the Creditors’ Committee, Goldberg Weprin Finkel Goldstein LLP, 1501 Broadway, 22nd Floor, New York, NY 10036 (Attn: Kevin Nash).

### **Transferred Contracts**

15. The Debtors shall file a copy of the Schedule of Transferred Contracts (the “Assumption Schedule”) with the Court no later than fifteen (15) days prior to the Sale Objection Deadline and shall concurrently serve notice of such schedule upon all counterparties to the Transferred Contracts and the Bidding Procedures Parties.

16. The Assumption Schedule shall identify the proposed Transferred Contracts. The Debtors, with the consent of New Purchaser or the Successful Bidder(s), as applicable, shall have the right until the fifth (5<sup>th</sup>) day prior to the Closing of the Sale to amend and remove executory contracts or unexpired leases from the Assumption Schedule. The Debtors shall file and serve notice of any such amendment (an “Amendment Notice”) on all non-Debtor parties to the

Transferred Contracts that are impacted by any amendment to the Assumption Schedule. Further, on or before the date that is two (2) business days after the Auction, the Debtors shall file notice setting forth the proposed Cure Amounts with respect to any Transferred Contracts (such notice, the “Cure Notice”), which notice shall be served on all non-Debtor parties to the Transferred Contracts that are impacted by the Cure Notice.<sup>4</sup>

17. All non-Debtor parties to the Transferred Contracts shall have until (i) the Sale Objection Deadline to file an objection to the assumption and assignment of the Transferred Contracts to which they are parties but solely with respect to adequate assurance of future performance (an “Adequate Assurance Objection”), which filing must describe in detail in writing the basis of any such objection, and (ii) on or before the date that is seven (7) business days after the filing of the Cure Notice (the “Cure Objection Deadline”) to file an objection to the proposed Cure Amount, if any, with respect to any Transferred Contracts (a “Cure Objection”), and such counterparty’s Cure Objection must set forth (i) the basis for the objection, and (ii) with specificity, the amount the party asserts as the correct Cure Amount; provided, that, to the extent a counterparty files a Cure Objection, such counterparty shall also provide to the Debtors appropriate documentation in support of the alleged alternative Cure Amount.

18. If an Adequate Assurance Objection is timely filed and not consensually resolved, this Court may hold a hearing with respect to the Adequate Assurance Objection either at the Sale Hearing or at such other date as this Court shall designate. If a counterparty files only a Cure Objection, that Transferred Contract may be assumed by the Debtors and assigned to New

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<sup>4</sup> The inclusion of any agreement as an contract or lease on the Assumption Schedule and/or Cure Notice does not constitute an admission by the Debtors that such agreement actually constitutes an executory contract or unexpired lease under the Bankruptcy Code, and the Debtors expressly reserve the right to challenge the status of any agreement included as an Transferred Contract.

Purchaser or the Successful Bidder(s), as applicable; provided, however, that the amount asserted by the objecting party as the proper Cure Amount, or a different amount set by this Court, shall be held in escrow pending further order of this Court or mutual agreement of the parties as to the proper Cure Amount for that Transferred Contract. The Debtors and New Purchaser or the Successful Bidder(s), as the case may be, are hereby authorized to settle, compromise or otherwise resolve any disputed Cure Amounts with the relevant non-Debtor party to any Transferred Contract without Court approval or notice to any party.

19. If no Adequate Assurance Objection or Cure Objection is timely filed and served, then subject to entry of an Order by this Court upon the Sale Hearing approving the Sale and proposed assumption and assignment of the Transferred Contracts in connection therewith, the Cure Amounts set forth in the Cure Notice shall control notwithstanding any terms or conditions to the contrary in any Transferred Contract. The non-Debtor parties to the Transferred Contracts shall be barred from asserting against the Debtors or the New Purchaser (or the Successful Bidder(s), as the case may be) any other claim arising from the Transferred Contracts.

20. The effective date of any assumption and assignment of the Transferred Contracts shall be the Closing Date of the Sale. Any Cure Amounts to be paid under any of the Transferred Contracts shall be paid by the New Purchaser (not to exceed \$3,450,000) (or Successful Bidder(s), as the case may be) either prior to, upon or promptly following the Closing of the Sale, or as otherwise agreed to by the parties to the Transferred Contracts.

21. The Debtors reserve any and all rights with respect to any contracts, leases, the Transferred Contracts, the Cure Costs, and any document or issue related thereto.

**Additional Provisions**

22. The Debtors are authorized and empowered to take all steps, and incur and pay all costs and expenses, as may be reasonably necessary to fulfill the requirements established by this Order.

23. Nothing contained in this Order precludes any party in interest from objecting to the Sale in accordance with the objection procedures set forth herein, and no party shall be deemed to have consented to the Sale by virtue of not having objected to the Bidding Procedures requested in the Amended Sale Motion.

24. The Debtors are hereby authorized to implement the Bidding Procedures and conduct the Auction without the necessity of complying with any state or local bulk transfers law, or requirement or any similar law of any state or other jurisdiction which may apply in any way to any of the transactions under the Amended APA.

25. This Court shall retain jurisdiction over any and all matters or disputes arising from or relating to the implementation of this Order.

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

## Schedule 1

### **Bidding Procedures**

#### **BIDDING PROCEDURES AND TERMS AND CONDITIONS OF SALE**

Seasons Corporate LLC and certain of its affiliates, as debtors and debtors in possession (collectively, the “**Debtors**” or “**Sellers**”) in Lead Bankruptcy Case No. 18-45284 (NHL) (the “**Chapter 11 Cases**”) currently pending in the United States Bankruptcy Court for the Eastern District of New York (the “**Court**”), have entered into an asset purchase agreement (the “**Amended APA**”)<sup>5</sup> with SSNS Express LLC (the “**New Purchaser**”), dated as of October 15, 2018, for the sale of substantially all of the Debtors’ assets, free and clear of any and all liens, claims, encumbrances and other interests (except as explicitly stated in the Amended APA). The Debtors are currently soliciting higher or otherwise better bids for the sale of the Acquired Assets (the “**Sale**”).

#### **A. Bidding Procedures**

Set forth below are the bidding procedures (the “**Bidding Procedures**”) with respect to the Sale of the Acquired Assets. On October [\_\_\_], 2018, the Court entered the *Order Approving Bidding Procedures for the Sale of Substantially All of the Debtors’ Assets, (B) Scheduling an Auction and a Sale Hearing Related Thereto, (C) Approving the Form and Manner of Notice of the Auction and the Sale Hearing, and (D) Approving Bidding Protections* [Docket No. [\_\_\_]] (the “**Bidding Procedures Order**”), which, among other things, granted those portions of the Debtors’ amended sale motion [Docket No. [\_\_\_]], (the “**Amended Sale Motion**”), which modified the original motion (the “**Original Motion**”) dated September 16, 2018 [Docket No. 12], concerning approval of the Bidding Procedures and Bidding Protections to be employed in connection with the solicitation of higher or otherwise better bids and an auction (the “**Auction**”) for the Sale of the Acquired Assets.

#### **B. Relevant Dates**

Bid Deadline:	November 21, 2018 (Noon. EST)
Auction:	November 27, 2018 (10:00 a.m. EST)
Sale Objection Deadline:	November 13, 2018 (4:00 p.m. EST)
Sale Hearing:	November 29, 2018 (1:00 p.m. EST)

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<sup>5</sup> Capitalized terms used but not otherwise defined herein shall be ascribed the meanings provided to those terms in the Amended Sale Motion or the Amended APA, as applicable.

**C. Acquired Assets to be Sold Free and Clear**

The Debtors are offering to sell the Acquired Assets. Except as otherwise provided for in the Amended APA, with respect to the Sale, all of the Sellers' right, title and interest in and to the Acquired Assets shall be sold free and clear of any and all liens, claims, encumbrances, security interests and other restrictions on transfer (collectively, the "**Liens**") to the extent permitted by section 363 of title 11 of the United States Code (the "**Bankruptcy Code**") and other applicable law (except as otherwise expressly provided for in the Amended APA) with such Liens to attach to the proceeds of the Sale.

Except as expressly provided in the Amended APA, the Sale of the Acquired Assets shall be on an "**as is, where is**" basis and without representations or warranties of any kind, nature or description by the Debtors or their agents.

**D. Stalking Horse Bidder**

The New Purchaser shall act as the "stalking horse bidder" at the Auction for the Acquired Assets with the right to receive a break-up fee of \$411,000.00 (or 3% of the Cash Purchase Price and Assumed Cure Costs) (the "**Breakup Fee**") and reimbursement of its actual and necessary expenses, including reasonable attorney's fees, incurred in connection with negotiation and entry into the Amended APA, due diligence with respect to the transactions contemplated by the Amended APA, and obtaining Bankruptcy Court approval of the Amended APA, in an amount not to exceed \$400,000 (the "**Expense Reimbursement**" and, together with the Breakup Fee, the "**Bidding Protections**") under the terms set forth in the Amended APA. The Bidding Protections shall be paid from the first proceeds of an Alternate Transaction, including the Sale, or as otherwise set forth in the Amended APA.

THE DEBTORS RESERVE THE RIGHT, IN THEIR DISCRETION, AND AFTER CONSULTATION WITH THE CREDITORS' COMMITTEE, TO DETERMINE WHETHER ANY BID IS BETTER, IF NOT HIGHER, THAN ANOTHER BID SUBMITTED DURING THE AUCTION. THE DEBTORS MAY CONSIDER A VARIETY OF FACTORS IN MAKING THIS DECISION, INCLUDING, WITHOUT LIMITATION, ANY PROPOSED CONDITIONS TO CLOSING, TIMING OF CLOSING OF THE PROPOSED TRANSACTION AND THE LIKELIHOOD OF THE BIDDER TO OBTAIN REQUISITE APPROVALS.

**E. Mailing the Sale Notice**

The Debtors shall provide notice of the Auction and the Sale of the Acquired Assets (the "**Sale Notice**"), together with a copy of these Bidding Procedures, by first class mail, postage prepaid, to: (i) counsel for the Creditors' Committee; (ii) the Debtors' secured creditors or their counsel; (iii) the Office of the United States Trustee for the Eastern District of New York (the "**U.S. Trustee**"); (iv) all parties in interest who have requested notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"); (v) all counterparties to the Transferred Contracts; (vi) the following federal, state and local taxing and regulatory authorities: (a) the United States Attorney for the Eastern District of New York, (b) the Attorney General of the State of New York, (c) the Internal Revenue Service, (d) New York State Department of Taxation and Finance, (e) New York City Department of Finance and (f) the Environmental

Protection Agency; (vii) counsel to the New Purchaser; (viii) all parties who are known to assert a lien on any portion of the Acquired Assets; (ix) all parties identified by the Debtors as potentially having an interest in acquiring some or all of the Acquired Assets; and (x) all known creditors of the Debtors and those parties who have filed proofs of claim against the Debtors' estates.

Any other party in interest that wishes to receive a copy of the Bidding Procedures Order and/or the Amended Sale Motion may make such request in writing to Nathan Schwed, Zeichner Ellman & Krause LLP, 1211 Avenue of the Americas, 40<sup>th</sup> Floor, New York, New York 10036, by telephone: (212) 223-0400 or via email at nschwed@zeklaw.com.

**F. Confidentiality Agreement / Due Diligence**

Any entity that wishes to conduct due diligence with respect to the Acquired Assets, other than New Purchaser, must (i) deliver to the Debtors an executed confidentiality agreement in form and substance reasonably satisfactory to the Debtors and on terms no less favorable than the confidentiality agreement executed by the New Purchaser, and (ii) deliver to the Debtors a written non-binding expression of interest to purchase the Acquired Assets, reasonably acceptable to the Debtors.

Interested parties that comply with the foregoing (each such entity referred to as a "**Potential Bidder**"), shall be permitted to conduct diligence with respect to the Acquired Assets; provided, however, that the Debtors shall not be obligated to furnish any due diligence information after the Bid Deadline (defined below).

**G. Qualification of Bids and Bidders**

To participate in the bidding process and have a bid considered by the Debtors, each Potential Bidder must deliver a written, irrevocable offer to purchase some or all of the Acquired Assets that satisfies the following criteria.

**A BID MAY BE MADE FOR ALL OR ONLY A PORTION OF THE ASSETS.**

To become a "**Qualified Bidder**", a Potential Bidder must deliver a binding bid that, in the Debtors' discretion, satisfies the following (a "**Qualified Bid**"):

- i. **Bid Deadline.** Each Bid Package (as defined below) must be delivered, in written form, to: proposed counsel to the Debtors, Zeichner Ellman & Krause LLP, 1211 Avenue of the Americas, 40<sup>th</sup> Floor, New York, New York 10036, Attn: Nathan Schwed so as to be **actually received no later than Noon (prevailing Eastern Time) on November 21, 2018 (the "Bid Deadline")**.
- ii. **Bid Package.** Each bid must include:
  - (a) a written and signed irrevocable offer (i) stating that the bidder seeks to consummate a sale transaction on terms and conditions no less favorable than in the

Amended APA and in an amount at least equal to the Minimum Bid (defined below); (ii) confirming that the bid will remain irrevocable until the earlier of (A) ninety (90) days following entry of the Sale Order (defined below) and (B) closing with the Successful Bidder, and (iii) that the Potential Bidder had the opportunity to conduct due diligence prior to submitting its bid, does not require further due diligence, has relied solely upon its own independent review and investigation when submitting its bid, and did not rely on any written or oral representation of the Debtors in preparation for submission of its bid; and

- (b) an executed copy of the Amended APA, as modified by the Potential Bidder in accordance with its bid (the "**Modified Purchase Agreement**"), as well as an electronic markup of the Amended APA clearly identifying the revisions in the Modified Purchase Agreement (formatted as a Microsoft Word document or such other word processing format acceptable to the Debtors)

(collectively, the "**Bid Package**").

The Debtors, in consultation with the Creditors' Committee, shall determine whether any Modified Purchase Agreement that modifies the Amended APA in any respect beyond the identity of the purchaser and the purchase price constitutes a Qualified Bid.

- iii. **Minimum Bid.** For a Bid Package submitted by a Potential Bidder to qualify as a Qualified Bid, the purchase price in that bid must provide for net cash in an amount not less than \$10,911,000.00 which represents the Purchase Price, the maximum amount of the Bidding Protections and a \$100,000 minimum overbid, and the Potential Bidder must agree to pay the Assumed Cure Costs (the "**Minimum Bid**").
- iv. **Financial Information.** To constitute a Qualified Bid, the Bid Package must contain financial and other information of the Potential Bidder that will allow the Debtors to make a determination as to the Potential Bidder's financial wherewithal to consummate the transactions contemplated by any Modified Purchase Agreement, including (a) any proposed conditions to Closing and (b) adequate assurance of such Potential Bidder's ability to perform under any Transferred Contracts and to pay all cure amounts required to assume and assign any such Transferred Contracts. A Potential Bidder shall cooperate reasonably with any request by any creditor, the Debtors, the U.S. Trustee, the Creditors' Committee or any other interested party (except the New Purchaser or another Potential Bidder) for further due diligence that is reasonably necessary and customary to evaluate the viability and terms of the Potential Bidder's Qualified Bid. Any due diligence conducted of a Potential Bidder shall be completed no later than five (5) business days following the submission of the Potential Bidder's Bid Package.



- v. Additional Bid Protections. The bid shall not request or entitle the Potential Bidder to any termination fee, transaction or break-up fee, expense reimbursement or similar type of payment.
- vi. Identity of Bidders. Each Potential Bidder must fully disclose the identity of each entity that will be bidding for the Acquired Assets, as well as disclose the organizational form and business conducted by each entity, and what connections, if any, the Potential Bidder has with the Debtors. Potential Bidders shall be required to provide such additional information as the Debtors may require regarding a bidder's ability to satisfy the requirements of the transaction contemplated by any Modified Purchase Agreement.
- vii. Due Diligence. Except as provided for in the Amended APA, the bid must not contain any contingencies of any kind, including, but not limited to (a) obtaining financing or shareholder, board of directors or other approval, or (b) the outcome or completion of due diligence. Each Potential Bidder must also affirmatively acknowledge that the Potential Bidder (x) had an opportunity to conduct due diligence regarding the Acquired Assets prior to making its offer and does not require further due diligence, (y) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Acquired Assets in making its bid, and (z) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied, by operation of law or otherwise, regarding the Acquired Assets, or the completeness of any information provided in connection therewith, except as expressly stated in these Bidding Procedures.
- viii. Consents. Each Potential Bidder must represent that it obtained all necessary organizational (not regulatory) approvals to make its competing bid and to enter into and perform any Modified Purchase Agreement.
- ix. Deposit. A Potential Bidder must deposit 10% of the Purchase Price, as set forth in any Modified Purchase Agreement, plus the amount of the Bidding Protections, with the Debtors in the form of a certified check or wire transfer on or before the Bid Deadline (the "Deposit"). The Potential Bidder or the Backup Bidder (defined below) shall forfeit the Deposit if (a) the Potential Bidder or the Backup Bidder is determined to be a Qualified Bidder and withdraws or modifies its bid other than as provided herein before the Court approves the Debtors' selection of the Successful Bidder (defined below), or (b) the bidder is a Successful Bidder and modifies or withdraws its bid without the Debtors' consent before the consummation of the sale contemplated by the bid, or breaches any of the terms of the relevant Modified Purchase Agreement.

The Deposit shall be returned to a Potential Bidder (x) as soon as practicable if the Potential Bidder is not determined to be a Qualified Bidder or (y) no

later than five (5) business days after entry of the Sale Order if the Potential Bidder is deemed to be a Qualified Bidder (who has not otherwise forfeited its Deposit), but is not the Successful Bidder or the Backup Bidder; provided, however, that in the event the New Purchaser is not the Successful Bidder, its Deposit shall be returned to it promptly upon termination of the Amended APA, but in no event later than five (5) business days after the date of that termination. The Debtors will maintain any Deposit in a non-interest bearing account.

- x. “As Is, Where Is”. Any Modified Purchase Agreement must provide that the Sale will be on an “as is, where is” basis and without representations or warranties of any kind, except and solely to the extent expressly set forth in the Modified Purchase Agreement of the Successful Bidder. Each Qualified Bidder shall be deemed to acknowledge and represent that it has had an opportunity to conduct any and all due diligence regarding the Acquired Assets prior to making its bid and that it has relied solely upon its own independent review and investigation in making its bid.
- xi. Debtors’ Considerations. The Debtors, after consultation with the Creditors’ Committee, shall have the right to determine that a bid is not a Qualified Bid if the terms of the bid are materially more burdensome or conditional than the terms of the Amended APA and are not offset by a material increase in purchase price, which determination may take into consideration: (1) whether the bid requires any indemnification of the Qualified Bidder; (2) whether the bid does not provide sufficient cash consideration to pay transfer taxes, cure costs or other cash costs of the transaction (including professionals’ fees and the Bidding Protections); (3) whether the bid includes a non-cash instrument or similar consideration that is not freely marketable; or (4) any other factors that the Debtors, after consultation with the Creditors’ Committee, may deem relevant.

The Debtors are offering to sell the Acquired Assets. The Debtors, in consultation with the Creditors’ Committee, shall have the exclusive right to determine whether a bid is a Qualified Bid and shall notify Potential Bidders whether their respective bid(s) have been determined to be Qualified Bid(s) prior to the Auction. The Debtors may reject any bid that is on terms more burdensome or conditional than the Amended APA or is otherwise contrary to the best interests of the Debtors’ estates. In addition to the requirements above, the Debtors may request any additional information from any Potential Bidder to assist the Debtors in making a determination as to whether a bid is a Qualified Bid.

#### **H. Sale to New Purchaser**

The Amended APA shall be deemed a Qualified Bid and the New Purchaser shall be deemed a Qualified Bidder. If no Qualified Bid other than New Purchaser’s is submitted by the Bid Deadline, the Debtors shall not hold the Auction, but may proceed with the Sale Hearing and seek approval of the Amended APA and the transactions contemplated thereby. In the event there is an Auction and New Purchaser determines to stop bidding at any point, the individual members of

New Purchaser shall each be deemed a Qualified Bidder and shall be entitled to submit bids for the Acquired Assets.

## **I. Auction**

In the event that the Debtors timely receive at least one Qualified Bid (excluding the New Purchaser's Qualified Bid) by the Bid Deadline for all or any portion of the Acquired Assets, the Debtors shall conduct the Auction with respect to the Acquired Assets. The Auction will take place at Zeichner Ellman & Krause LLP, 1211 Avenue of the Americas, 40<sup>th</sup> Floor, New York, New York 10036 on **November 27, 2018, starting at 10:00 a.m. (EST)**, or at such other date, time or place as may be determined by the Debtors at or prior to the Auction. The Auction shall be governed by the following procedures:

- i. **Participation.** Only Qualified Bidders that have submitted a Qualified Bid and provided Deposits will be eligible to participate in the Auction, and each Qualified Bidder shall appear in person at the Auction (and any attorney for a Qualified Bidder may appear at the Auction at the discretion of the Qualified Bidder). In the event that a Qualified Bidder does not attend the Auction, the relevant Qualified Bid shall nonetheless remain fully enforceable against that Qualified Bidder in accordance herewith.

The Debtors, in consultation with the Creditors' Committee, shall evaluate all Qualified Bids received and will select the Qualified Bid that reflects the highest or otherwise best offer for all or any portion of the Acquired Assets, and otherwise complies with the bid requirements set forth herein (the "**Starting Auction Bid**"). The Debtors may consider a variety of factors to determine the Starting Auction Bid, including, but not limited to, modifications to the Amended APA and the Qualified Bidder's ability to consummate the Sale. At the Auction, the Debtors shall announce the material terms of the Starting Auction Bid and the basis for calculating the total consideration offered in the Starting Auction Bid.

- ii. **Bidding.** Bidding at the Auction shall commence at the amount of the Starting Auction Bid. Qualified Bidders may then submit successive bids in increments of no less than \$100,000 (the "**Minimum Bid Increment**"); provided, however, that the Debtors, in consultation with the Creditors' Committee, shall retain the right to modify the Minimum Bid Increment during the Auction. Any bid submitted after the conclusion of the Auction shall not be considered for any purpose.
- iii. **Higher or Otherwise Better.** The Debtors reserve the right, in consultation with the Creditors' Committee, to determine whether any bid is better, if not higher, than another bid submitted during the Auction. The Debtors may consider any other factor that they, in consultation with the Creditors' Committee, deem relevant.

- iv. Rebidding. Any overbid by the New Purchaser at the Auction will be credited with the full amount of the Bidding Protections.
- v. Successful Bid. The Auction shall continue until there is only one collective offer or separate offers for the Acquired Assets that the Debtors, in consultation with the Creditors' Committee, determines, subject to Court approval, is (or are) the highest or otherwise best offer(s) from among the Qualified Bids submitted at the Auction (the "**Successful Bid(s)**") and the Debtors announce that the Auction is closed. The Qualified Bidder(s) submitting such Successful Bid(s) shall become the "**Successful Bidder(s)**," and shall have such rights and responsibilities of the New Purchaser, as set forth in the Modified Purchase Agreement, or the Amended APA, as applicable.

Within one (1) business day after the conclusion of the Auction (but in any event prior to the commencement of the Sale Hearing), the Successful Bidder(s) shall (a) complete and execute all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which the Successful Bid(s) was/were made, and (b) supplement the relevant Deposit by wire transfer or other immediately available funds so that, to the extent necessary, such Deposit equals 10% of the Successful Bid(s) plus the amount required for payment of the Bidding Protections.

- vi. Anti-Collusion. At the commencement of the Auction, each Qualified Bidder shall be required to confirm that it has not engaged in any collusion with any other Qualified Bidder or Potential Bidder with respect to the bidding or the Sale.
- vii. Conduct of Auction. The Auction may be conducted openly with the proceeding being transcribed and each Qualified Bidder being informed of the terms of the previous bid. The Debtors or their counsel may meet privately with any Qualified Bidder to negotiate the terms of its bid. The Debtors, in consultation with the Creditors' Committee, may adopt other rules for the conduct of the Auction at the Auction, which, in their judgment, will better promote the goals of the Auction.
- viii. Backup Bid. At the conclusion of the Auction, the Debtors will announce the second highest or otherwise best bid(s) from among the Qualified Bids submitted at the Auction (the "**Backup Bid(s)**"). The Qualified Bidder(s) submitting such Backup Bid(s) shall become the "**Backup Bidder(s)**," and subject to the rights of the Successful Bidder(s), shall have such rights and responsibilities of the New Purchaser, as set forth in the Modified Purchase Agreement or the Amended APA, as applicable.

The Backup Bid shall remain open and irrevocable until the earlier of (a) ninety (90) days following entry of the Sale Order and (b) Closing of the

Sale; provided, however, that if the New Purchaser's bid is deemed the Backup Bid, the New Purchaser's rights and obligations with respect to such bid shall be subject to the terms of the Amended APA. The Backup Bidder's Deposit will be returned by the Debtors upon consummation of the Sale of the Acquired Assets to the Successful Bidder(s), or will be otherwise applied or forfeited as provided in Section G(ix) above if the Backup Bidder is determined to be the Successful Bidder, except with respect to the New Purchaser, which shall be subject to the terms of the Amended APA.

- ix. Extensions/Adjournment. The Debtors reserve their rights, in the exercise of their reasonable business judgment, and in consultation with the Creditors' Committee, to modify any non-material provisions of these Bidding Procedures at or prior to the Auction, including, without limitation, extending the deadlines set forth in the Auction procedures, modifying bidding increments, adjourning the Auction at the Auction and/or adjourning the Sale Hearing in open court without further notice consistent with the Amended APA and Bidding Procedures Order.

**J. Sale Hearing and Return of Deposits**

The Successful Bid(s) and the Backup Bid(s) will be subject to approval by the Court after a hearing (the "**Sale Hearing**") and entry of an order (the "**Sale Order**"). The Sale Hearing will take place on **November 29, 2018 at 1:00 p.m. (EST)**. The Sale Hearing may be adjourned from time to time without further notice to creditors or parties in interest other than by announcement of the adjournment in open court. Upon approval of the Backup Bid(s) by the Court, the Backup Bid(s), other than the New Purchaser's bid which shall be subject to the terms of the Amended APA, shall remain open and irrevocable until the earlier of ninety (90) days following entry of the Sale Order or the Closing of the Sale.

No offer shall be deemed accepted unless and until it is approved by the Court and the Sale Order is entered.

Objections, if any, to the Amended Sale Motion and any filed supplements thereto, shall: (i) be in writing; (ii) specify, with particularity, the basis of the objection; and (iii) be filed with the Court and simultaneously served on: (a) proposed attorneys for the Debtors, Zeichner Ellman & Krause LLP, 1211 Avenue of the Americas, 40<sup>th</sup> Floor, New York, New York 10036 (Attn: Nathan Schwed), (ii) the attorneys for the New Purchaser, (a) Klestadt Winters Jureller Southard & Stevens, LLP, 200 West 41<sup>st</sup> Street, 17<sup>th</sup> Floor, New York, New York 10036 (Attn: Tracy L. Klestadt), (b) Norton Rose Fulbright US LLP, 1301 Avenue of the Americas, 26<sup>th</sup> Floor, New York, New York 10019 (Attn: Samuel S. Kohn and James A. Copeland), (iii) the Office of the United States Trustee for the Eastern District of New York, U.S. Federal Office Building, 201 Varick Street, Room 1006, New York, New York 10014 (Attn: William Curtin) and (iv) the attorneys for the Creditors' Committee, Goldberg Weprin Finkel Goldstein LLP, 1501 Broadway, 22nd Floor, New York, NY 10036 (Attn: Kevin Nash), so as to **be actually received by 4:00 p.m. (EST) on November 13, 2018 (the "Sale Objection Deadline")**.

**K. Consummation of the Sale**

Except as provided herein and in the Amended APA, following the Sale Hearing, if for any reason the Successful Bidder fails to consummate the Sale of the Acquired Assets, then the Backup Bidder shall automatically be deemed to have submitted the highest or otherwise best bid. The Debtors and the Backup Bidder are authorized to effectuate the Sale of the Acquired Assets to the Backup Bidder as soon as is commercially reasonable without further order of the Court. If the failure to consummate the Sale is the result of a breach by the Successful Bidder, its Deposit shall be forfeited to the Debtors. The Debtors specifically reserve the right to seek all available damages from the defaulting Successful Bidder.

**L. Jurisdiction**

The Court shall retain exclusive jurisdiction over any matter or dispute relating to the Sale of the Acquired Assets, the Bidding Procedures, the Sale Hearing, the Auction, the Successful Bid(s), the Backup Bid(s) and/or any other matter that in any way relates to the foregoing.

## **Schedule 2**

## Sale Notice

**ZEICHNER ELLMAN & KRAUSE LLP**

1211 Avenue of the Americas, 40<sup>th</sup> Floor

New York, New York 10036

Telephone: (212) 223-0400

Facsimile: (212) 753-0396

Nathan Schwed

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

**Hearing Date: November 29, 2018**

**Hearing Time: 1:00 p.m. (EST)**

**Bidding Deadline: November 21, 2018 at Noon (EST)**

**Auction: November 27, 2018 at 10:00 a.m.  
(EST)**

**Sale Objection Deadline: November 13, 2018 at 4:00 p.m. (EST)**

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK**

In re

SEASONS CORPORATE LLC, *et al.*,Debtors.<sup>6</sup>

Chapter 11

Case No. 18-15284 (NHL)

Jointly Administered

**NOTICE OF AUCTION AND HEARING TO CONSIDER APPROVAL  
OF THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS**

NOTICE IS HEREBY GIVEN, as follows:

<sup>6</sup> The Debtors in these Chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Blue Gold Equities LLC (7766), Central Avenue Market LLC (7961), Amsterdam Avenue Market LLC (7988), Wilmot Road Market LLC (8020), Seasons Express Inwood LLC (1703), Seasons Lakewood LLC (0295), Seasons Maryland LLC (1895), Seasons Clifton LLC (3331), Seasons Cleveland LLC (7367), Lawrence Supermarket LLC (8258), Upper West Side Market LLC (8895) and Seasons Corporate LLC (2266). The mailing address for the Debtors, solely for purposes of notices and communications, is: 5 Doughty Boulevard, Inwood, NY 11096.

On October 15, 2018, Seasons Corporate LLC and certain of its affiliates, as debtors and debtors in possession (collectively, the “**Debtors**”) in the above-captioned chapter 11 cases (the “**Chapter 11 Cases**”) filed a motion (the “**Amended Sale Motion**”) [Docket No. [\_\_]]<sup>7</sup> which modified the motion (the “**Original Motion**”) dated September 16, 2018 [Docket No. 12], and sought, among other things, entry of an order pursuant to sections 105, 363, 365, and 503 of title 11 of the United States Code (the “**Bankruptcy Code**”), rules 2002, 60004 and 6004 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and rules 6004-1, 6006-1 and 9006-1 of the Local Bankruptcy Rules for the Eastern District of New York (the “**Local Rules**”): (a) approving the proposed Bidding Procedures to be used in connection with the proposed sale of substantially all of the Debtors’ assets, free and clear of any and all liens, claims, encumbrances, security interests and other interests, to SSNS Express LLC (the “**New Purchaser**”), or to any competing bidder or bidders (the “**Successful Bidder(s)**”) that submits or collectively submit a higher or better offer or offers for the Acquired Assets; (b) scheduling the Auction and Sale Hearing to approve the Sale of the Acquired Assets; (c) approving the form and manner of notice of the Auction and Sale Hearing; and (d) approving the Bidding Protections and certain overbid procedures in connection therewith (the “**Bidding Procedures Order**”). The Bankruptcy Court conducted a hearing on October 11, 2018 to consider entry of the Bidding Procedures Order. On October [\_\_], 2018, the Court entered the Bidding Procedures Order [Docket No. [\_\_]].

The Amended Sale Motion, the Bidding Procedures, and the Bidding Procedures Order have been filed electronically with the Clerk of the United States Bankruptcy Court for the Eastern District of New York, and may be reviewed by all registered users of the Court’s website at

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<sup>7</sup> Capitalized terms used but not otherwise defined herein shall be ascribed the meanings provided to those terms in the Amended Sale Motion or the Amended APA, as applicable.



<http://ecf.nyeb.uscourts.gov>. Copies of the Amended Sale Motion, the Bidding Procedures, and the Bidding Procedures Order can also be obtained by telephonic, written, or e-mail request to the undersigned counsel to the Debtors, Attn: Robert Guttman (Telephone: (212) 223-0400 or e-mail: [rguttmann@zeklaw.com](mailto:rguttmann@zeklaw.com)).

As set forth in the Bidding Procedures, the sale of the Acquired Assets remains subject to higher or better offers for all or a portion of the Acquired Assets and Bankruptcy Court approval. All interested parties are invited to make competing offers for all or a portion of the Acquired Assets in accordance with the terms of the Bidding Procedures and the Bidding Procedures Order. The deadline to submit a competing offer in accordance with the terms of the Bidding Procedures is **November 21, 2018 at Noon (ET)** (the “**Bid Deadline**”). Pursuant to the Bidding Procedures Order, if a Qualified Bid other than the New Purchaser’s bid is received by the Bid Deadline, the Debtors may conduct an auction (the “**Auction**”) for the sale of the Acquired Assets at Zeichner Ellman & Krause LLP, 1211 Avenue of the Americas, 40<sup>th</sup> Floor, New York, New York 10036, **beginning at 10:00 a.m. (EST) on November 27, 2018.**

The Bidding Procedures Order further provides that a Sale Hearing will be held on **November 29, 2018 at 1:00 p.m. (EST)** before the Honorable Carla E. Craig, Chief United States Bankruptcy Judge, United States Bankruptcy Court for the Eastern District of New York, 271-C Cadman Plaza East, Brooklyn, New York 11201-1800, Courtroom No 3357.

At the Sale Hearing, the Debtors will request that the Bankruptcy Court enter an order, among other things, approving the highest or otherwise best bid for the Acquired Assets (which will be determined in accordance with the terms of the Bidding Procedures). In addition, the Debtors shall request that the Bankruptcy Court provide that the transfer of the Acquired Assets

be free and clear of any and all liens, claims, interests, encumbrances and security interests, including successor liability claims.

At the Sale Hearing, the Bankruptcy Court may enter such orders as it deems appropriate under applicable law and as required by the circumstances and equities of these Chapter 11 Cases. Objections, if any, to the Amended Sale Motion must (a) be made in writing, (b) state with particularity the reasons for the objection or response, (c) conform to the Bankruptcy Rules and the Local Bankruptcy Rules for the Eastern District of New York, (d) set forth the name of the objecting party, the nature and basis of the objection, and the specific grounds therefore, and (e) be filed with the Clerk of the Court (with a copy to be delivered to the Chambers of the Honorable Carla E. Craig, Chief United States Bankruptcy Judge, United States Bankruptcy Court for the Eastern District of New York, 271-C Cadman Plaza East, Brooklyn, New York 11201-1800, and shall be served upon: (i) proposed attorneys for the Debtors, Zeichner Ellman & Krause LLP, 1211 Avenue of the Americas, 40<sup>th</sup> Floor, New York, New York 10036 (Attn: Nathan Schwed), (ii) the attorneys for the New Purchaser, (a) Klestadt Winters Jureller Southard & Stevens, LLP, 200 West 41<sup>st</sup> Street, 17<sup>th</sup> Floor, New York, New York 10036 (Attn: Tracy L. Klestadt) and (b) Norton Rose Fulbright US LLP, 1301 Avenue of the Americas, 26<sup>th</sup> Floor, New York, New York 10019 (Attn: Samuel S. Kohn and James A. Copeland), (iii) the Office of the United States Trustee for the Eastern District of New York, U.S. Federal Office Building, 201 Varick Street, Room 1006, New York, New York 10014 (Attn: William Curtin) and (iv) the attorneys for the Creditors' Committee, Goldberg Weprin Finkel Goldstein LLP, 1501 Broadway, 22nd Floor, New York, NY 10036 (Attn: Kevin Nash), so as to be **actually received** no later than **4:00 p.m. (EST) on November 13, 2018.**

Requests for information concerning the sale of the Acquired Assets should be directed by written or telephonic request to: Nathan Schwed, Zeichner Ellman & Krause LLP, 1211 Avenue of the Americas, 40<sup>th</sup> Floor, New York, New York 10036, (212) 223-0400 or via email at nschwed@zeklaw.com.

Dated: New York, New York  
[\_\_\_\_], 2018

**ZEICHNER ELLMAN & KRAUSE LLP**

By: \_\_\_\_\_  
Nathan Schwed  
1211 Avenue of the Americas, 40<sup>th</sup> Floor  
New York, New York 10036  
Telephone: (212) 223-0400  
Facsimile: (212) 753-0396  
Email: nschwed@zeklaw.com

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

**EXHIBIT B**

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK**

In re

## Chapter 11

SEASONS CORPORATE LLC, *et al.*,

Case No. 18-45284 (NHL)

Jointly Administered

Debtors.<sup>1</sup>

**ORDER AUTHORIZING AND APPROVING (I) THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS; (II) THE PROCEDURES GOVERNING THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS; AND (III) RELATED RELIEF<sup>2</sup>**

Upon the amended motion of the above-captioned debtors (the “Debtors”) and on the record of the Bidding Procedures Hearing (defined below), seeking the entry of an Order pursuant to sections 105(a), 363, and 365 of title 11 of the United States Code (the “Bankruptcy Code”), Federal Rules of Bankruptcy Procedure 2002, 6004, and 6006 (the “Bankruptcy Rules”), and Rules 6004-1, 6006-1 and 9006-1 of the Local Bankruptcy Rules for the Eastern District of New York (the “Local Bankruptcy Rules”) for entry of an order authorizing and approving, among other things, the sale of substantially all of the Debtors’ assets to SSNS Express LLC (the “New Purchaser”) free and clear of all liens, Claims and Encumbrances (as defined below), the assumption and assignment of the Transferred Contracts (as defined below), and related relief

<sup>1</sup> The Debtors in these Chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Blue Gold Equities LLC (7766), Central Avenue Market LLC (7961), Amsterdam Avenue Market LLC (7988), Wilmot Road Market LLC (8020), Seasons Express Inwood LLC (1703), Seasons Lakewood LLC (0295), Seasons Maryland LLC (1895), Seasons Clifton LLC (3331), Seasons Cleveland LLC (7367), Lawrence Supermarket LLC (8258), Upper West Side Market LLC (8895) and Seasons Corporate LLC (2266). The mailing address for the Debtors, solely for purposes of notices and communications, is: 5 Doughty Boulevard, Inwood, NY 11096.

<sup>2</sup> Findings of fact shall be construed as conclusions of law, and conclusions of law shall be construed as findings of fact when appropriate. *See* FED. R. BANKR. P. 7052.

[Docket No. \_\_\_\_] (as amended, the “Amended Sale Motion”);<sup>3</sup> and the *Order (A) Approving Bidding Procedures for the Sale of Substantially all of the Debtors’ Assets, (B) Scheduling an Auction and a Sale Hearing Related Thereto, (C) Approving the Form and Manner of Notice of the Auction and the Sale Hearing, and (D) Approving Bidding Protections* [Docket No. \_\_\_\_] (the “Bid Procedures Order”); and it appearing that due and appropriate notice of the Amended Sale Motion, the Bid Procedures Order, the Bid Procedures, the Auction and the Sale Hearing having been given; and it appearing that no other notice of the relief granted by this Order need be given; and the Court having conducted a hearing on the Amended Sale Motion on November 29, 2018 (the “Sale Hearing”) at which time all interested parties were offered an opportunity to be heard with respect to the Amended Sale Motion; and the Debtors having conducted a marketing process in compliance with the Bid Procedures Order and determined that the New Purchaser has submitted the highest and best bid for the assets of the Debtors that the New Purchaser has offered to purchase as more specifically described in the Amended Asset Purchase Agreement between the Debtors and New Purchaser, dated as of October 15, 2018 (the “Amended APA”) and (the “Acquired Assets”); and all parties in interest having been heard, or having had the opportunity to be heard, regarding entry of this Order and approval of the sale of substantially all of the Debtors’ assets to the New Purchaser and assumption and assignment of certain contracts (the “Amended Sale Transaction”) and the Amended APA; and this Court being fully advised; this Court, based upon the arguments, testimony and evidence presented to it, hereby makes the following findings of fact and conclusions of law:

A. This Court has jurisdiction to hear and determine the Amended Sale Motion and to grant the relief requested in the Amended Sale Motion pursuant to 28 U.S.C. §§ 157 and 1334.

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<sup>3</sup> Capitalized terms not otherwise defined herein shall have the meanings given to them in the Amended Sale Motion or the Amended APA (as defined below). A copy of the Amended APA is attached as Exhibit C to the Amended Sale Motion.

Venue of this case and the Amended Sale Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

B. This Order constitutes a final and appealable order within the meaning of 28 U.S.C. § 158(a). To any extent necessary under Bankruptcy Rule 9014 and Rule 54(b) of the Federal Rules of Civil Procedure as made applicable by Bankruptcy Rule 7054, this Court expressly finds that there is no just reason for delay in the implementation of this Order, and expressly directs entry of judgment as set forth herein.

C. This proceeding is a “core proceeding” within the meaning of 28 U.S.C. § 157(b)(2)(A), (N) and (O).

D. The statutory predicates for the Amended Sale Motion are sections 105, 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006, 9007 and 9014.

E. As evidenced by the affidavits of service filed with the Court, and based upon the representations of counsel at the Sale Hearing, (i) proper, timely and adequate notice of the Amended Sale Motion, the Bid Procedures Order, the Sale Hearing, the Amended Sale Transaction, the Auction and the Bid Deadline as approved herein has been provided in accordance with Bankruptcy Rules 2002, 6004, 9007 and 9014, (ii) such notice was good, sufficient and appropriate under the circumstances and (iii) no other or further notice of the Amended Sale Motion, the Bid Procedures Order, the Sale Hearing, the Amended Sale Transaction, the Auction or the Bid Deadline as provided herein is necessary or shall be required.

F. A reasonable opportunity to object or be heard with respect to the Amended Sale Motion and the Amended Sale Transaction has been afforded to all interested persons and entities, including, without limitation: (i) the U.S. Trustee, (ii) counsel for the New Purchaser,

(iii) counsel for the Creditors' Committee, (iv) the Debtors' creditors, and (v) all other parties who filed requests for notice under Bankruptcy Rule 2002 in this case.

G. Notice, as specified in the preceding paragraph and as evidenced by the affidavits of service filed with the Court, has been provided in the form and manner specified in the Amended Sale Motion and required by the Bid Procedures Order, and such notice is reasonable and adequate.

H. The sale process for the Acquired Assets and the Auction were conducted in good faith and in accordance with the Bid Procedures Order. At the conclusion of the Auction, the New Purchaser was deemed the Successful Bidder with the highest and best offer for the Acquired Assets. The Auction was conducted in a non-collusive, fair and good faith manner and a reasonable opportunity has been given to any interested party to make a higher and better offer for the Acquired Assets.

I. The New Purchaser is purchasing the Acquired Assets in good faith and is a good faith purchaser within the meaning of section 363(m) of the Bankruptcy Code, and is therefore entitled to the protection of that provision.

J. The Amended APA was negotiated, proposed and entered into by the Debtors and the New Purchaser without collusion, in good faith and from arms' length bargaining positions. Neither the Debtors nor the New Purchaser have engaged in any conduct that would cause or permit the Amended Sale Transaction or any part of the transactions contemplated by the Amended APA to be avoidable under section 363(n) of the Bankruptcy Code.

K. As demonstrated by the record established at the Sale Hearing, the Debtors afforded interested potential purchasers a full and fair opportunity to qualify as Qualified Bidders under the Bid Procedures and to submit an offer for the Acquired Assets.



L. The New Purchaser is not an “insider” of the Debtors as that term is defined in section 101(31) of the Bankruptcy Code.

M. The consideration provided by the New Purchaser for the Acquired Assets pursuant to the Amended APA (i) is fair and reasonable, (ii) is the highest and best offer for the Acquired Assets, (iii) will provide a greater recovery for all of the Debtors’ stakeholders than would be provided by any other practical available alternative, and (iv) constitutes reasonably equivalent value and fair consideration under the Bankruptcy Code, the Uniform Fraudulent Transfer Act, New York State Debtor Creditor Law and all other applicable laws.

N. The Debtors have demonstrated a sufficient basis and compelling circumstances requiring the Debtors to enter into the Amended APA and sell the Acquired Assets under section 363 of the Bankruptcy Code, and such actions are appropriate exercises of the Debtors’ business judgment and are in the best interests of the Debtors, the estates, and their creditors.

O. The marketing and bidding processes implemented by the Debtors and their advisors, as set forth in the Amended Sale Motion, were fair, proper, and reasonably calculated to result in the best value received for the Acquired Assets.

P. The Debtors have full authority and power to execute and deliver the Amended APA and related agreements and all other documents contemplated by the Amended APA, to perform its obligations therein and to consummate the Amended Sale Transaction. Except as set forth in the Amended APA, no additional consents or approvals are necessary or required for the Debtors to enter into the Amended APA, perform its obligations therein and consummate the Amended Sale Transaction.

Q. The New Purchaser would not have entered into the Amended APA and would not consummate the Amended Sale Transaction, thus adversely affecting the Debtors, the estates,

and their creditors, if the Acquired Assets were not sold to it free and clear of all Claims and Encumbrances or if the New Purchaser would, or in the future could, be liable for any Claims and Encumbrances against the Acquired Assets.

R. Selling the Acquired Assets other than free and clear of any and all liens, claims (as defined in section 101(5) of the Bankruptcy Code), security interests, mortgages, encumbrances, obligations, including employee benefit obligations charges against or interests in property, adverse claims, claims of possession, rights of way, licenses, easements or restrictions of any kind, demands, guarantees, actions, suits, defenses, deposits, credits, allowances, options, rights, restrictions, limitations, contractual commitments, rights of first refusal, rights of setoff or recoupment, or interests of any kind or nature whether known or unknown, legal or equitable, matured or unmatured, contingent or noncontingent, liquidated or unliquidated, asserted or unasserted, whether arising prior to or subsequent to the commencement of these Chapter 11 Cases, whether imposed by agreement, understanding, law, equity or otherwise, subject to applicable law, including section 363 of the Bankruptcy Code (collectively, the “Claims and Encumbrances”) would adversely impact the Debtors’ estates, and the sale of the Acquired Assets other than as free and clear of all Claims and Encumbrances would be of substantially less value to the Debtors’ estates.

S. The provisions of section 363(f) of the Bankruptcy Code have been satisfied. All parties and entities that failed to timely object to the Amended Sale Motion or the relief requested therein are deemed to have consented to the relief sought therein and granted by this Order including, without limitation, all non-Debtor counterparties to the Transferred Contracts.

T. Any objections and responses to the Amended Sale Motion or the relief requested therein that have not been withdrawn, waived, settled, or resolved, and all reservations of rights included in such objections and responses, are overruled on the merits and denied with prejudice.

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED, EFFECTIVE IMMEDIATELY, AS FOLLOWS:**

1. The relief requested in the Amended Sale Motion is granted and approved in all respects, as set forth herein. The Debtors' entry into the Amended APA and the Amended Sale Transaction is hereby approved in all respects. Except as may be expressly provided herein, objections to the relief sought in the Amended Sale Motion that have not been previously resolved or withdrawn are hereby overruled on their merits.

2. The Debtors are authorized and directed to take any and all actions necessary or appropriate to (a) consummate the Amended Sale Transaction in accordance with the Amended Sale Motion, the Amended APA and this Order, and (b) perform, consummate, implement and close fully the Amended Sale Transaction, together with all additional instruments and documents that may be reasonably necessary or desirable to implement the Amended APA including, without limitation, consenting to the assignment by the New Purchaser of any of its rights under or relating to the Amended APA.

3. Those holders of Claims and Encumbrances and other non-Debtor parties who did not object, or who withdrew their objections to entry of this Order, the Amended Sale Motion, the Bid Procedures Order, the Sale Hearing, the Amended Sale Transaction and the Amended APA are deemed to have consented to this Order, the Bid Procedures Order, the Amended Sale Transaction and the Amended APA pursuant to section 363(f)(2) of the Bankruptcy Code and are enjoined from taking any action against the New Purchaser, its successors, its assigns, its

representatives, its affiliates, its properties, or any agent of the foregoing to recover any claim which such person or entity has against the Debtors or any of their affiliates or any of the Debtors' property. Those holders of Claims and Encumbrances and other non-Debtor parties who did object, if any, fall within one or more of the other subsections of section 363(f) of the Bankruptcy Code and are adequately protected by having their Claims and Encumbrances, if any, attach to the proceeds of the Amended Sale Transaction ultimately attributable to the property against or in which they assert a Claim or Encumbrance.

#### **Sale and Transfer of the Acquired Assets**

4. Upon Closing, the Acquired Assets transferred, sold and delivered to the New Purchaser shall be free and clear of all Claims and Encumbrances of any person or entity to the fullest extent permissible under Bankruptcy Code section 363(f). The transfer of the Acquired Assets to the New Purchaser constitutes a legal, valid and effective transfer of the Acquired Assets and shall vest the New Purchaser with all right, title and interest in and to the Acquired Assets.

5. Upon closing of the Amended Sale Transaction, this Order shall be construed as, and shall constitute for any and all purposes, a full and complete general assignment, conveyance and transfer of the Acquired Assets pursuant to the terms of the Amended APA.

6. To the fullest extent permissible under Bankruptcy Code section 363(f), effective on the Closing, all entities, including, but not limited to, the Debtors, creditors, employees, former employees and shareholders, administrative agencies, tax and regulatory authorities, governmental departments, secretaries of state, federal, state and local officials, and their respective successors or assigns, including, but not limited to, persons asserting any Claims or Encumbrance against the Debtors' assets, shall be permanently and forever barred, restrained and

enjoined from commencing or continuing in any manner any action or other proceeding of any kind against the Acquired Assets or the New Purchaser (or its successors, assigns, agents or representatives) as alleged successor or otherwise with respect to any Claims and Encumbrances on or in respect of the Acquired Assets.

7. Each and every term and provision of the Amended APA, together with the terms and provisions of this Order, shall be binding in all respects upon all entities, including, but not limited to the Debtors, the New Purchaser, creditors, employees, former employees and shareholders, administrative agencies, governmental departments, secretaries of state, federal, state and local officials and their respective successors or assigns, including but not limited to persons asserting any Claim or Encumbrance against or interest in the Debtors' estates or the Debtors' assets, including any subsequent appointment of a trustee or other fiduciary under any section of the Bankruptcy Code.

8. Upon the Closing, all entities holding Claims and Encumbrances of any kind and nature against the Debtors' assets hereby are barred from asserting such Claims and Encumbrances against the New Purchaser (or its successors, assigns, agents or representatives) and/or the Acquired Assets and, effective upon the transfer of the Acquired Assets to the New Purchaser upon Closing, the Claims and Encumbrances shall attach to the proceeds of the Amended Sale Transaction with the same force, validity, priority and effect, if any, as against the Debtors' assets.

9. This Order (a) is and shall be effective as a determination that, upon Closing, all Claims and Encumbrances existing as to the Debtors' assets conveyed to the New Purchaser have been and hereby are adjudged to be unconditionally released, discharged and terminated, with all such Claims and Encumbrances attaching automatically the proceeds in the same manner

and priority, and (b) shall be binding upon and govern the acts of all entities, including all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies or units, governmental departments or units, secretaries of state, federal, state and local officials and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to any of the Debtors' assets conveyed to the New Purchaser. All Claims and Encumbrances of record as of the date of this Order shall be deemed to be removed and stricken as against the Acquired Assets in accordance with the foregoing. Each and every federal, state, and local governmental agency or department is authorized and directed to accept any and all documents and instruments necessary or appropriate to consummate the transactions contemplated by the Amended APA, including, without limitation, the Amended Sale Transaction and the assumption and assignment of the Transferred Contracts. All of the foregoing entities are authorized and directed to strike, terminate, and/or cancel from their records, official and otherwise all liens, Claims and Encumbrances against the Acquired Assets (including the Transferred Contracts) recorded, filed, or otherwise existing on and/or before the Closing Date.

10. If any person or entity which has filed financing statements, mortgage, *lis pendens* or other documents or agreements evidencing Claims and Encumbrances on the Acquired Assets shall not have delivered to the Debtors prior to closing, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, releases of liens and easements and any other documents necessary for the purpose of documenting the release of all Claims and Encumbrances which the person or entity has or may assert with respect to the Acquired Assets, the Debtors are hereby authorized and directed upon closing, and the New

Purchaser is hereby authorized upon closing, to execute and file such statements, instruments, releases and other documents on behalf of such person or entity with respect to the Acquired Assets. Upon closing of the Amended Sale Transaction, each of the Debtors' creditors is authorized and directed to execute such documents and take all such actions as may be necessary to release their respective Claims and Encumbrances against the Acquired Assets.

11. Upon closing, the New Purchaser (or its successors, assigns, agents or representatives) shall not be deemed to be (a) a successor to the Debtors, (b) *de facto* merged with the Debtors or (c) a mere continuation of the Debtors. Without limiting the generality of the foregoing, and except as specifically provided in the Amended APA, the New Purchaser (or its successors, assigns, agents or representatives) shall not be liable for any claims against the Debtors or any of their predecessors or affiliates or assets, other than as expressly provided for in the Amended APA and/or in this Order.

#### **Assumption and Assignment of Contracts**

12. Schedule 1.1(a) to the Amended APA identifies all Contracts and Leases the New Purchaser wishes to be assumed by the Debtors and assigned by the Debtors to the New Purchaser (the "Transferred Contracts"). All Contracts and Leases not identified in Schedule 1.1(a) to the Amended APA shall not be assumed by the Debtors and assigned to the New Purchaser and shall be referred to as "Excluded Contracts". The Debtors have exercised their reasonable business judgement, and are hereby authorized and directed, to assume and assign in accordance with the Amended APA each of the Transferred Contracts free and clear of all liens, claims, Encumbrances, and other interests of any kind or nature whatsoever. Upon assignment to New Purchaser, the Transferred Contracts shall be valid and binding, in full force and effect, and enforceable by New Purchaser in accordance with their respective terms. The Transferred

Contracts shall remain in full force and effect, and no default shall exist under any of the Transferred Contracts, nor shall there exist any event or condition which, with the passage of time or giving of notice, or both, would constitute such a default, notwithstanding any provision in the Transferred Contracts or other restrictions prohibiting their assignment or transfer. To the extent that a Transferred Contract constitutes an executory contract or unexpired lease under section 365 of the Bankruptcy Code, all requirements and conditions under sections 363 and 365 of the Bankruptcy Code for the assumption and assignment of such Transferred Contracts have been satisfied.

13. New Purchaser shall be deemed to be substituted for the applicable Debtor as a party to any Transferred Contract.

14. There shall be no right to payment, termination, modification, acceleration or cancellation, assignment fees, increases, or any other fees charged to the Debtors and/or New Purchaser as a result of the execution and delivery by New Purchaser of the Amended APA or any related documents or transactions, the consummation of the Amended Sale Transaction, or the compliance by New Purchaser with any provisions in the Amended APA. Any provision in any Transferred Contract that prohibits or conditions the assignment of such Transferred Contract or allows the counterparty to such Transferred Contract to impose any penalty, fee, rent increase, profit sharing arrangement, or other condition on renewal or extension, or to modify any term or condition upon the assignment of such Transferred Contract, constitutes an unenforceable anti-assignment provision that is void and of no force and effect in connection with the Amended Sale Transaction.

15. Pursuant to sections 105(a), 363, and 365 of the Bankruptcy Code, all parties with an interest in the Transferred Contracts (including counterparties thereto) are deemed to have



consented (including for all purposes of section 365 of the Bankruptcy Code) to the assignment of the Transferred Contracts and are forever barred and permanently enjoined from raising or asserting against the Debtors and/or New Purchaser any assignment fee, default, breach or claim of pecuniary loss, or condition to assignment, arising under or related to the Transferred Contracts and existing as of and including the Closing Date, or under the Amended APA or arising by reason of the consummation of the transactions contemplated by the Amended APA, including, without limitation, the Amended Sale Transaction and the assumption and assignment of the Transferred Contracts.

16. Any and all Contracts, Leases, and agreements that are not Transferred Contracts pursuant to the Amended APA shall be deemed to be rejected, cancelled, and/or terminated effective as of the Closing Date.

#### **Additional Provisions**

17. The provisions of this Order and the Amended APA and any actions taken pursuant hereto or thereto shall survive entry of any order which may be entered (a) confirming or consummating any plan of reorganization of the Debtors, (b) converting the Debtors' cases from chapter 11 to chapter 7, (c) dismissing the Debtors' bankruptcy cases or (d) appointing a chapter 11 trustee or examiner, and the terms and provisions of the Amended APA as well as the rights and interests granted pursuant to this Order and the Amended APA shall continue in this or any superseding case and shall be binding upon the Debtors, the New Purchaser, and their respective successors and permitted assigns.

18. The Debtors shall assign to the New Purchaser any and all Causes of Action (including, without limitation, Avoidance Actions) that the Debtors may hold against any third party vendors in respect of the Acquired Assets, any Assumed Liability, and/or the Business; provided,

however that simultaneously upon acquisition of such Causes of Action, New Purchaser and Sellers shall waive and release any and all such Causes of Action.

19. Each and every federal, state, and governmental agency or department and any other person or entity is hereby directed to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the Amended APA.

20. Nothing contained in any order of any type or kind entered in these Chapter 11 Cases or any related proceeding subsequent to entry of this Order, nor in any chapter 11 plan confirmed in these Chapter 11 Cases, shall conflict with or derogate from the provisions of the Amended APA or the terms of this Order. In any plan of reorganization or liquidation or otherwise, the Debtors shall not make any statement, take any position or take any act that supports an argument that the New Purchaser assumed debt that is not expressly assumed under the Amended APA.

21. To the extent, if any, anything contained in this Order conflicts with a provision in the Amended APA, this Order shall govern and control.

22. The New Purchaser is purchasing the Acquired Assets in good faith and is a good faith purchaser within the meaning of section 363(m) of the Bankruptcy Code, and is therefore entitled to the protection of that provision. The consideration provided by the New Purchaser for the Acquire Assets is fair and reasonable, and the Amended Sale Transaction may not be avoided under section 363(n) of the Bankruptcy Code.

23. This Court retains jurisdiction, even after conversion of these Chapter 11 Cases to cases under chapter 7, to (a) interpret, implement and enforce the terms and provisions of this Order (including any injunctive relief provided in this Order) and the terms of the Amended APA, all amendments thereto and any waivers and consents thereunder and of each of the

agreements executed in connection therewith; (b) protect the New Purchaser (and its successors, assigns, agents and representatives) and the Acquired Assets from and against any of the Claims and Encumbrances; (c) resolve any disputes arising under or related to the Amended APA or the Amended Sale Transaction; (d) adjudicate all issues concerning (alleged) pre-Closing Claims and Encumbrances and any other (alleged) interest(s) in and to the Debtors' assets, including the extent, validity, enforceability, priority and nature of all such (alleged) Claims and Encumbrances and any other (alleged) interest(s); and (e) adjudicate any and all issues and/or disputes relating to the Debtors' right, title or interest in the Debtors' assets, the Amended Sale Motion and/or the Amended APA.

24. From and after the date hereof, the Debtors shall act in accordance with the terms of the Amended APA and the Debtors, to the extent they have not already done so, shall execute the Amended APA prior to Closing.

25. This Order and the Amended APA shall be binding in all respects upon all creditors (whether known or unknown) of the Debtors, all successors and assigns of the New Purchaser, the Debtors and their affiliates and subsidiaries, the Debtors' assets, and any subsequent trustees appointed in the Debtors' chapter 11 cases or in any chapter 7 cases or upon (a) a conversion of these Chapter 11 Cases to cases under chapter 7 or (b) dismissal of the Debtors' bankruptcy cases.

26. No law of any state or other jurisdiction relating to bulk sales or similar laws shall apply in any way to the transactions contemplated by the Amended APA, including, without limitation, the Amended Sale Transaction and the assumption and assignment of the Transferred Contracts, the Amended Sale Motion, and this Order. As the assignment, transfer and/or sale of

the Purchased Assets constitutes a casual sale or occasional sale, it is exempt from New York sales and use tax.

27. The failure specifically to include any particular provisions of the Amended APA in this Order shall not diminish or impair the efficacy of such provisions, it being the intent of the Court that the Amended APA and each and every provision, term and condition thereof be, and therefore is, authorized and approved in its entirety.

28. The provisions of this Order are non-severable and mutually dependent.

29. The automatic stay of section 362(a) of the Bankruptcy Code shall not apply to and otherwise shall not prevent the exercise or performance by any party of its rights or obligations under the Amended APA, including, without limitation, with respect to any cash held in escrow pursuant to the provisions thereof.

30. This Sale Order shall take effect immediately and shall not be stayed pursuant to Bankruptcy Rules 6004(h), 6006(d), 7062, or otherwise.

**EXHIBIT C**

***SSNS EXPRESS LLC PROPOSED STALKING HORSE BID,  
SUBJECT TO FINAL DOCUMENTATION,  
BANKRUPTCY COURT APPROVAL, AND EXECUTION BY THE PARTIES***

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**ASSET PURCHASE AGREEMENT  
BY AND AMONG  
SEASONS CORPORATE LLC, *ET AL.*, AND  
SSNS EXPRESS LLC**

**OCTOBER 15, 2018**

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## **ASSET PURCHASE AGREEMENT**

This Asset Purchase Agreement (this “Agreement”) is entered into as of October 15, 2018 by (i) Blue Gold Equities LLC, a New York limited liability company (“Blue Gold”), (ii) Central Ave. Market LLC, a New York limited liability company (“Central Avenue”) (iii) Amsterdam Ave. Market LLC, a New York limited liability company (“Amsterdam Avenue”), (vi) Wilmot Road Market, LLC, a New York limited liability company (“Wilmot Road”), (v) Seasons Express Inwood LLC, a New York limited liability company (“Inwood”), (vi) Seasons Lakewood, LLC, a New Jersey limited liability company (“Lakewood”), (vii) Seasons Maryland LLC, a Maryland limited liability company (“Maryland”), (viii) Seasons Clifton LLC, a New Jersey limited liability company (“Clifton”), (ix) Lawrence Supermarket LLC, a New York limited liability company (“Lawrence”), (x) Upper West Side Supermarket LLC, a New York limited liability company (“Upper West Side”, and collectively with Blue Gold, Central Avenue, Amsterdam Avenue, Wilmot Road, Inwood, Lakewood, Maryland, Clifton, and Lawrence the “Operating Entities”), (xi) Seasons Corporate LLC, a New York limited liability company (“Corporate”), and (xii) Seasons Property Management LLC, a Maryland limited liability company (“Seasons Property”, and collectively with Corporate and the Operating Entities, the “Sellers”) and SSNS Express LLC, a Delaware limited liability company (the “Purchaser”). Sellers and Purchaser are referred to collectively herein as the “Parties”.

## **WITNESSETH**

WHEREAS, Corporate and the Operating Entities filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) on September 16, 2018 in the United States Bankruptcy Court for the Eastern District of New York (the “Bankruptcy Court”); and

WHEREAS, Seasons Property intends to file a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court; and

WHEREAS, Sellers operate eight (8) supermarkets. Purchaser desires to purchase those stores at the locations set forth in Schedule 3.5 of the Disclosure Schedule (as defined below) under the name “Seasons” (each a “Store” and, collectively, the “Stores”); and

WHEREAS, Sellers desire to sell, transfer and assign to Purchaser, and Purchaser desires to purchase, acquire and assume from Sellers, all of the Acquired Assets (as defined below) and Assumed Liabilities (as defined below), all as more specifically provided herein.

NOW, THEREFORE, in consideration of the mutual promises herein made, and in consideration of the representations, warranties and covenants herein contained, the Parties hereby agree as follows:

## **ARTICLE I**

### **DEFINITIONS**

Section 1.1 Definitions. For purposes of this Agreement:

“Acquired Assets” means all of Sellers’ right, title, and interest in and to all of the following assets of Sellers used or held for use exclusively in the operation of the Stores or the Business, regardless of the location of the asset on the Closing Date (subject in all respects to the Purchaser’s sole discretion):

- (a) the Inventory;
- (b) the Furnishings and Equipment owned by Sellers (other than Furnishings and Equipment set forth on Schedule 1.1(d));
- (c) to the maximum extent permitted by the Bankruptcy Code and in accordance with the terms herein, the Leases set forth on Schedule 1.1(a) as of the Closing Date (which such schedule shall be in form and substance satisfactory to the Purchaser in its sole discretion), together with (to the extent of the Sellers’ interest therein) the buildings, fixtures and improvements located on or attached to such real property, and all rights arising therefrom, and all tenements, hereditaments, appurtenances and other real property rights appertaining thereto, subject to the rights of the applicable landlord (including rights to ownership or use of such property) under such Leases which have been assumed by any of the Sellers pursuant to section 365 of the Bankruptcy Code (the “Assumed Leases”);
- (d) to the maximum extent permitted by the Bankruptcy Code and in accordance with the terms herein, all rights under those Contracts set forth on Schedule 1.1(a) as of the Closing Date (which such schedule shall be in form and substance satisfactory to the Purchaser in its sole discretion), other than those Contracts that expire or that are terminated prior to the Closing (such Contracts, together with the Assumed Leases; provided, that such Contracts shall have been assumed by the Debtor in accordance with section 365 of the Bankruptcy Code (the “Transferred Contracts”);
- (e) all of Sellers’ security deposits, prepaid rent, and prepaid expenses previously paid by Sellers to fulfill Sellers’ obligations under the Assumed Leases and, to the extent transferable, other deposits by Sellers relating to the Stores under any of the Transferred Contracts (collectively, the “Prepaid Expenses”). For each Assumed Lease, the Prepaid Expenses as of the date hereof are listed on Schedule 1.1(b), which Schedule shall be updated three (3) Business Days prior to the Closing Date;
- (f) the Owned Real Property set forth on Schedule 1.1(f);
- (g) all Causes of Action (including, without limitation, Avoidance Actions) that the Sellers may hold against any third party vendors in respect of the Acquired Assets, any Assumed Liability, and/or the Business; provided, however that simultaneously upon acquisition of such Causes of Action, Purchaser and Sellers shall waive and release any and all such Causes of Action.
- (h) all Permits;
- (i) all Intellectual Property owned, used, or held for use by Sellers, including,

for the avoidance of doubt, the names “Seasons” and all other marks set forth on Schedule 1.1(c), any name or trademark, service mark, trade name, logo, trade dress, Internet domain name or other indicia of origin that includes, relates to or derives from any such name, or any related abbreviations, acronyms or other formatives based on any such name, whether alone or in combination with any other words, phrases, or designs, and all registrations, applications and renewals thereof, all rights and goodwill associated therewith and any name or trademark, service mark, trade name, logo, Internet domain name, or other indicia of origin that is confusingly similar thereto or derived therefrom (collectively, the “Seller Marks”);

(j) all files, documents, instruments, papers, computer files, information and records and all other books and records of Sellers in any media primarily relating to the Acquired Assets, including real property documents, surveys (boundary and topographical), construction drawings, soil reports, all records relating to Liabilities which constitute Assumed Liabilities, asbestos inspections, environmental reports and assessments, fixture plans, personnel records, ledgers, journals, studies, reports, budgets, forecasts, projections and competitive or capital spending analysis of the Stores, and information relating to Taxes (collectively, the “Files and Records”);

(k) Subject to applicable customer protections, all customer data and information derived from branded loyalty promotion or co-branded credit card programs (to the extent in existence) and other similar information related to customer purchases at the Stores; provided, however, if Purchaser determines in its sole discretion to purchase data and records subject to applicable Law regarding privacy related to Sellers’ business, the costs of a privacy ombudsman relating solely to such data and records purchased by Purchaser, to the extent that the Bankruptcy Court requires a privacy ombudsman to be appointed, shall be borne equally between Purchaser, on the one hand, and Sellers, on the other hand (and, for the avoidance of doubt, in all other circumstances, the costs of the privacy ombudsman shall not be borne by Purchaser);

(l) all goodwill of Sellers arising, directly or indirectly, primarily out of the operation or conduct of the Business;

(m) to the extent transferable, all warranties related to any of the foregoing; and

(n) without limiting the foregoing, all other business, assets, rights or properties used exclusively in the Business or located at the Stores and not specifically set forth herein.

provided, however, notwithstanding anything to the contrary set forth in this definition, the Acquired Assets shall not include any Excluded Assets.

“Affiliate” means, with respect to any specified Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, such specified Person, where “control” means the power, directly or indirectly, to direct or cause the direction of the management and policies of another Person, whether through

the ownership of voting securities, by contract, or otherwise.

“Agreement” has the meaning set forth in the preamble.

“Allocation Principles” has the meaning set forth in Section 2.8.

“Alternate Transaction” means (a) a merger, consolidation, restructuring, reorganization, plan of reorganization in all or any of the Bankruptcy Cases, joint venture, refinancing, funding of a plan of reorganization in all or any of the Bankruptcy Cases, business combination, transaction or series of transactions involving the sale or other disposition (including, without limitation, by lease, foreclosure, transfer in lieu of foreclosure, or management agreement) of all or any part of Sellers, the Business, or the Acquired Assets, in each case pursuant to one or more transactions to a Person other than Purchaser; (b) the sale of outstanding or newly issued (or some combination of outstanding and newly issued) capital stock of any Seller (including by way of a debt for equity swap, tender offer, foreclosure or plan of reorganization or liquidation) resulting in a transfer of voting control of such Seller to a Person or group of Persons who, before the transaction or series of transactions, did not hold voting control of such Seller; (c) the dismissal of all or any of the Bankruptcy Cases, converting all or any of the Bankruptcy Cases to Chapter 7 cases or if any Seller file a motion or other pleading seeking the dismissal or conversion of all or any of the Bankruptcy Cases under Section 1112 of the Bankruptcy Code or otherwise prior to the Closing, or (d) the appointment of a Chapter 7 trustee or an examiner with expanded powers in all or any of the Bankruptcy Cases prior to the Closing.

“Assignment and Assumption Agreement” has the meaning set forth in Section 2.6(c).

“Assumed Cure Costs” has the meaning set forth in the definition of Assumed Liabilities.

“Assumed Leases” has the meaning set forth in the definition of Acquired Assets.

“Assumed Liabilities” means all liabilities of each of the Sellers incurred exclusively in the operation of the Stores as of the Closing, including:

(a) Cure Costs under the Transferred Contracts not to exceed \$3,450,000 (the “Assumed Cure Costs”);

(b) all Liabilities under the Transferred Contracts arising from and after the Closing Date;

(c) all Liabilities relating to Gift Cards listed on Schedule 2.2(a) ;

(d) all amounts allocated to Purchaser under Section 2.8; and

(e) all Liabilities relating to or arising out of the Purchaser’s ownership or operation of the Stores or any Acquired Asset from and after the Closing Date;

provided, however, that notwithstanding anything to the contrary set forth in this definition, the Assumed Liabilities shall not include any Excluded Liabilities.

“Auction” has the meaning set forth in Section 5.4(a).

“Avoidance Actions” means all causes of action of Sellers under Sections 544 through 553 of the Bankruptcy Code with respect to payments or transfers of property made prior to the filing of the Bankruptcy Cases.

“Bankruptcy Cases” means the Chapter 11 cases of Sellers.

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

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

“Bidding Procedures” has the meaning set forth in Section 5.4(a).

“Bidding Procedures Order” means an Order of the Bankruptcy Court, in form and substance satisfactory to Purchaser, approving, among other things, the bidding procedures, the Breakup Fee, Purchaser to serve as stalking horse bidder, and this Agreement and the transactions contemplated herein as a qualified bid in respect of the Acquired Assets.

“Bid Deadline” shall have the meaning set forth in the Bidding Procedures Order.

“Bill of Sale” has the meaning set forth in Section 2.6(c).

“Bonding Requirements” means standby letters of credit, guarantees, indemnity bonds and other financial commitment credit support instruments issued by third parties on behalf of Sellers or any of their respective Subsidiaries or Affiliates regarding any of the Acquired Assets.

“Breakup Fee” has the meaning set forth in Section 2.4(a).

“Budget” means that certain budget prepared by the Debtors as of October 10, 2018 and annexed hereto as **Exhibit “A”**.

“Business” means the operation of the Stores by Sellers.

“Business Day” means any day, other than a Saturday, Sunday, a Jewish holiday, and any day which is a legal holiday under the laws of the State of New York or is a day on which banking institutions located in the State of New York are authorized or required by Law or other governmental action to close.

“Cash Equivalents” means cash, checks, money orders, funds in time and demand deposits or similar accounts, marketable securities, short-term investments, and other cash equivalents and liquid investments.

“Cash Purchase Price” has the meaning set forth in Section 2.3(a).

“Causes of Action” means all claims, causes of action, choses in action, rights of recovery, repayment obligations, rights of setoff and rights of recoupment that Sellers have or may have

against any Person.

“Closing” has the meaning set forth in Section 2.5.

“Closing Date” has the meaning set forth in Section 2.5.

“Closing Gift Card Liabilities” has the meaning set forth in Section 2.11(b).

“Closing Statement” has the meaning set forth in Section 2.7(b)(i).

“Competing Bid” has the meaning set forth in Section 5.4(a).

“Concession Agreements” means those certain agreements listed on Schedule 1.1(j).

“Contract” means any agreement, contract, arrangement, commitment, promise, obligation, right, instrument, document or other similar understanding, which in each case is in writing and signed by parties intending to be bound thereby, other than the Leases.

“Contracting Parties” has the meaning set forth in Section 9.14.

“Cure Costs” means all amounts payable in order to cure any monetary defaults required to be cured under section 365(b)(1) of the Bankruptcy Code or otherwise to effectuate, pursuant to the Bankruptcy Code, the assumption by the applicable Seller and assignment to Purchaser of the Transferred Contracts.

“Damages” means any actual losses, claims, liabilities, debts, damages, fines, penalties, or costs (in each case, including reasonable out-of-pocket expenses (including reasonable fees and expenses of counsel)).

“Decree” means any judgment, decree, ruling, injunction, assessment, attachment, undertaking, award, charge, writ, executive order, administrative order, or any other order of any Governmental Authority.

“Deposit” has the meaning set forth in Section 2.3(b).

“DIP Financing Facility” means the debtor-in-possession financing facility approved by the Bankruptcy Court by and between Sellers and SKNY LLC, or another lender.

“Disclosure Schedule” has the meaning set forth in Article III.

“Employee Benefit Plan” means all “employee benefit plans,” as defined in section 3(3) of ERISA, including any multiemployer plans as defined in section 3(37) of ERISA, and all other material employee benefit plans or arrangements (other than governmental plans and statutorily required benefit arrangements), including bonus or incentive plans, deferred compensation arrangements, severance pay, sick leave, vacation pay, disability, medical insurance and life insurance maintained or contributed to by Sellers and their Subsidiaries with respect to Sellers’

employees.

“ERISA” means the Employee Retirement Income Security Act of 1974, as amended.

“Escrow Agent” means Klestadt Winters Jureller Southard & Stevens, LLP.

“Excluded Assets” means all assets of Sellers as of the Closing that are not expressly included in the Acquired Assets, including:

(a) any asset of Sellers that is (i) not used or held for use exclusively in the operation of the Stores or (ii) inseparable from any other business of Sellers or any of their Affiliates (other than the operation of the Stores), in each case, including (A) organizational documents, qualifications to conduct business as a foreign corporation, arrangements with registered agents relating to foreign qualifications, taxpayer and other identification numbers, seals, minute books, stock transfer books, stock certificates, and other documents relating to Sellers’ organization, maintenance, existence, and operation; (B) books and records related to (1) Taxes paid or payable by Sellers or (2) any claims, obligations or liabilities not included in Assumed Liabilities; and (C) any Tax refund, deposit, prepayment, credit, attribute, or other Tax asset of or with respect to any of the Sellers;

(b) all insurance policies and binders and all claims, refunds and credits from insurance policies or binders due or to become due with respect to such policies or binders;

(c) all of Sellers’ rights under this Agreement or any Related Agreement;

(d) all Cash Equivalents and accounts receivable;

(e) [intentionally deleted];

(f) except as otherwise provided in this Agreement, any other payment, reimbursement, rebate or refund arising from the operation of the Stores prior to the Closing;

(g) all leased equipment located at or used in the Stores and all leased in-store processors, direct access storage devices, and electronic funds transfer devices, except any equipment leased pursuant to a Transferred Contract;

(h) the Furnishings and Equipment described on Schedule 1.1(d);

(i) all Contracts and Leases other than the Transferred Contracts; and

(j) those items set forth on Schedule 1.1(e).

“Excluded Liabilities” means the following Liabilities of Sellers:

(a) any Liability not exclusively relating to or arising out of the operation of

the Stores or the Acquired Assets, including any Liability relating to or arising out of the Excluded Assets;

- (b) any Liability of Sellers for Taxes (except as provided for in Section 2.8);
- (c) all accounts payable;
- (d) all Liabilities of Sellers under this Agreement or any Related Agreement and the transactions contemplated hereby or thereby;
- (e) any amounts owed by the Sellers in respect of the Concessions Agreements (whether or not such amounts due are deemed to be held in trust or otherwise);
- (f) all Liabilities of Sellers relating to or arising out of the Stores or Acquired Assets prior to the Closing Date not specifically assumed by Purchaser hereunder; and
- (g) all Liabilities of Sellers or any of their respective Subsidiaries or any ERISA Affiliate with respect to any Employee Benefit Plan or any other compensation or benefit plan, program, policy, agreement or arrangement of any such Seller, Subsidiary thereof, or any ERISA Affiliate, including, for the avoidance of doubt, any Liability of Sellers or any of their respective Subsidiaries or any ERISA Affiliate under Title IV of ERISA with respect to any single-employer plan (within the meaning of Section 4001(a)(15) of ERISA) or any multiemployer plan (within the meaning of Section 4001(a)(3) of ERISA).

“Expense Reimbursement” has the meaning set forth in Section 2.4(b).

“Final Closing Adjustment” has the meaning set forth in Section 2.7(b)(iii).

“Final Inventory” has the meaning set forth in Section 2.7(b)(i).

“Final Order” means an order or judgment, the operation or effect of which is not stayed, and as to which order or judgment (or any revision, modification or amendment thereof), the time to appeal or seek review or rehearing has expired, and as to which no appeal or petition for review or motion for re-argument has been taken or been made and is pending for argument.

“Furnishings and Equipment” means all trade fixtures, store models, shelving, and refrigeration and other equipment owned by Sellers for use exclusively in the Business wherever located, except as listed on Schedule 1.1(d).

“GAAP” means United States generally accepted accounting principles consistently applied.

“Gift Card” means gift cards or such similar products sold by the Sellers to customers in the ordinary course of the Business.

“Governmental Authority” means any federal, state, local, or foreign government or



governmental or regulatory authority, agency, board, bureau, commission, court, department, or other governmental entity.

“Independent Appraisers” means WIS Consulting or other nationally or regionally recognized firm of independent inventory appraisers as to which Purchaser and Sellers mutually agree.

“Intellectual Property” means all intellectual property and proprietary rights, interests and protections of any kind, however arising, pursuant to the Laws of any jurisdiction throughout the world.

“Insider” as defined in section 101(31) of the Bankruptcy Code.

“Inventory” means all food, beverages and other merchandise and products (including items described in Schedule 1.1(g)) owned by Sellers and offered for sale to customers at the Stores.

“Inventory Escrow Amount” shall mean an amount to be deposited with the Escrow Agent in accordance with Section 2.6(a) equal to the sum of (a) 10% of the Target Inventory, *plus* (b) the excess of the aggregate amount set forth on the “CGS-Grocery” line in the Budget for the period up to and including the Closing Date over the total amount of Inventory identified as having been purchased in the Weekly Inventory Purchases Reports delivered to the Purchaser as required by Section 2.7(a).

“Inventory Escrow Fund” means the Inventory Escrow Amount, together with any interests and earnings thereon.

“Knowledge” means (a) with respect to the Sellers (and other words of similar import), the actual knowledge of persons holding a position of senior vice president or senior thereto at Sellers after due inquiry; and (b) with respect to Purchaser (and other words of similar import), the actual knowledge of persons holding a position of senior vice president or senior thereto at Purchaser after due inquiry.

“Labor Agreement” means the collective bargaining agreement covering the Sellers’ employees, which is listed on Schedule 1.1(h).

“Law” means any constitution applicable to, and any statute, treaty, code, rule, regulation, ordinance, or requirement of any kind of, any Governmental Authority.

“Leases” means all leases, subleases, licenses, options (including lease renewal options), contracts, extension letters, easements, reciprocal easements, assignments, termination agreements, subordination agreements, non-disturbance agreements, estoppel certificates and other agreements (written or oral), and any amendments or supplements to the foregoing, and recorded memoranda of any of the foregoing, pursuant to which any Seller holds any leasehold or subleasehold estates and other rights of use and occupancy of any Store.

“Liability” means any liability or obligation of whatever kind or nature (whether known or unknown, whether asserted or unasserted, whether determined, determinable or otherwise, whether directly incurred, absolute or contingent, whether absolute or contingent, whether accrued or unaccrued, whether liquidated or unliquidated and whether due or to become due) regardless of when arising.

“Lien” means any mortgage, pledge, lien, charge, security interest, option, right of first refusal, easement, security agreement or other encumbrance or restriction on the use or transfer of any property; provided, however, that “Lien” shall not be deemed to include any license of Intellectual Property.

“Litigation” means any action, cause of action, suit, claim, charge, investigation, audit, demand, hearing or proceeding, whether civil, criminal, administrative, or arbitral, whether at law or in equity (including actions or proceedings seeking injunctive relief) and whether before any Governmental Authority.

“Material Adverse Effect” means any event, change, circumstance, effect or other matter that has, or could reasonably be expected to have, either individually or in the aggregate with all other events, changes, circumstances, effects or other matters, a material adverse effect on the condition of the Acquired Assets, taken as a whole, other than any event, change, circumstance, effect or other matter arising from or related to: (a) general business or economic conditions in any of the geographical areas in which the Stores operate; (b) any condition or occurrence affecting retail grocery generally; (c) national or international political or social conditions, including the engagement by any country in hostilities, whether commenced before or after the date hereof and whether or not pursuant to the declaration of a national emergency or war, or the occurrence of any military or terrorist attack; (d) financial, banking, or securities markets (including any disruption thereof or any decline in the price of securities generally or any market or index); (e) the occurrence of any act of God or other calamity or force majeure events (whether or not declared as such), including civil disturbance, embargo, natural disaster, fire, flood, hurricane, tornado, or other weather event; (f) changes in Law or accounting rules; (g) the taking of any action contemplated by this Agreement or any Related Agreement or taken with the consent of the other Party; (h) any effects or changes as a result of the announcement or pendency of this Agreement; (i) any effects or changes arising from or related to the breach of the Agreement by Purchaser; or (j) any strike or labor dispute; provided, further, that (x) any event, change, circumstance, effect or other matter set forth in clauses (a) through (f) and (j) above may be taken into account in determining whether there has been or is a Material Adverse Effect to the extent such any event, change, circumstance, effect or other matter has a disproportionate and adverse effect on the Acquired Assets, taken as a whole, as compared to other entities and assets engaged in the relevant business in the relevant geographic area.

“Modified Labor Agreement” means a new collective bargaining agreement with the Union that is entered into by Purchaser and the Union.

“Non-Party Affiliates” has the meaning set forth in Section 9.14.

“Ordinary Course of Business” means the ordinary and usual course of normal day to day

operations of the Business through the date hereof consistent with past practice.

“Outside Date” has the meaning set forth in Section 8.1(c).

“Owned Real Property” means all real property owned in whole or in part by the Sellers, together with all facilities, buildings, structures, fixtures and other improvements situated thereon and all easements, rights-of-way and other rights and privileges appurtenant thereto.

“Parties” has the meaning set forth in the preamble.

“Permit” means any franchise, approval, permit, license, order, registration, certificate, variance or similar right obtained from any Governmental Authority.

“Permitted Lien” means (a) Liens for Taxes not yet delinquent or which are being contested in good faith by appropriate proceedings; (b) mechanic’s, workmen’s, repairmen’s, warehousemen’s, carrier’s or other similar Liens, including all statutory liens, arising or incurred in the Ordinary Course of Business, that in each case have been bonded over or otherwise secured in a manner acceptable to Purchaser in Purchaser’s sole discretion; (c) with respect to leased or licensed real or personal property, the terms and conditions of the lease, license, sublease or other occupancy agreement applicable thereto; (d) with respect to real property, zoning, building codes and other land use laws regulating the use or occupancy of such real property or the activities conducted thereon which are imposed by any Governmental Authority having jurisdiction over such real property; (e) easements, covenants, conditions, restrictions and other similar matters affecting title to real property and other encroachments and title and survey defects that do not or would not reasonably be expected to have a Material Adverse Effect; (f) matters that would be disclosed on an accurate survey of the real property; (g) any liens shown in any title commitment, report or policy, or otherwise of record; (h) any other Liens that Purchaser has expressly stated are acceptable to Purchaser in a writing delivered to Sellers; and (i) other than any of the Liens set forth in the foregoing clauses (a) through (h) and other than any Lien that is required to be removed or cured by the applicable tenant under the applicable Lease or was created by such tenant, any Liens on the fee property underlying any Lease that do not or would not reasonably be expected to adversely affect the current occupancy or use of such real property in any material respect or impose any material adverse obligations on Purchaser following the applicable Closing.

“Person” means an individual, a partnership, a corporation, a limited liability company, an association, a joint stock company, a trust, a joint venture, an unincorporated organization, or any other entity, including any Governmental Authority or any group of any of the foregoing.

“Petition Date” means September 16, 2018.

“Pre-Closing Period” has the meaning set forth in Section 6.4(c).

“Prepaid Expenses” has the meaning set forth in the definition of Acquired Assets.

“Prorated Charges” has the meaning set forth in Section 2.9(a).

“Proration Period” has the meaning set forth in Section 6.4(b).

“Purchase Price” has the meaning set forth in Section 2.3(a).

“Purchase Price Allocation” has the meaning set forth in Section 2.8.

“Purchaser Proration Amount” has the meaning set forth in Section 2.9(a).

“Purchaser” has the meaning set forth in the preamble.

“Related Agreements” means the Bill of Sale and the Assignment and Assumption Agreement.

“Representative” means, when used with respect to a Person, the Person’s controlled Affiliates (including Subsidiaries) and such Person’s and any of the foregoing Persons’ respective officers, directors, managers, members, shareholders, partners, employees, agents, representatives, advisors (including financial advisors, bankers, consultants, legal counsel, and accountants), and financing sources.

“Sale Motion” means that certain *Debtors' Motion for Orders Pursuant to Sections 105(A), 363, 365 and 503 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004 and 6006: (A)(I) Establishing Bidding Procedures and Bid Protections in Connection With the Sale of Certain of the Assets of the Debtors, (II) Approving the Form and Manner of Notices, (III) Approving the Asset Purchase Agreement Subject to Higher and Better Offers and (IV) Setting a Sale Hearing Date; and (B)(I) Approving the Sale of Certain Assets of the Debtors Free and Clear of Liens, Claims and Encumbrances, (II) Authorizing the Assumption and Assignment of Certain Unexpired Leases and Executory Contracts; and (III) Granting Related Relief* filed at Docket No. 12 in the Chapter 11 Cases as amended, supplemented, and/or modified, in form and substance satisfactory to the Purchaser, on or before the entry of the Bid Procedures Order.

“Sale Hearing” means a hearing before the Bankruptcy Court to approve this Agreement and the Sale Order.

“Sale Order” means an order of the Bankruptcy Court in form and substance satisfactory to the Purchaser (a) approving (i) this Agreement and the execution, delivery, and performance by Sellers of this Agreement and the other instruments and agreements contemplated hereby; (ii) the sale of the Acquired Assets to Purchaser free and clear of all Liens, other than any Permitted Liens and any Assumed Liabilities; (iii) the assumption of the Assumed Liabilities by Purchaser on the terms set forth herein; and (iv) the assumption and assignment to Purchaser of the Transferred Contracts on the terms set forth herein; (b) determining that Purchaser is a good faith purchaser; and (c) providing that the Closing will occur in accordance with the terms and conditions hereof.

“Seasons” has the meaning set forth in the preamble.

“Seller Marks” has the meaning set forth in the definition of Acquired Assets.

“Seller Proration Amount” has the meaning set forth in Section 2.9(a).

“Sellers” has the meaning set forth in the preamble.

“Stores” has the meaning set forth in the recitals.

“Subsidiary” means, with respect to any Person, means, on any date, any Person (a) the accounts of which would be consolidated with and into those of the applicable Person in such Person’s consolidated financial statements if such financial statements were prepared in accordance with GAAP as of such date or (b) of which securities or other ownership interests representing more than fifty percent of the equity or more than fifty percent (50%) of the ordinary voting power or, in the case of a partnership, more than fifty percent (50%) of the general partnership interests or more than fifty percent of the profits or losses of which are, as of such date, owned, controlled or held by the applicable Person or one or more subsidiaries of such Person.

“Target Inventory” means an amount equal to the total consolidated Inventory of the Sellers and their Subsidiaries as reflected in the final inventory appraisal report prepared by WIS Consulting in connection with the inventory appraisal currently being performed as of the date of this Agreement by WIS Consulting in respect of the Sellers and their Subsidiaries.

“Tax” or “Taxes” means any United States federal, state, local or foreign income, gross receipts, license, payroll, employment, excise, stamp, occupation, premium, windfall profits, environmental (including taxes under section 59A of the IRC), customs duties, capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, real property, personal property, sales, use, transfer, registration, value added, alternative or add-on minimum, estimated or other tax of any kind whatsoever, whether computed on a separate or consolidated, unitary or combined basis or in any other manner, including any interest, penalty or addition thereto, whether disputed or not.

“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.

“Transfer Tax” has the meaning set forth in Section 6.4(a).

“Transferred Contracts” has the meaning set forth in the definition of Acquired Assets and, without limiting the preceding, shall include the Assumed Leases, and shall exclude the Concession Agreements.

“Union” means the union identified on Schedule 1.1(i).

“Weekly Inventory Purchases Report” has the meaning set forth in Section 2.7(a).

Section 1.2 Interpretations. Unless otherwise indicated herein to the contrary:

(a) When a reference is made in this Agreement to an Article, Section, Exhibit, Schedule, clause or subclause, such reference shall be to an Article, Section, Exhibit, Schedule, clause or subclause of this Agreement.

(b) The words “include,” “includes” or “including” and other words or phrases of similar import, when used in this Agreement, shall be deemed to be followed by the words “without limitation.”

(c) The words “hereof,” “herein” and “hereunder” and words of similar import, when used in this Agreement, refer to this Agreement as a whole and not to any particular provision of this Agreement.

(d) The word “if” and other words of similar import shall be deemed, in each case, to be followed by the phrase “and only if.”

(e) The use of “or” herein is not intended to be exclusive.

(f) The definitions contained in this Agreement are applicable to the singular as well as the plural forms of such terms. Whenever the context may require, any pronouns used herein shall include the corresponding masculine, feminine or neuter forms, and the singular form of names and pronouns shall include the plural and vice versa.

(g) All terms defined in this Agreement have their defined meanings when used in any certificate or other document made or delivered pursuant hereto, unless otherwise defined therein.

(h) References herein to a Person are also to its successors and permitted assigns. Any reference herein to a Governmental Authority shall be deemed to include reference to any successor thereto.

(i) Any reference herein to “Dollars” or “\$” shall mean United States dollars.

(j) Purchaser acknowledges and agrees that the specification of any dollar amount in the representations, warranties, or covenants contained in this Agreement is not intended to imply that such amounts or higher or lower amounts are or are not material, and Purchaser shall not use the fact of the setting of such amounts in any dispute or controversy between the Parties as to whether any obligation, item, or matter is or is not material.

(k) References in this Agreement to materials or information “furnished to Purchaser” and other phrases of similar import include all materials or information made available to Purchaser or its Representatives or provided to Purchaser or its Representatives in response to requests for materials or information.

(l) All Exhibits and Schedules referenced herein are incorporated herein and made part of this Agreement and shall be in form and substance acceptable to the Purchaser in its sole discretion.

## **ARTICLE II**

### **PURCHASE AND SALE**

Section 2.1 Purchase and Sale of Assets. On the terms and subject to the conditions set forth in this Agreement, Purchaser will purchase from Sellers, and Sellers will sell, transfer, assign, convey, and deliver to Purchaser at the Closing all of the Acquired Assets, free and clear of all Liens (other than Permitted Liens and Assumed Liabilities).

Section 2.2 Assumed Liabilities. On the terms and subject to the conditions set forth in this Agreement, Purchaser will assume and become responsible for the Assumed Liabilities at the Closing. Purchaser agrees to pay, perform, honor, and discharge, or cause to be paid, performed, honored and discharged, all Assumed Liabilities in a timely manner in accordance with the terms thereof.

Section 2.3 Consideration; Deposit.

(a) The consideration for the Acquired Assets at and including the Stores, including the Inventory, shall be (i) an aggregate Dollar amount equal to the sum of (A) \$10,250,000 (the "Cash Purchase Price"), *plus* (B) the amount of the Prepaid Expenses, *plus* (C) the Seller Proration Amount, if any, *minus* (D) the Purchaser Proration Amount, if any, *minus* (E) the Closing Gift Card Liabilities (such calculation, the "Purchase Price") and (ii) Purchaser's assumption of the Assumed Liabilities. The Purchase Price shall be subject to adjustment as contemplated by Section 2.6(e) and Section 2.7(b).

(b) Upon the execution of this Agreement, Purchaser shall make a cash deposit in the amount of \$1,025,000 (the "Deposit"). The Deposit shall be liquidated damages, available to Sellers as their sole and exclusive remedy, if this Agreement is properly terminated by Sellers pursuant to Section 8.1(m) or Section 8.1(q), or upon the failure of Purchaser to consummate the Sale, provided that all conditions precedent to Closing have been satisfied and there shall not have been a material breach by Sellers of any representation, warranty or covenant contained in this Agreement.

Section 2.4 Breakup Fee and Expense Reimbursement.

(a) In the event that the Bankruptcy Court enters an order approving an Alternate Transaction, then Purchaser shall be entitled to and Sellers shall pay to Purchaser at the consummation of an Alternate Transaction 3.00% of the Cash Purchase Price and Assumed Cure Costs (the "Breakup Fee"). The Breakup Fee provided for by this Section is intended to cover opportunity costs incurred by Purchaser in pursuing and negotiating this Agreement and the transactions contemplated hereby, and is considered by the Parties to be reasonable for such purposes. The Breakup Fee shall be paid from the first sale proceeds of an Alternate Transaction. The claims of Purchaser to the Breakup Fee shall constitute an administrative expense against Sellers' bankruptcy estates under the applicable provisions of the Bankruptcy Code. Sellers shall seek the approval of the Bankruptcy Court of the Breakup Fee in the Sale Motion.

(b) In addition to any Breakup Fee that may be payable pursuant to this Section 2.4, upon (i) any event in which the Breakup Fee is payable pursuant to this Section 2.4 or (ii) termination of this Agreement by Purchaser pursuant to Section 8.1, other than Section 8.1(m) or Section 8.1(q), Sellers shall reimburse the actual and necessary expenses, including reasonable attorney's fees, incurred in connection with negotiation and entry into this Agreement, due diligence with respect to the transactions contemplated by this Agreement, and obtaining Bankruptcy Court approval of this Agreement, in an amount not to exceed \$400,000 (the "Expense Reimbursement"). The claims of Purchaser to the Expense Reimbursement shall constitute an administrative expense against Sellers' bankruptcy estates under the applicable provisions of the Bankruptcy Code.

(c) Sellers acknowledges that the Breakup Fee, the Expense Reimbursement, and the agreements contained in this Section 2.4 are an integral part of the transactions contemplated hereby and that, without these agreements, Purchaser would not enter into this Agreement. The provisions of this Section 2.4 shall survive the closing or earlier termination of the transactions contemplated hereby.

Section 2.5 Closing. The closing of the transactions contemplated by this Agreement (the "Closing") shall take place at the offices of Zeichner Ellman & Krause LLP, located at 1211 Avenue of the Americas, 40<sup>th</sup> Floor, New York, New York 10036 (or such other location as shall be mutually agreed upon by Sellers and Purchaser) commencing at 10:00 a.m. local time on a date (the "Closing Date") that is the third (3rd) Business Day following the date upon which all of the conditions to the obligations of Sellers and Purchaser to consummate the transactions contemplated hereby set forth in Article VII (other than conditions that by their nature are to be satisfied at the Closing itself, but subject to the satisfaction or waiver of those conditions) have been satisfied or waived, or on such other date as shall be mutually agreed upon by Sellers and Purchaser prior thereto. For purposes of this Agreement and the transactions contemplated hereby, the Closing will be deemed to occur and be effective, and title to and risk of loss associated with the Acquired Assets, shall be deemed to occur at 12:01 am, New York City time, on the Closing Date. The Closing Date shall occur no later than December 15, 2018, unless extended by Purchaser in its sole discretion.

Section 2.6 Closing Payments and Deliveries.

(a) On the Closing Date:

(i) Purchaser shall deposit a portion of the Purchase Price equal to the Inventory Escrow Amount with the Escrow Agent by wire transfer of immediately available funds into an account designated by the Escrow Agent for the purpose of funding payments of the Final Closing Adjustment by Sellers, if any, in accordance with Section 2.7(b).

(ii) Purchaser shall pay the balance of the Purchase Price to Sellers by wire transfer of immediately available funds into an account designated by Sellers.

(b) At the Closing, Sellers shall be required to use the proceeds of the Purchase



Price to satisfy in full the Sellers' obligations under the DIP Financing Facility and Sellers shall deliver pay-off letters and evidence of the release of any Liens on any of the Acquired Assets in each case in form and substance satisfactory to Purchaser.

(c) At the Closing, Sellers will deliver to Purchaser (i) a duly executed Bill of Sale in form and substance satisfactory to the Purchaser (the "Bill of Sale"); (ii) a duly executed Assignment and Assumption Agreement in form and substance satisfactory to the Purchaser (the "Assignment and Assumption Agreement"); (iii) a duly executed certificate from an officer of each Seller to the effect that each of the conditions specified in Section 7.1(a) and Section 7.1(b) is satisfied; and (iv) the executed originals of each of the Assumed Leases to the extent in Sellers' possession.

(d) At the Closing, Purchaser will deliver to Sellers (i) the Bill of Sale duly executed by Purchaser; (ii) the Assignment and Assumption Agreement duly executed by Purchaser; and (iii) a duly executed certificate from an officer of Purchaser to the effect that each of the conditions specified in Section 7.2(a) and Section 7.2(b) are satisfied.

(e) At the Closing, the Cash Purchase Price shall be reduced to the extent that Seller has not paid any Cure Costs that arose or accrued after the Petition Date and remains outstanding as of the Closing under or pursuant to any Transferred Contract.

(f) At Closing, Sellers will deliver to Purchaser all documents in form and substance satisfactory to Purchaser evidencing the transfer of the Owned Real Property of the Sellers to the Purchaser (including deed instruments and similar documents). Sellers and Purchaser shall execute any documents necessary to effectuate the transfer of the Owned Real Property.

#### Section 2.7 Inventory.

(a) From the date of this Agreement up until the Closing Date, Sellers agree to purchase Inventory on a weekly basis in accordance with the "CGS-Grocery" line on the Budget; provided, however, that Sellers shall be entitled to purchase up to 10% more Inventory than the amount set forth on the "CGS-Grocery" line on a weekly basis or up to 10% less Inventory than the amount set forth on the "CGS-Grocery" line on a weekly basis, but in the aggregate Inventory purchases shall be substantially consistent with the "CGS-Grocery" line on the Budget. From the date of this Agreement up until the Closing Date, Sellers shall use commercially reasonable efforts to maintain the purchases set forth on "CGS-Concessions" line on the Budget that is substantially equivalent with Sellers' historical practices. Sellers shall inform Purchaser of the actual amounts of Inventory purchased and actual amounts of purchases in connection with the "CGS-Concessions" line on the Budget, including any related variances to the Budget, in writing on a weekly basis, which written information shall include reasonable supporting detail (each, a "Weekly Inventory Purchases Report"). The initial Weekly Inventory Purchases Report shall set forth the aggregate amount of actual purchases from the Petition Date through the date hereof.

(b) (i) Promptly after the Closing, Purchaser and Sellers shall direct the Independent Appraiser to prepare and deliver to Purchaser and Sellers no later than thirty (30) days following the Closing Date a statement (the “Closing Statement”) setting Independent Appraiser’s calculation of Inventory as of 12:01 a.m. (eastern time) on the Closing Date determined in accordance with GAAP (the “Final Inventory”), along with reasonable supporting detail as part of the Closing Statement to evidence the calculation thereof. Such calculation of Inventory by the Independent Appraiser shall be binding and conclusive on the parties and not subject to appeal or further review.

(ii) If Final Inventory is less than the Target Inventory, Sellers shall pay to Purchaser the full amount by which Target Inventory exceeds Final Inventory in accordance with Section 2.7(b)(iii). If the Final Inventory is greater than the Target Inventory, Purchaser shall pay to Sellers the full amount by which Final Inventory exceeds Target Inventory in accordance with Section 2.7(b)(iii).

(iii) The amount (if any) owed to Sellers, on the one hand, or to Purchaser, on the other hand, pursuant to Section 2.7(b)(iii) shall be referred to as the “Final Closing Adjustment.” If Sellers are obligated to pay the Final Closing Adjustment, the Escrow Agent shall release from the Inventory Escrow Fund the Final Closing Adjustment to Purchaser and shall release the balance, if any, of the Inventory Escrow Fund to Sellers, in each case in cash by wire transfer of immediately available funds to the accounts designated by Purchaser and Sellers, as applicable. If Purchaser is obligated to pay the Final Closing Adjustment, it shall make payment thereof to Sellers and the Escrow Agent shall release the Inventory Escrow Fund to Sellers, in each case in cash by wire transfer of immediately available funds to the account or accounts designated by Sellers. Any payment required under this Section 2.7(b)(ii) shall be made within five (5) Business Days of the final determination of the Final Closing Adjustment.

**Section 2.8 Allocation.** Purchaser and Sellers agree to allocate the Purchase Price (as finally determined hereunder) and all other relevant items among the Acquired Assets in accordance with section 1060 of the IRC and the Treasury Regulations thereunder (the “Allocation Principles”). No later than sixty (60) days after the Closing Date, Sellers shall deliver to Purchaser an allocation of the Purchase Price and the Assumed Liabilities (and all other relevant items) as of the Closing Date among the Acquired Assets determined in a manner consistent with the Allocation Principles (the “Purchase Price Allocation”) for Purchaser’s review and comment. Any reasonable comments provided by Purchaser to the Sellers under this Section 2.8 shall be considered by the Sellers in good faith. The Purchase Price Allocation (inclusive of any reasonable comments accepted by the Sellers) shall be conclusive and binding on the parties, and Purchaser and Sellers agree (and agree to cause their respective subsidiaries and Affiliate) to prepare, execute, and file IRS Form 8594 and all Tax Returns on a basis consistent with the Purchase Price Allocation. None of the Parties will take any position inconsistent with the Purchase Price Allocation on any Tax Return or in any audit or Tax proceeding, unless otherwise required by a final determination by a Governmental Authority. For the avoidance of doubt, the Parties shall cooperate in determining the portion of the Purchase Price allocable to the Acquired Assets that are subject to a Transfer Tax prior to the due date of the Tax Return required to be filed in connection with such Transfer Taxes; provided, that if the Parties do not agree with respect to such

determination, such matter shall be resolved in accordance with the process outlined in this Section 2.8, provided further, that such Tax Return shall be amended if the Purchase Price Allocation is subsequently adjusted pursuant to the procedures described above. Notwithstanding any other provision of this Agreement, the terms and provisions of this Section 2.8 shall survive the Closing without limitation.

#### Section 2.9 Proration.

(a) On the Closing Date all monthly payments for the month in which the Closing occurs (including base rent, common area maintenance fees, and utility charges) under the Assumed Leases transferred at the Closing (the “Prorated Charges”) shall be apportioned and prorated between Sellers and Purchaser as of the Closing Date with (i) Purchaser bearing the expense of Purchaser’s proportionate share of such Prorated Charges that shall be equal to the product obtained by multiplying (A) a fraction, the numerator being the amount of the Prorated Charges under the applicable Lease and the denominator being the total number of days in the lease month in which the Closing occurs, times (B) the number of days in such lease month following the day that immediately precedes the Closing Date and paying such amount to Sellers to the extent payment for such Prorated Charges has been made by Sellers prior to the Closing, and (ii) Sellers bearing the remaining portion of such Prorated Charges (and paying the amounts thereof to Purchaser to the extent payment for such Prorated Charges has not been previously made by Sellers). The net amount of all Prorated Charges owed to Purchaser and Sellers under this shall be referred to as the “Purchaser Proration Amount” if owed to Purchaser or the “Seller Proration Amount” if owed to Sellers. Except as set forth in this Section 2.9, no amounts paid or payable under or in respect of any Acquired Asset or group of Acquired Assets shall be apportioned and prorated between Sellers and Purchaser. Notwithstanding the foregoing there shall be no apportionment nor reduction in Purchase Price for percentage rents, if any.

(b) Real estate taxes and assessments and water and sewer charges shall be adjusted in the manner set forth in Section 6.4.

(c) As to all non-monthly real estate related payments, the same shall be apportioned between Sellers and Purchaser as of 12:01 a.m. on the Closing Date. If any amounts are payable in installments, all installments due through the Closing together with the accrued but unpaid portion of any other installments not yet due as of the Closing shall be prorated based on the periods of time covered by such installments occurring before and after the Closing Date.

(d) If any of the items subject to apportionment under the foregoing provisions cannot be apportioned at the Closing because of the unavailability of the information necessary to compute such apportionment, or if any errors or omissions in computing apportionments at the Closing are discovered subsequent to the Closing, then such item shall be reapportioned and such errors and omissions corrected as soon as practicable after the Closing Date and the proper party reimbursed, provided, however, that such apportionment must occur within sixty (60) days from and after the Closing Date.

Section 2.10 Removal of Excluded Assets. Sellers shall reasonably cooperate with Purchaser to remove, at such time as Sellers and Purchaser agree, all Excluded Assets that are located at the Stores.

Section 2.11 Gift Cards. Sellers shall use commercially reasonable efforts to deliver to Purchaser, at least five (5) Business Days prior to the Closing Date, a written statement setting forth Sellers' good faith estimate of outstanding Liabilities of the Sellers and their Subsidiaries relating to Gift Cards as of 12:01 a.m. (eastern time) on the Closing Date determined (the "Closing Gift Card Liabilities") along with reasonable supporting detail to evidence the calculation thereof.

### **ARTICLE III** **SELLERS' REPRESENTATIONS AND WARRANTIES**

Sellers represent and warrant to Purchaser that, to the best of their knowledge and belief, the statements contained in this Article III are true and correct as of the date of this Agreement, except as (i) set forth in the disclosure schedule accompanying this Agreement (the "Disclosure Schedule") or (ii) disclosed in any forms, statements, or other documents filed with the Bankruptcy Court.

Section 3.1 Organization of Sellers; Good Standing. Each Seller is a corporation or limited liability company, as applicable, duly organized, validly existing and in good standing under the laws of the state of its formation. Each Seller has, subject to the necessary authority from the Bankruptcy Court, all requisite corporate or other organizational power and authority to own, lease and operate its assets and to carry on its business as now being conducted, except where the failure to have such power and authority would not be reasonably expected to have a Material Adverse Effect.

Section 3.2 Authorization of Transaction. Subject to the Bankruptcy Court's entry of the Sale Order and any other necessary order to close the sale of the Acquired Assets, each Seller, has full power and authority (including full corporate or other organizational power and authority) to execute and deliver this Agreement and all other agreements contemplated hereby to which it is a party and to perform its obligations hereunder and thereunder. The execution, delivery, and performance of this Agreement and all other agreements contemplated hereby to which each Seller is a party have been duly authorized by such Seller. Upon due execution hereof by each Seller, this Agreement (assuming due authorization and delivery by Purchaser) shall constitute, subject to the Bankruptcy Court's entry of the Sale Order and any other necessary order to close the sale of the Acquired Assets, the valid and legally binding obligation of such Seller, enforceable against such Seller in accordance with its terms and conditions, subject to applicable bankruptcy, insolvency, moratorium, or other similar laws relating to creditors' rights and general principles of equity.

Section 3.3 Noncontravention; Government Filings. Neither the execution and delivery of this Agreement, nor the consummation of the transactions contemplated hereby (including the assignments and assumptions referred to in Article II), will (a) conflict with or result

in a breach of the organizational documents of any Seller, (b) subject to the entry of the Sale Order and any other necessary order to close the sale of the Acquired Assets, materially violate any Law or Decree to which any Seller is subject in respect of the Acquired Assets, or (c) subject to the entry of the Sale Order and any other necessary order to close the sale of the Acquired Assets, result in a material breach of, constitute a material default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify or cancel, or require any notice under any material Contract to which any Seller is a party or to which any of the Acquired Assets is subject, except, in the case of either clause (b) or (c), for such conflict, violations, breaches, defaults, accelerations, rights or failures to give notice as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. Other than as required or pursuant to the Bankruptcy Code, the Sale Order and any other necessary order to close the sale of the Acquired Assets, no Seller is required to give any notice to, make any filing with, or obtain any authorization, consent or approval of any Governmental Authority in order for the Parties to consummate the transactions contemplated by this Agreement or any Related Agreement, except where the failure to give notice, file or obtain such authorization, consent or approval would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect or prevent or materially impair or delay any Seller's ability to consummate the transactions contemplated hereby or perform its obligations hereunder on a timely basis.

Section 3.4 Title to Assets. At the Closing, subject to any Permitted Liens, Sellers, in all material respects, will have good and valid title to, or the right to use, the tangible Acquired Assets. Pursuant to the Sale Order, Sellers will convey such title to or rights to use, all of the tangible Acquired Assets, free and clear of all Liens (other than Permitted Liens and Assumed Liabilities).

Section 3.5 Real Property. In addition to the Owned Real Property, Schedule 3.5 of the Disclosure Schedule sets forth the location of each Store, each of which is leased to a Seller by a third party, and a list of all Store lease agreements and related amendments. Sellers, have made available to Purchaser a true and complete copy of each Lease to the extent in their possession. With respect to each Lease, (a) assuming due authorization and delivery by the other party thereto, such Lease constitutes the valid and legally binding obligation of the Seller party thereto and, to Sellers' Knowledge, the counterparty thereto, enforceable against such Seller and, to Sellers' Knowledge, the counterparty thereto in accordance with its terms and conditions, subject to applicable bankruptcy, insolvency, moratorium or other similar laws relating to creditors' rights and general principles of equity, and (b) neither such Seller nor, to Sellers' Knowledge, the counterparty thereto is in material breach or material default under such Lease, except (i) for those defaults that will be cured in accordance with the Sale Order or waived in accordance with section 365 of the Bankruptcy Code (or that need not be cured under the Bankruptcy Code to permit the assumption and assignment of the Assumed Leases) or (ii) to the extent such breach or default would not reasonably be expected to have a Material Adverse Effect. To Sellers' Knowledge, there are no subleases at the Stores to which any Seller is sublessor.

Section 3.6 Litigation; Decrees. Except as set forth in Schedule 3.6 of the Disclosure Schedule and other than the Bankruptcy Cases, there is no Litigation pending or, to the Knowledge of Sellers, threatened, that (a) would reasonably be expected to have a Material Adverse Effect or (b) challenges the validity or enforceability of this Agreement or seeks to enjoin

or prohibit consummation of the transactions contemplated hereby. Other than the Bankruptcy Cases, no Seller is subject to any outstanding Decree that would (a) reasonably be expected to have a Material Adverse Effect or (b) prevent or materially delay such Seller's ability to consummate the transactions contemplated hereby or perform in any material respect its obligations hereunder.

Section 3.7. Permits.

a) Set forth on Schedule 3.7, is a true, complete and correct list of all Permits that are held by the Sellers related to the Business. The Sellers currently hold all Permits which are necessary for the ownership or operation of the Acquired Assets or the Business. All such permits are valid and in full force and effect in accordance with their terms and conditions. All material fees and charges with respect to such Permits as of the date of this Agreement have been paid in full.

b) Except as set forth on Schedule 3.7, (i) each Seller is in compliance in all material respects, and has complied in all material respects, with all Permits held by such Seller and with all Laws applicable to such Seller, the Acquired Assets or the Business and (ii) neither such Seller nor any of its Affiliates has received notice from any Person alleging any material violation of any Permit held by such Seller or any Law applicable to such Seller, the Business or the Acquired Assets.

Section 3.8 Brokers' Fees. Except as provided in their engagement agreement with Getzler Henrich & Associates LLC, no Seller has entered into any Contract to pay any fees or commissions to any broker, finder, or agent with respect to the transactions contemplated hereby for which Purchaser could become liable or obligated to pay.

Section 3.9 Intentionally Deleted.

Section 3.10 Compliance with Laws; Permits.

(a) Except as set forth on Schedule 3.10(a), Sellers, in all material respects, are in compliance with all material Laws applicable to the Business. Sellers, in all material respects, have not received any written notice of or been charged with the violation of any material Laws.

(b) Except as set forth on Schedule 3.10(b), Sellers have all material Permits which are required for the operation of the Business as presently conducted. Sellers are not in material default or violation (and no event has occurred which, with notice or the lapse of time or both, would constitute a default or violation) of any term, condition or provision of any Permit to which they are parties.

Section 3.11 Contracts. Except as set forth on Schedule 3.11, each Transferred Contract is valid and binding on Sellers in accordance with its terms and is in full force and effect and neither the applicable Seller, nor to the Knowledge of Seller, any other party, is in violation or breach of, or default under (or is alleged to be in violation or breach of or default under), or has provided or received any written notice of any intention to terminate any Contract, including as a

result of the execution of this Agreement or the anticipated consummation of the transactions contemplated hereby. To the Knowledge of Sellers, there are no Bonding Requirements with respect to the Transferred Contracts.

Section 3.12 Intellectual Property. To the Knowledge of Sellers, the Sellers Intellectual Property as used by Sellers in the conduct of the Business does not infringe upon or misappropriate the Intellectual Property of any Person. Neither any Seller nor any of its Affiliates has ever received any written communication, and no Litigation is pending, has been settled or, to the Knowledge of Sellers, is threatened, that alleges any such infringement or misappropriation. No Person is currently infringing upon or misappropriating, or has infringed upon or misappropriated, any Sellers' Intellectual Property.

Section 3.13 Disclaimer of Other Representations and Warranties. Except for the representations and warranties contained in this Article III (as modified by the Disclosure Schedule) or expressly contained in any Related Agreement, neither Sellers nor any other Person shall be deemed to have made any representation or warranty, express or implied, including as to the accuracy or completeness of any information regarding Sellers, any Acquired Assets, any Assumed Liabilities or any other matter. Notwithstanding anything herein to the contrary, but without limitation of any representation or warranty expressly contained in this Article III or any Related Agreement, SELLERS MAKE NO OTHER (AND HEREBY DISCLAIM EACH OTHER) REPRESENTATION, WARRANTY, OR GUARANTY WITH RESPECT TO THE VALUE, CONDITION, OR USE OF THE ACQUIRED ASSETS, WHETHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. PURCHASER ACKNOWLEDGES THAT, SHOULD THE CLOSING OCCUR, PURCHASER WILL ACQUIRE THE ACQUIRED ASSETS AND ASSUME THE ASSUMED LIABILITIES IN AN "AS IS" CONDITION AND ON A "WHERE IS" BASIS, WITHOUT ANY REPRESENTATION OR WARRANTY OF ANY KIND, EXPRESS OR IMPLIED (INCLUDING ANY WITH RESPECT TO ENVIRONMENTAL, HEALTH, OR SAFETY MATTERS). Sellers disclaim all Liability and responsibility for any representation, warranty, projection, forecast, statement, or information made, communicated, or furnished (orally or in writing) to Purchaser or its Affiliates or representatives (including any opinion, information, projection, or advice that may have been or may be provided to Purchaser by any director, officer, employee, agent, consultant, or representative of Sellers or any of their Affiliates).

## **ARTICLE IV**

### **PURCHASER'S REPRESENTATIONS AND WARRANTIES**

Purchaser represents and warrants to each Seller that the statements contained in this Article IV are true and correct as of the date of this Agreement.

Section 4.1 Organization of Purchaser; Good Standing. Purchaser is a limited liability company duly organized, validly existing, and in good standing under the laws of the State of New York and has all requisite corporate or similar power and authority to own, lease, and operate its assets and to carry on its business as now being conducted.

Section 4.2 Authorization of Transaction. Purchaser has full power and authority (including full corporate or other entity power and authority) to execute and deliver this Agreement and all other agreements contemplated hereby to which it is a party and to perform its obligations hereunder and thereunder. The execution, delivery, and performance of this Agreement and all other agreements contemplated hereby to which Purchaser is a party have been duly authorized by Purchaser. This Agreement (assuming due authorization and delivery by Sellers) constitutes the valid and legally binding obligation of Purchaser, enforceable against Purchaser in accordance with its terms and conditions, subject to applicable bankruptcy, insolvency, moratorium, or other similar laws relating to creditors' rights and general principles of equity.

Section 4.3 Noncontravention. Neither the execution and delivery of this Agreement, nor the consummation of the transactions contemplated hereby (including the assignments and assumptions referred to in Article II) will (a) conflict with or result in a breach of the certificate of incorporation or bylaws, or other organizational documents, of Purchaser, (b) violate any law or Decree to which Purchaser is, or its assets or properties are, subject or (c) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify or cancel, or require any notice under any Contract to which Purchaser is a party or by which it is bound, except, in the case of either clause (b) or (c), for such conflicts, breaches, defaults, accelerations, rights or failures to give notice as would not, individually or in the aggregate, have a Material Adverse Effect on Purchaser. Purchaser is not required to give any notice to, make any filing with, or obtain any authorization, consent or approval of any Governmental Authority in order for the Parties to consummate the transactions contemplated by this Agreement or any Related Agreement, except where the failure to give notice, file or obtain such authorization, consent or approval would not, individually or in the aggregate, prevent or materially impair or delay Purchaser's ability to consummate the transactions contemplated hereby or perform its obligations hereunder on a timely basis.

Section 4.4 Litigation; Decrees. There is no Litigation pending or, to Purchaser's Knowledge, threatened in writing that challenges the validity or enforceability of this Agreement or seeks to enjoin or prohibit consummation of the transactions contemplated hereby. Neither Purchaser nor any of its Subsidiaries is subject to any outstanding Decree that would prevent or materially impair or delay Purchaser's ability to consummate the transactions contemplated hereby or perform its obligations hereunder on a timely basis.

Section 4.5 Brokers' Fees. Purchaser has not entered into any Contract to pay any fees or commissions to any broker, finder or agent with respect to the transactions contemplated by this Agreement for which Sellers or any of their Affiliates could become liable or obligated to pay.

Section 4.6 Sufficient Funds. Purchaser has or on the Closing Date shall have the resources and capabilities (financial or otherwise), including immediately available funds, to consummate the Closing on the Closing Date and otherwise perform its obligations hereunder,

Section 4.7 Adequate Assurances. Purchaser is and shall be capable of satisfying the conditions contained in sections 365(b)(1)(C) and 365(f) of the Bankruptcy Code with respect to the Transferred Contracts and the related Assumed Liabilities.



## **ARTICLE V**

### **PRE-CLOSING COVENANTS**

The Parties agree as follows with respect to the period between the execution of this Agreement and the Closing (except as otherwise expressly stated to apply to a different period):

#### Section 5.1 Efforts; Cooperation.

(a) Upon the terms and subject to the conditions set forth in this Agreement, each of the Parties shall use (except as otherwise set forth in Section 5.3) its commercially reasonable efforts to take, or cause to be taken, all actions, and to do, or cause to be done, and to assist and cooperate with the other Parties in doing, all things necessary, proper, or advisable to consummate and make effective, in the most expeditious manner practicable, the transactions contemplated hereby (including by giving, or causing to be given, any notices to, making any filings with, and using commercially reasonable efforts to obtain any consents of Governmental Authorities, as applicable, as are necessary and appropriate to consummate the transactions contemplated hereby). Without limiting the generality of the foregoing, (i) each Seller shall use its commercially reasonable efforts to cause the conditions set forth in Section 7.1 that are within its control or influence to be satisfied or fulfilled, (ii) Purchaser shall use its commercially reasonable efforts to cause the conditions set forth in Section 7.2 that are within its control or influence to be satisfied or fulfilled, and (iii) in the event the Bankruptcy Court requires a consumer privacy ombudsman to be appointed in connection with the transactions contemplated by this Agreement, Purchaser shall provide any cooperation reasonably required by such ombudsman and shall use commercially reasonable efforts to take all reasonable actions recommended by such ombudsman in any report provided to the Bankruptcy Court.

(b) Without limiting the generality of Section 5.1(a), neither Party shall take any action, or permit any of its Subsidiaries to take any action, to materially diminish the ability of any Party to consummate, or materially delay any Party's ability to consummate, the transactions contemplated hereby, including any action that is intended or would reasonably be expected to result in any of the conditions to any Party's obligations to consummate the transactions contemplated hereby set forth in Article VII to not be satisfied.

#### Section 5.2 Conduct of the Business Pending the Closing.

(a) Prior to the Closing, except (i) as set forth on Schedule 5.2(a) of the Disclosure Schedule, (ii) as required by applicable Law or by order of the Bankruptcy Court (provided that none of the Sellers have requested or applied or have requested that any of their respective Affiliates make such request or application) (iii) as otherwise expressly contemplated by this Agreement or (iv) with the prior written consent of Purchaser (which consent shall not be unreasonably withheld, conditioned or delayed), each Seller shall (A) conduct the Business only in the Ordinary Course of Business and (B) use its commercially reasonable efforts to (1) preserve the present business operations,

organization and goodwill of the Business, and (2) preserve the present relationships with material vendors and suppliers of the Business.

(b) Except (i) as set forth on Schedule 5.2(b) of the Disclosure Schedule, (ii) as required by applicable Law or by order of the Bankruptcy Court (provided that none of the Sellers have requested or applied or have requested that any of their respective Affiliates make such request or application) (iii) as otherwise contemplated by this Agreement or (iv) with the prior written consent of Purchaser (which consent shall not be unreasonably withheld, conditioned or delayed), no Seller shall, solely as it relates to the Business:

(i) other than in the Ordinary Course of Business or as required by applicable Law or pursuant to any Contract or written policy in effect as of the date of this Agreement which Contract or written policy has been delivered to Purchaser prior to the date hereof, (A) materially increase the annual level of compensation of any employee or (B) materially increase the coverage or benefits available under any (or create any new) Employee Benefit Plan;

(ii) subject any of the Acquired Assets to any Lien, except for Permitted Liens and any Lien securing any debtor in possession loan facility or granted in an order authorizing use of cash collateral;

(iii) other than in the Ordinary Course of Business, sell, transfer, assign, license, sub-license, or otherwise dispose of any Acquired Asset;

(iv) other than in the Ordinary Course of Business, remove any tangible Acquired Asset from the Stores; or

(v) agree to do anything prohibited by this Section 5.2.

(c) For each Lease, the Prepaid Expenses as of the date hereof are listed on Schedule 1.1(b), which Schedule shall be updated three (3) Business Days prior to the Closing Date.

Section 5.3 Prepaid Expenses. Seller shall deliver to Purchaser an update to Schedule 1.1(b) no less than five (5) Business Days prior to the Closing Date.

Section 5.4 Bankruptcy Court Matters.

(a) Bidding Procedures Order. This Agreement is subject to approval by the Bankruptcy Court in accordance with the Bidding Procedures Order and the consideration by Sellers of higher or better competing bids in respect of all or any part of the Acquired Assets in accordance with the bidding procedures in form and substance acceptable to the Purchaser (the "Bidding Procedures") (whether in combination with other assets of the Sellers or their Affiliates or otherwise) (each a "Competing Bid") and an auction to be conducted in accordance with the Bidding Procedures (the "Auction"). From the date hereof (and any prior time) and until the filing of the Notice of Successful Bidder (as

defined in the Bidding Procedures), Sellers are permitted to and to cause their Representatives and Affiliates to, initiate contact with, solicit or encourage submission of any inquiries, proposals or offers by, any Person (in addition to Purchaser and its Affiliates and Representatives) in connection with a Competing Bid, including, to (and to cause their Representatives and Affiliates to) respond to any inquiries or offers to purchase all or any part of the Acquired Assets, (including supplying information relating to the Business and the assets of Sellers to prospective purchasers).

(b) Sale Order. Provided Purchaser is selected as the winning bidder in respect of the Acquired Assets at the Auction, or if no Competing Bid is submitted with respect to the Acquired Assets, Sellers shall seek entry of the Sale Order and any other necessary orders of the Bankruptcy Court to close the sale of the Acquired Assets in accordance with the terms and conditions of the Bidding Procedures Order. Purchaser and Sellers understand and agree that the consummation of the transactions contemplated by this Agreement is subject to approval by the Bankruptcy Court. Purchaser agrees that it will promptly take such actions as are reasonably requested by Sellers to assist in obtaining entry of the Sale Order including a finding of adequate assurance of future performance by Purchaser, including by furnishing affidavits or other documents or information for providing the adequate assurance information as required by the Bidding Procedures Order, and filing with the Bankruptcy Court for the purposes, among others, of providing necessary assurances of performance by Purchaser under this Agreement and demonstrating that Purchaser is a “good faith” purchaser under section 363(m) of the Bankruptcy Code. Purchaser shall not, without the prior written consent of Sellers, file, join in, or otherwise support in any manner whatsoever any motion or other pleading relating to the sale of the Acquired Assets hereunder except to protect its rights hereunder. In the event the entry of the Sale Order is appealed, Sellers shall use commercially reasonable efforts to defend such appeal at Sellers’ expense.

(c) The Sale Order shall provide that any Contract or Lease related to the Acquired Assets, Assumed Liabilities, and/or the Business that is not a Transferred Contract shall be deemed to be rejected pursuant to section 365 of the Bankruptcy Code effective as of the Closing Date.

(d) Back-up Bidder. Purchaser agrees that, in the event that Purchaser is not the winning bidder at the Auction, if and only if Purchaser is notified that its bid at the Auction or the terms of this Agreement constitutes the next highest or best bid for the Acquired Assets (for the avoidance of doubt, on a Store by Store basis), Purchaser shall be the Back-Up Bidder (as defined in the Bidding Procedures) and shall comply with the obligations of a Back-Up Bidder set forth in the Bidding Procedures.

Section 5.5 Notice of Developments. Each Seller and Purchaser will give prompt written notice to the other Parties of (a) the existence of any fact or circumstance, or the occurrence of any event, of which it has Knowledge that would reasonably be likely to cause a condition to a Party’s obligations to consummate the transactions contemplated hereby set forth in Article VII not to be satisfied as of a reasonably foreseeable Closing Date, or (b) the receipt of

any notice or other communication from any Governmental Authority in connection with the transactions contemplated by this Agreement; provided, however, that the delivery of any such notice pursuant to this Section 5.5 shall not be deemed to amend or supplement this Agreement and the failure to deliver any such notice shall not constitute a waiver of any right or condition to the consummation of the transactions contemplated hereby by any Party.

Section 5.6 Access; No Contact. Upon the reasonable request of Purchaser, and to the extent not otherwise prohibited by applicable Law, Sellers will permit Purchaser and its Representatives to have, upon reasonable advance written notice, reasonable access to all premises, properties, books and records and Transferred Contracts included in the Acquired Assets during normal business hours, and in a manner so as not to interfere unreasonably with the normal business operations of any Seller; provided, however, that, for avoidance of doubt, the foregoing shall not require any Person to waive, or take any action with the effect of waiving, its attorney-client privilege with respect thereto. Prior to the Closing, Purchaser shall not, and shall cause its Representatives not to, contact any employees, vendors, suppliers, landlords, or licensors of any Seller in connection with or pertaining to any subject matter of this Agreement except with the prior written consent of each Seller; provided, however, that so long as the applicable landlord for the applicable Store(s) is not a potential bidder at the Auction, Purchaser may contact the landlords for the Stores beginning one (1) day following the bid deadline for the Auction.

Section 5.7 Bulk Transfer Laws. Purchaser acknowledges that Sellers will not comply with the provisions of any bulk transfer laws or similar laws of any jurisdiction in connection with the transactions contemplated by this Agreement, including the United Nations Convention on the Sale of Goods, and hereby waives all claims related to the non-compliance therewith.

## **ARTICLE VI**

### **OTHER COVENANTS**

The Parties agree as follows with respect to the period from and after the Closing:

Section 6.1 Further Assurances. In case at any time after the Closing any further action is necessary to carry out the purposes of this Agreement, each of the Parties will, at the requesting Party's sole cost and expense, take such further action (including the execution and delivery of such other reasonable instruments of sale, transfer, conveyance, assignment, assumption and confirmation, providing materials and information) as the other Party may reasonably request which actions shall be reasonably necessary to transfer, convey or assign to Purchaser all of the Acquired Assets or to confirm Purchaser's assumption of the Assumed Liabilities.

Section 6.2 Access; Enforcement; Record Retention. From and after the Closing, upon request by any Seller, Purchaser will permit Sellers and their Representatives to have reasonable access during normal business hours, and in a manner so as not to interfere unreasonably with the normal business operations of Purchaser, to all premises, properties, personnel, books and records, and Contracts of or related to the Acquired Assets or the Assumed

Liabilities for the purposes of (a) preparing Tax Returns, (b) monitoring or enforcing rights or obligations of any Seller under this Agreement or any of the Related Agreements, or (c) complying with the requirements of any Governmental Authority; provided, however, that, for avoidance of doubt, the foregoing shall not require Purchaser to take any such action if (i) such action may result in a waiver or breach of any attorney/client privilege, (ii) such action could reasonably be expected to result in violation of applicable law, or (iii) providing such access or information would be reasonably expected to be disruptive to its normal business operations. Purchaser agrees to maintain the files or records which are contemplated by the first sentence of this Section 6.2 in a manner consistent in all material respects with its document retention and destruction policies, as in effect from time to time, for six (6) years following the Closing.

### Section 6.3 Employees, Labor Matters, etc.

(a) Treatment of Labor Agreement. With respect to employees covered under the Labor Agreement, Purchaser may (i) agree to assume the Labor Agreement with respect to the applicable Stores without modification and thereafter comply with the obligations with respect to employees under such Labor Agreement or (ii) meet with the Union representatives at reasonable times, and confer and negotiate in good faith with the Union to reach mutually satisfactory modifications to the Labor Agreement with the Union and to enter into a Modified Labor Agreement with the Union. Purchaser shall keep Sellers reasonably informed as to the status of its negotiations with the Union. Purchaser may, at any time prior to the Sale Hearing, agree to have the Labor Agreement assigned to it without modification by providing notice of such agreement to Sellers and the Union. To the extent Purchaser is not assuming the Labor Agreement, Purchaser shall, in coordination with Sellers, propose a Modified Labor Agreement to the Union. The Parties agree to cooperate with each other in providing the Union with complete and reliable information to allow the Union to evaluate any such proposals. For all purposes under this Section 6.3, the Parties acknowledge the requirements of sections 1113 and 1114 of the Bankruptcy Code and agree to use good faith efforts to cooperate with each other (and to negotiate in good faith with the Union) in ensuring compliance with any applicable provisions thereof. If the Union does not reach agreement with the Purchaser on the terms of a Modified Labor Agreement, then Purchaser shall have the right, at its sole discretion, to deem such Labor Agreement an Excluded Asset, such Labor Agreement shall not be assumed by Purchaser, and Sellers shall take all reasonable actions to the extent required under sections 1113 and 1114 of the Bankruptcy Code.

(b) Offer of Employment. Sellers shall provide Purchaser with details regarding their employees' salaries, wages, incentive compensation, benefits and employment records within ten (10) days of the date hereof and shall provide an updated schedule of the same upon Purchaser's request. Prior to the Closing Date, Purchaser may make an offer of employment, effective as of the Closing Date and contingent upon such Closing, to substantially all of the individuals who are then employed by Sellers (at the same base wage or hourly rate as in effect immediately prior to the Closing); provided, however, that any offer of employment shall be contingent upon the Closing actually occurring. Such offers shall be consistent with the terms and conditions required by the Labor Agreement or Modified Labor Agreement, if applicable.

(c) Except to the extent specifically provided in this Agreement and subject to the Bankruptcy Code and other applicable Laws, Sellers shall be responsible and liable for all amounts owed to any of its employees or former employees, including, without limitation, accrued wages, salaries, sick pay, vacation, compensation, bonuses or other benefits or payments on account of termination. Purchaser shall not assume or accept any obligation or liability under any Employee Benefit Plan or compensation arrangement of Sellers.

(d) Sellers shall be solely responsible for any and all liabilities, penalties, fines or other sanctions that may be assessed or otherwise due under the WARN Act and similar laws and regulations, if applicable, on account of the dismissal or termination of any of the employees of Sellers by them on or prior to the Closing Date.

(e) Purchaser shall have the right, subject to applicable Laws, to review and inspect Sellers' employee files and records, and, upon request, interview employees of Sellers, in order for Purchaser to evaluate each and every employee for possible hiring and employment, in Purchaser's absolute and sole discretion. Notwithstanding Section 6.3(c), to the extent that Purchaser offers employment to any employee of any Seller and such employee accepts such employment, then, at the Closing or within ten (10) days thereafter, such Seller shall pay to such employee or to Purchaser all amounts owing by such Seller prior to the Closing with respect to such employees for accrued vacation time, sick pay time and other unpaid wages, salaries and other compensation.

(f) Purchaser acknowledges that any and all decisions regarding which of the employees may be offered employment by Purchaser are solely those of Purchaser.

(g) The obligations of Sellers and of Purchaser hereunder relating to Sellers' employees are for the sole benefit of either Sellers or Purchaser, and no inference should be drawn that any employee is a beneficiary of any of the terms, provisions and obligations hereunder; and the ability to enforce the obligations of Sellers and/or Purchaser hereunder with respect to such employees shall be the right of either Sellers or Purchaser, as applicable, but not any employee.

#### Section 6.4 Certain Tax Matters.

(a) Transfer Taxes. Sellers shall pay any and all stamp, documentary, filing, recording, registration, use, transfer, added-value or other non-income Tax, fee or governmental charge imposed under applicable Law in connection with the transactions contemplated hereby (a "Transfer Tax") other than sales taxes, if any. The party that is required by applicable Law to file any Tax Returns in connection with Transfer Taxes described in the immediately preceding sentence shall, subject to Section 2.8, prepare and timely file such Tax Returns. Purchaser shall be entitled to receive such Tax Returns and other documentation reasonably in advance of filing by the applicable Seller, but not less than ten (10) Business Days prior to the due date of such Tax Returns, and such Tax Returns and other documentation shall be subject to Purchaser's approval, which shall not be unreasonably withheld, delayed, or conditioned. Purchaser and Sellers shall cooperate in making, in a timely manner, all Tax Returns, filings, reports, forms and other

documentation as are necessary or appropriate to comply with all applicable Laws in connection with the payment of Transfer Taxes and shall cooperate in good faith to minimize, to the fullest extent possible under such Laws, the amount of any such Transfer Taxes.

(b) Tax Adjustments. Taxes (other than Transfer Taxes) imposed upon or assessed directly against the Acquired Assets (including real estate Taxes (other than those subsumed in Section 2.8), personal property Taxes and similar Taxes) for the Tax period in which the Closing occurs (the "Proration Period") will be apportioned and prorated between Sellers and Purchaser as of the Closing Date with Purchaser bearing the expense of Purchaser's proportionate share of such Taxes which shall be equal to the product obtained by multiplying (i) a fraction, the numerator being the amount of the Taxes and the denominator being the total number of days in the Proration Period, times (ii) the number of days in the Proration Period following the Closing Date, and Sellers shall bear the remaining portion of such Taxes. If the precise amount of any such Tax cannot be ascertained on the Closing Date, apportionment and proration shall be computed on the basis of the amount payable for each respective item during the Tax period immediately preceding the Proration Period and any proration shall be adjusted thereafter on the basis of the actual charges for such items in the Proration Period. When the actual amounts become known, such proration shall be recalculated by Purchaser and Sellers, and Purchaser or Sellers, as the case may be, promptly (but not later than ten (10) days after notice of payment due and delivery of reasonable supporting documentation with respect to such amounts) shall make any additional payment or refund so that the correct prorated amount is paid by each of Purchaser and Sellers.

(c) Tax Refunds. In furtherance of Sellers' right to retain those assets described in clause (a)(C) of the definition of Excluded Assets, Sellers shall be entitled to receive from Purchaser all refunds (or credits for overpayments) of Taxes, including any interest paid thereon, by a Governmental Authority, attributable to any tax period ending on or prior to the Closing Date (a "Pre-Closing Period") or the portion of any Proration Period ending on and including the Closing Date, net of any costs, fees, expenses or Taxes incurred in obtaining such refunds (or credits). Purchaser and Sellers shall execute all documents, take reasonable additional actions and otherwise reasonably cooperate as may be necessary to obtain the Tax refunds (or credits) contemplated by this Section 6.4(c). Purchaser shall pay any such Tax refund (or the amount of any such credit) to the Sellers within five (5) calendar days after Purchaser receives such Tax refund from a Governmental Authority or files a Tax Return claiming such credit.

**Section 6.5 Insurance Matters.** Purchaser acknowledges that, upon Closing, all insurance coverage provided in relation to Sellers, the Stores, or the Acquired Assets that is maintained by any Seller or its Affiliates (whether such policies are maintained with third party insurers or with such Seller or its Affiliates) shall cease to provide any coverage to Purchaser, the Stores, or the Acquired Assets and no further coverage shall be available to Purchaser, the Stores, or the Acquired Assets under any such policies.

**Section 6.6 Acknowledgements.**

(a) Purchaser acknowledges that it has received from Sellers certain projections, forecasts, and prospective or third party information relating to Sellers, the Stores, the Acquired Assets, the Assumed Liabilities, and other related topics. Purchaser acknowledges that (i) there are uncertainties inherent in attempting to make such projections and forecasts and in such information; (ii) Purchaser is familiar with such uncertainties and is taking full responsibility for making its own evaluation of the adequacy and accuracy of all projections, forecasts, and information so furnished; and (iii) neither Purchaser nor any other Person shall have any claim against any Seller or any of its respective directors, officers, Affiliates, agents, or other Representatives with respect thereto. Accordingly, without limiting the generality of Section 3.11 or Section 9.1, Purchaser acknowledges that neither Sellers nor any other Person makes any representations or warranties with respect to such projections, forecasts, or information.

(b) Purchaser acknowledges that, except for the representations and warranties expressly set forth in Article III (which representations and warranties shall terminate and be of no further force or effect as of the Closing), and without limiting the generality of Section 3.11, neither Sellers nor any other Person makes any representation or warranty, express or implied, including as to the accuracy or completeness of any information regarding any Seller, the Stores, any Acquired Assets, any Assumed Liabilities or any other matter, and neither Sellers nor any other Person will be subject to any Liability to Purchaser or any other Person resulting from such matters or the distribution to Purchaser, or the use of, any such information. Purchaser acknowledges that, should the Closing occur, Purchaser will acquire the Acquired Assets and assume the Assumed Liabilities in an “as is” condition and on a “where is” basis, without any representation or warranty of any kind, express or implied (including any with respect to environmental, health or safety matters). Further, without limiting any representation, warranty, or covenant of any Seller expressly set forth herein, Purchaser acknowledges that it has waived and hereby waives as a condition to the Closing any further due diligence reviews, inspections, or examinations with respect to any Seller, the Stores, the Acquired Assets, the Assumed Liabilities, or any other matter, including with respect to engineering, environmental, title, survey, financial, operational, regulatory, and legal compliance matters.

**Section 6.7 Press Releases and Public Announcements.** No Party shall issue any press release or make any public announcement relating to the existence or subject matter of this Agreement without the prior written approval of the other Parties, unless a press release or public announcement is required by applicable Law or a Decree of the Bankruptcy Court. If any such announcement or other disclosure is required by applicable Law or a Decree of the Bankruptcy Court, the disclosing Party shall, to the extent practical, give the nondisclosing Parties prior notice of, and an opportunity to comment on, the proposed disclosure. The Parties acknowledge that Sellers shall file this Agreement with the Bankruptcy Court in connection with obtaining the Sale Order.

**Section 6.8 Licenses.** With respect to any license to which any Seller is a party to related to any part of the space covered by the Leases, such Seller shall use commercially reasonable efforts to either terminate such license and/or reject such license under the Bankruptcy



Code, excluding for the avoidance of doubt, any unexpired leases of real property under which a Seller is the lessor that is governed by section 365(h)(1)(A) of the Bankruptcy Code.

## **ARTICLE VII**

### **CONDITIONS TO OBLIGATION TO CLOSE**

Section 7.1 Conditions to Purchaser's Obligations. Purchaser's obligation to consummate the transactions contemplated hereby in connection with the Closing is subject to satisfaction or waiver of the following conditions:

- (a) Each of the representations and warranties set forth in Article III shall have been true and correct on the date hereof and shall be true and correct as of the Closing (except to the extent expressly made as of an earlier specific date, in which case as of such date as if made at and as of such date) in all material respects, (without giving effect to any limitation as to "material" or "Material Adverse Effect" set forth therein);
- (b) Sellers shall have performed and complied with its covenants and agreements hereunder through the Closing in all material respects;
- (c) Subject to the terms of the DIP Financing Facility, Sellers shall have paid any and all Cure Costs that arose or otherwise accrued after the Petition Date and remain outstanding as of the Closing under or in respect of the Transferred Contracts;
- (d) in accordance with the Bidding Procedures Order, the Bankruptcy Court shall have entered (i) the Sale Order and (ii) any other order necessary to close the sale of the Acquired Assets, and no order staying, reversing, modifying, or amending such orders shall be in effect on the Closing Date;
- (e) no Law or Decree shall be in effect that prohibits consummation of the transactions contemplated by this Agreement; and
- (f) each delivery contemplated by Section 2.6 to be delivered to Purchaser shall have been delivered.

Section 7.2 Conditions to Sellers' Obligations. Sellers' obligations to consummate the transactions contemplated hereby in connection with the Closing are subject to satisfaction or waiver of the following conditions:

- (a) the representations and warranties set forth in Article IV shall have been true and correct on the date hereof and shall be true and correct as of the Closing (except to the extent expressly made as of an earlier date, in which case as of such date as if made at and as of such date) in all material respects, (without giving effect to any limitation as to "material" or "Material Adverse Effect" set forth therein);
- (b) Purchaser shall have performed and complied with its covenants and

agreements hereunder through the Closing in all material respects;

(c) the Bankruptcy Court shall have entered (i) the Sale Order and (ii) any other order necessary to close the sale of the Acquired Assets, and no order staying, reversing, modifying, or amending such orders shall be in effect on the Closing Date;

(d) no Law or Decree shall be in effect that prohibits consummation of any of the transactions contemplated by this Agreement; and

(e) each payment contemplated by Section 2.6(a) to be made to Sellers shall have been made, and each delivery contemplated by Section 2.6(d) to be delivered to Sellers shall have been delivered.

**Section 7.3 No Frustration of Closing Conditions.** Neither Purchaser nor Sellers may rely on the failure of any condition to their respective obligations to consummate the transactions contemplated hereby set forth in Section 7.1 or Section 7.2, as the case may be, to be satisfied if such failure was caused by such Party's or its Affiliates' failure to use its reasonable best efforts (or commercially reasonable efforts, with respect to those matters contemplated by Section 5.3, respectively, as applicable) to satisfy the conditions to the consummation of the transactions contemplated hereby or by any other breach of a representation, warranty, or covenant hereunder.

## **ARTICLE VIII**

### **TERMINATION**

**Section 8.1 Termination of Agreement.** The Parties may terminate this Agreement at any time prior to the Closing as provided below:

(a) by the mutual written consent of the Parties;

(b) by any Party by giving written notice to the other Parties if any court of competent jurisdiction or other competent Governmental Authority shall have enacted or issued a Law or Decree or taken any other action permanently restraining, enjoining or otherwise prohibiting the consummation of the transactions contemplated by this Agreement and such Law shall have become effective and such Decree or other action shall have become final and non-appealable;

(c) by Purchaser by giving notice to each Seller if the Closing has not occurred prior to December 15, 2018 (the "Outside Date");

(d) by Purchaser by giving notice to each Seller if the Bankruptcy Court has not entered the Bidding Procedures Order on or before the date that is thirty-two (32) calendar days after the Petition Date or the Bidding Procedures Order has been entered but is stayed, withdrawn, or rescinded as of such date;

(e) by Purchaser giving notice to each Seller if the Bankruptcy Court has not

entered the Sale Order on or before November 30, 2018;

(f) by Purchaser by giving notice to each Seller if the Bankruptcy Court does not approve the Breakup Fee and Expense Reimbursement;

(g) by Purchaser by giving notice to each Seller if an order has been entered dismissing any of the Bankruptcy Cases, converting all or any of the Bankruptcy Cases to Chapter 7 cases or if any Seller files a motion or other pleading seeking the dismissal or conversion of all or any of the Bankruptcy Cases under Section 1112 of the Bankruptcy Code or otherwise;

(h) by Purchaser by giving notice to each Seller at any time after the appointment of a Chapter 7 trustee or an examiner with expanded powers in any of the Bankruptcy Cases;

(i) by Purchaser by giving notice to each Seller in the event the Bankruptcy Court grants relief from the automatic stay to any party to permit foreclosure or the exercise of other remedies on any material Acquired Assets of the Sellers;

(j) by Purchaser by giving notice to each Seller in the event that the Sellers modify, alter or amend this Agreement without the consent of Purchaser, or in the event that the Sellers consent to any such modification, alteration or amendment;

(k) by Purchaser by giving notice to each Seller if an event of default under the DIP Financing Facility has occurred and has not been cured or waived in accordance with the terms of the DIP Financing Facility documents;

(l) by Purchaser by giving written notice to each Seller if there has been a material breach by any Seller of any representation, warranty, covenant, or agreement contained in this Agreement that has prevented the satisfaction of the conditions to the obligations of Purchaser at Closing set forth in Section 7.1(a) and Section 7.1(b), and such breach has not been waived by Purchaser, or, if such breach is curable, not cured by such Seller prior to the earlier to occur of (A) ten (10) days after receipt of Purchaser's notice of intent to terminate or (B) the Outside Date;

(m) by any Seller by giving written notice to Purchaser and the other Sellers if there has been a material breach by Purchaser of any representation, warranty, covenant, or agreement contained in this Agreement that has prevented the satisfaction of the conditions to the obligations of Sellers at Closing set forth in Section 7.2(a) and Section 7.2(b), and such breach has not been waived by such Seller, or, if such breach is curable, not cured by Purchaser prior to the earlier to occur of (A) ten (10) days after receipt of such Seller's notice of intent to terminate or (B) the Outside Date;

(n) by Sellers or Purchaser with respect to any of the Stores and/or the Acquired Assets, if (x) Sellers enter into a definitive agreement with respect to a Competing Bid with respect to the applicable Store(s) and/or the Acquired Assets, (y) the Bankruptcy Court

enters an order approving a Competing Bid with respect to such Store(s) and/or Acquired Assets and (z) the Person making such Competing Bid consummates such Competing Bid, subject to Purchaser's right to payment of the Breakup Fee and Expense Reimbursement, if applicable, in accordance with the provisions of Section 2.4; or

(o) by Purchaser if Purchaser is neither selected as the Successful Bidder (as defined in the Bidding Procedures) nor the Back-Up Bidder;

(p) by Sellers or Purchaser, if the Bankruptcy Court enters an order that precludes the consummation of the transactions contemplated hereby on the terms and conditions set forth in this Agreement; or

(q) by Seller by giving notice to the Purchaser if the Closing has not occurred prior to the Outside Date.

Section 8.2 Effect of Termination. If any Party terminates this Agreement pursuant to Section 8.1, all rights and obligations of the Parties hereunder shall terminate upon such termination and shall become null and void (except that Article I, Section 2.4, Section 3.11, Section 6.6, Section 8.3, Article IX, and this Section 8.2 shall survive any such termination) and no Party shall have any Liability (except as set forth in Section 2.4 and Section 8.3) to the other Party hereunder; provided, however, that nothing in this Section 8.2 shall relieve any Party from Liability for any breach occurring prior to any such termination (but solely to the extent such breach was willful, grossly negligent, or fraudulent) set forth in this Agreement; provided, further, that other than in the case of fraud or willful misconduct, that (a) the maximum Liability of Sellers under this Agreement shall not exceed the Breakup Fee and Expense Reimbursement and (b) the maximum liability of Purchaser under this Agreement shall not exceed the amount of the Deposit.

Section 8.3 Lease Indemnity. If this Agreement is terminated pursuant to Section 8.1(m) and Section 8.1(q), Purchaser shall indemnify Sellers for all Liabilities and Damages arising out of any Lease assumed by Sellers pursuant to section 365(k) of the Bankruptcy Code.

## **ARTICLE IX** **MISCELLANEOUS**

Section 9.1 Survival. Except for any covenant that by its terms is to be performed (in whole or in part) by any Party following the Closing, none of the representations, warranties, or covenants of any Party set forth in this Agreement or in any certificate delivered pursuant to Section 2.6(b) or Section 2.6(c) shall survive, and each of the same shall terminate and be of no further force or effect as of, the Closing.

Section 9.2 Expenses. Except as otherwise expressly set forth herein including Section 2.4(b), each Party will bear its own costs and expenses incurred in connection with this Agreement and the transactions contemplated hereby, including all fees of law firms, commercial banks, investment banks, accountants, public relations firms, experts and consultants. For the

avoidance of doubt, Purchaser shall pay all recording fees arising from the transfer of the Acquired Assets.

Section 9.3 Entire Agreement. This Agreement and the Related Agreements constitute the entire agreement between the Parties and supersede any prior understandings, agreements or representations (whether written or oral) by or between the Parties to the extent they relate in any way to the subject matter hereof.

Section 9.4 Incorporation of Exhibits and Disclosure Schedule. The Exhibits to this Agreement and the Disclosure Schedule are incorporated herein by reference and made a part hereof.

Section 9.5 Amendments and Waivers. No amendment of any provision of this Agreement shall be valid unless the same shall be in writing and signed by each Party except as expressly provided herein. No waiver of any breach of this Agreement shall be construed as an implied amendment or agreement to amend or modify any provision of this Agreement. No waiver by any Party of any default, misrepresentation or breach of warranty or covenant hereunder, whether intentional or not, shall be valid unless the same shall be in writing and signed by the Party making such waiver, nor shall such waiver be deemed to extend to any prior or subsequent default, misrepresentation or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent default, misrepresentation or breach of warranty or covenant. No conditions, course of dealing or performance, understanding or agreement purporting to modify, vary, explain, or supplement the terms or conditions of this Agreement shall be binding unless this Agreement is amended or modified in writing pursuant to the first sentence of this Section 9.5 except as expressly provided herein. Except where a specific period for action or inaction is provided herein, no delay on the part of any Party in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

Section 9.6 Succession and Assignment. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns. No Party may assign either this Agreement or any of its rights, interests, or obligations hereunder without the prior written consent of the other Parties. Notwithstanding the preceding, prior to Closing and only upon the advance written notice to Sellers, Purchaser may assign its rights under this Agreement with respect to the Stores and Assumed Leases to one or more Affiliates of Purchaser; provided, that any such assignment pursuant to this Section 9.6 shall not relieve Purchaser of any Liability or any of its obligations hereunder.

Section 9.7 Notices. All notices, requests, demands, claims and other communications hereunder shall be in writing except as expressly provided herein. Any notice, request, demand, claim, or other communication hereunder shall be deemed duly given (a) when delivered personally to the recipient; (b) one (1) Business Day after being sent to the recipient by reputable overnight courier service (charges prepaid); (c) upon receipt of confirmation of receipt if sent by facsimile transmission; (d) on the day such communication was sent by e-mail; or (e) three (3) Business Days after being mailed to the recipient by certified or registered mail, return

receipt requested and postage prepaid, and addressed to the intended recipient as set forth below:

If to any Sellers: Seasons Corporate LLC  
c/o Getzler Henrich & Associates LLC  
295 Madison Avenue  
20th Floor  
New York, NY 10017  
Telephone: (212) 697-2400 ext. 20  
Facsimile: (212) 697-4812

With a copy (which shall not constitute notice to Sellers)

to: Zeichner Ellman & Krause LLP  
1211 Avenue of the Americas, 40<sup>th</sup> Floor  
New York, New York 10036  
Attention: Nathan Schwed  
Facsimile: (212) 753-0396  
Email: nschwed@zeklaw.com

If to Purchaser: SSNS Express LLC c/o Duscany Financial  
3512 Quentin Road, Suite 204  
Brooklyn, New York 11234  
Telephone: (718) 475-4712

and

200 Public Square, Suite 2500  
Cleveland, OH 44114  
Attention: Mitchell Wolf  
Telephone: (216) 738-3040  
Facsimile: (216) 738-3050

With a copy (which shall not constitute notice to Purchaser) to:

Norton Rose Fulbright US LLP  
1301 Avenue of the Americas  
New York, New York 10019  
Attention: Samuel S. Kohn  
James A. Copeland  
Telephone: (212) 408-1060  
Facsimile: (212) 541-5369  
Email: samuel.kohn@nortonrosefulbright.com  
james.copeland@nortonrosefulbright.com

and

Klestadt Winters Jureller Southard & Stevens, LLP  
200 West 41<sup>st</sup> Street, 17<sup>th</sup> Floor  
New York, New York 10036  
Attention: Tracy L. Klestadt  
Facsimile: (212) 972-2245  
Email: tklestadt@klestadt.com

Any Party may change the address to which notices, requests, demands, claims and other communications hereunder are to be delivered by giving the other Parties notice in the manner set forth in this Section 9.7.

Section 9.8 Governing Law. This Agreement shall be governed by and construed in accordance with the internal laws of the State of New York (without giving effect to the principles of conflict of Laws thereof), except to the extent that the Laws of such state are superseded by the Bankruptcy Code.

Section 9.9 Submission to Jurisdiction; Service of Process. Each of the Parties irrevocably and unconditionally submits to the exclusive jurisdiction of the Bankruptcy Court in any Litigation arising out of or relating to this Agreement or any Related Agreement or the transactions contemplated hereby or thereby and agrees that all claims in respect of such Litigation may be heard and determined in any such court. Each Party also agrees not to (a) attempt to deny or defeat such exclusive jurisdiction by motion or other request for leave from the Bankruptcy Court or (b) bring any action or proceeding arising out of or relating to this Agreement or any Related Agreement or the transactions contemplated hereby or thereby in any other court. Each of the Parties irrevocably and unconditionally waives any objection to the laying of venue in, and any defense of inconvenient forum to the maintenance of, any Litigation so brought and waives any bond, surety or other security that might be required of any other Party with respect thereto. Any Party may make service on any other Party by sending or delivering a copy of the process to the Party to be served at the address and in the manner provided for the giving of notices in Section 9.7; provided, however, that nothing in this Section 9.9 shall affect the right of any Party to serve legal process in any other manner permitted by law or in equity. Each Party agrees that a final judgment in any Litigation so brought shall be conclusive and may be enforced by Litigation or in any other manner provided by law or in equity. The Parties intend that all foreign jurisdictions will enforce any Decree of the Bankruptcy Court in any Litigation arising out of or relating to this Agreement or any Related Agreement or the transactions contemplated hereby or thereby.

Section 9.10 Waiver of Jury Trial. EACH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY RELATED AGREEMENTS OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY.

Section 9.11 Specific Performance. Each Party acknowledges and agrees that the other Party and their respective estates would be damaged irreparably in the event a Party does not

perform its obligations under this Agreement in accordance with its specific terms or otherwise breaches this Agreement, so that, in addition to any other remedy that a Party may have under law or equity, each Party shall be entitled, without the requirement of posting a bond or other security, to injunctive relief to prevent any breaches of the provisions of this Agreement and to enforce specifically this Agreement and the terms and provisions hereof.

Section 9.12 Severability. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provisions of this Agreement. In the event that any of the provisions of this Agreement shall be held by a court or other tribunal of competent jurisdiction to be illegal, invalid or unenforceable, such provisions shall be limited or eliminated only to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect, provided that the economic or legal substance of the transactions contemplated hereby are not affected in any manner materiality adverse to any Party.

Section 9.13 No Third Party Beneficiaries. This Agreement shall not confer any rights or remedies upon any Person other than Purchaser, each Seller, and their respective successors and permitted assigns, except as set forth in Section 9.14.

Section 9.14 Non-Recourse. All claims or causes of action (whether in contract or in tort, in law or in equity, or granted by statute) that may be based upon, in respect of, arise under, out or by reason of, be connected with, or related in any manner to this Agreement or the Related Agreements may be made only against (and are expressly limited to) the Persons that are expressly identified as parties hereto or thereto (the “Contracting Parties”). In no event shall any Contracting Party have any shared or vicarious Liability for the actions or omissions of any other Person. No Person who is not a Contracting Party, including any director, officer, employee, incorporator, member, partner, manager, stockholder, Affiliate, agent, attorney or representative of, and any financial advisor or lender to, any of the foregoing (“Non-Party Affiliates”), shall have any Liability (whether in contract or in tort, in law or in equity, or granted by statute or based upon any theory that seeks to impose Liability of an entity party against its owners or affiliates) for any claims, causes of action, obligations or Liabilities arising under, out of, in connection with or related in any manner to this Agreement or the Related Agreements or based on, in respect of, or by reason of this Agreement or the Related Agreements or their negotiation, execution, performance or breach; and, to the maximum extent permitted by Law, each Contracting Party waives and releases all such Liabilities, claims and obligations against any such Non-Party Affiliates. Without limiting the foregoing, to the maximum extent permitted by Law, (a) each Contracting Party hereby waives and releases any and all rights, claims, demands, or causes of action that may otherwise be available at law or in equity, or granted by statute, to avoid or disregard the entity form of a Contracting Party or otherwise impose Liability of a Contracting Party on any Non-Party Affiliate, whether granted by statute or based on theories of equity, agency, control, instrumentality, alter ego, domination, sham, single business enterprise, piercing the veil, unfairness, undercapitalization, or otherwise; and (b) each Contracting Party disclaims any reliance upon any Non-Party Affiliates with respect to the performance of this Agreement or the Related Agreements or any representation or warranty made in, in connection with, or as an inducement to this Agreement or the Related Agreements. The Parties acknowledge and agree that the Non-Party Affiliates are intended third-party beneficiaries of this Section 9.14.



Section 9.15 Mutual Drafting. The Parties 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.

Section 9.16 Disclosure Schedule. All capitalized terms not defined in the Disclosure Schedule shall have the meanings ascribed to them in this Agreement. The representations and warranties of Sellers in this Agreement are made and given, and the covenants are agreed to, subject to the disclosures and exceptions set forth in the Disclosure Schedule. The disclosure of any matter in any section of the Disclosure Schedule shall be deemed to be a disclosure for all purposes of this Agreement and all other sections of the Disclosure Schedule to which such matter relates if the relevance of such item is reasonably apparent from the information disclosed. The listing of any matter shall expressly not be deemed to constitute an admission by Sellers, or to otherwise imply, that any such matter is material, is required to be disclosed under this Agreement or falls within relevant minimum thresholds or materiality standards set forth in this Agreement. No disclosure in the Disclosure Schedule relating to any possible breach or violation of any Contract or law shall be construed as an admission or indication that any such breach or violation exists or has actually occurred. In no event shall the listing of any matter in the Disclosure Schedule be deemed or interpreted to expand the scope of Sellers' representations, warranties, or covenants set forth in this Agreement. All attachments to the Disclosure Schedule are incorporated by reference into the applicable section of the Disclosure Schedule in which they are directly or indirectly referenced. The Disclosure Schedule may be amended at any time on or before the Closing Date as more information continues to become available.

Section 9.17 Headings; Table of Contents. The section headings and the table of contents contained in this Agreement and the Disclosure Schedule are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

Section 9.18 Counterparts; Facsimile and Electronic Signatures. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together will constitute one and the same instrument. This Agreement or any counterpart may be executed and delivered by facsimile copies or delivered by electronic communications by portable document format (.pdf), each of which shall be deemed an original.

Section 9.19 Limitations Under Applicable Law. Notwithstanding anything to the contrary contained in this Agreement, Sellers' obligations hereunder shall be subject to limitations under applicable Law.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first above written.

BLUE GOLD EQUITIES LLC

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

Title: CRO

CENTRAL AVE. MARKET LLC

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

Title: CRO

AMSTERDAM AVE. MARKET LLC

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

Title: CRO

WILMOT ROAD MARKET, LLC

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

Title: CRO

SEASONS EXPRESS INWOOD LLC

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

Title: CRO

SEASONS EXPRESS LAKEWOOD LLC

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

Title: LRO

SEASONS MARYLAND LLC

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

Title: LRO

SEASONS CLIFTON LLC

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

Title: LRO

LAWRENCE SUPERMARKET LLC

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


Title: LRO

UPPER WEST SIDE MARKET LLC

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

Title: LRO

SEASONS CORPORATE LLC

By: 

Title: 

SEASONS PROPERTY MANAGEMENT LLC

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

Title:

SSNS EXPRESS LLC

By: LB Brothers LLC, its Managing Member

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

Name: Joseph Bistritzky

Title: Authorized Person

SEASONS CORPORATE LLC

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

Title:

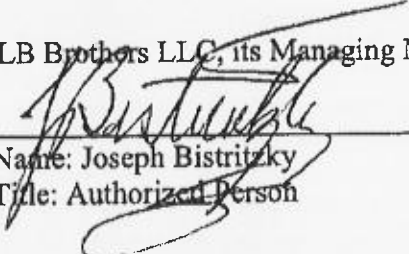
SEASONS PROPERTY MANAGEMENT LLC

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

Title:

SSNS EXPRESS LLC

By: LB Brothers LLC, its Managing Member

By:  \_\_\_\_\_  
Name: Joseph Bistrizky  
Title: Authorized Person

**EXHIBIT D**

**ZEICHNER ELLMAN & KRAUSE LLP**

1211 Avenue of the Americas, 40<sup>th</sup> Floor  
 New York, New York 10036  
 Telephone: (212) 223-0400  
 Facsimile: (212) 753-0396  
 Nathan Schwed

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

**UNITED STATES BANKRUPTCY COURT  
 EASTERN DISTRICT OF NEW YORK**

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In re	:
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SEASONS CORPORATE LLC, <i>et al.</i> ,	:
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	:
Debtors. <sup>1</sup>	:
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Chapter 11

Case No. 18-45284 (NHL)

Jointly Administered

**NOTICE OF POTENTIAL ASSUMPTION AND ASSIGNMENT OF  
 EXECUTORY CONTRACTS AND UNEXPIRED LEASES FOR NON-DEBTOR  
 COUNTERPARTIES TO EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

**TO ALL NON-DEBTOR COUNTERPARTIES TO  
 EXECUTORY CONTRACTS OR LEASES WITH THE DEBTORS:**

**PLEASE TAKE NOTICE** that, on October 15, 2018, the above-captioned debtors and debtors-in-possession (collectively, the “**Debtors**”) filed their *Amended Motion For Orders Pursuant to Sections 105(a), 363, 365, and 503 of the Bankruptcy Code, Bankruptcy Rules 2002, 6004 and 6006, Local Rules 6004-1, 6006-1 and 9006-1: (A)(i) Establishing Bidding Procedures*

<sup>1</sup> The Debtors in these Chapter 11 cases, together with the last four digits of each Debtor’s federal tax identification number, are as follows: Blue Gold Equities LLC (7766), Central Avenue Market LLC (7961), Amsterdam Avenue Market LLC (7988), Wilmot Road Market LLC (8020), Seasons Express Inwood LLC (1703), Seasons Lakewood LLC (0295), Seasons Maryland LLC (1895), Seasons Clifton LLC (3331), Seasons Cleveland LLC (7367), Lawrence Supermarket LLC (8258), Upper West Side Market LLC (8895) and Seasons Corporate LLC (2266). The mailing address for the Debtors, solely for purposes of notices and communications, is: 5 Dougherty Boulevard, Inwood, NY 11096.

*and Bidding Protections in Connection with the Sale of Certain of the Assets of the Debtors, (ii) Approving the Form and Manner of Notices, (iii) Approving the Asset Purchase Agreement Subject to Higher and Better Offers and (iv) Settling a Sale Hearing Date; and (B)(i) Approving the Sale of Certain Assets of the Debtors Free and Clear of Liens, Claims and Encumbrances, (ii) Authorizing the Assumption and Assignment of Certain Unexpired Leases and Executory Contracts; and (iii) Granting Related Relief [Docket No. \_\_\_\_] (the “**Amended Sale Motion**”).*

**PLEASE TAKE FURTHER NOTICE** that in connection with the Amended Sale Transaction,<sup>2</sup> the Debtors have filed a schedule of all of the Debtors’ executory contracts and unexpired leases that may potentially be assumed and assigned to the New Purchaser (the “**Transferred Contracts**”) in accordance with the Amended Asset Purchase Agreement, (the “**Assumption Schedule**”). The Assumption Schedule is attached hereto as **Exhibit A**.

**PLEASE TAKE FURTHER NOTICE** that the Bankruptcy Court has established **November 13, 2018 at 4:00 p.m.** (the “**Sale Objection Deadline**”) as the date by which all non-Debtor counterparties parties to the Transferred Contracts must electronically file with the Clerk of the Bankruptcy Court an objection to the assumption and assignment of the Transferred Contract to which they are parties but solely with respect to adequate assurance of future performance (an “**Adequate Assurance Objection**”), which filing must describe in detail in writing the basis of any such objection, and serve a copy of the Adequate Assurance Objection upon (i) the proposed attorneys for the Debtors, Zeichner Ellman & Krause LLP, 1211 Avenue of the Americas, 40<sup>th</sup> Floor, New York, New York 10036 (Attn: Nathan Schwed), (ii) the attorneys for the New Purchaser, (a) Klestadt Winters Jureller Southard & Stevens, LLP, 200 West 41<sup>st</sup> Street, 17<sup>th</sup> Floor, New York, New York 10036 (Attn: Tracy L. Klestadt), and (b) Norton Rose Fulbright US LLP,

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<sup>2</sup> Capitalized terms not defined herein shall have the meaning ascribed to them in the Amended Sale Motion.



1301 Avenue of the Americas, New York, New York 10019-6022 (Attn. Samuel S. Kohn and James A. Copeland), (iii) the Office of the United States Trustee for the Eastern District of New York, U.S. Federal Office Building, 201 Varick Street, Room 1006, New York, New York 10014 (Attn: William Curtin) and (iv) proposed counsel for the Committee, Goldberg Weprin Finkel Goldstein LLP, 1501 Broadway, 22nd Floor, New York, NY 10036 (Attn: Kevin Nash).

**PLEASE TAKE FURTHER NOTICE** that any party that is required to file an Adequate Assumption Objection, but fails to do so shall be forever barred from asserting any other Adequate Assumption Objection against the Debtors, their estates, the New Purchaser, or its designee, and/or any Successful Bidder arising under such Transferred Contract.

**PLEASE TAKE FURTHER NOTICE** that the inclusion of any agreement as a contract or lease on this Assumption Schedule does not constitute an admission by the Debtors that such agreement actually constitutes an executory contract or unexpired lease under section 365 of the Bankruptcy Code, and the Debtors expressly reserve the right to challenge the status of any agreement included as a Transferred Contract. The Debtors further reserve any and all rights with respect to any contracts, leases, the Transferred Contracts, the Cure Costs, and any document or issue related thereto.

Dated: New York, New York  
October \_\_, 2018

**ZEICHNER ELLMAN & KRAUSE LLP**

By: \_\_\_\_\_  
Nathan Schwed  
1211 Avenue of the Americas, 40<sup>th</sup> Floor  
New York, New York 10036  
Telephone: (212) 223-0400  
Facsimile: (212) 753-0396  
Email: nschwed@zeklaw.com

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

**Exhibit A**  
**Assumption Schedule**

<b><u>Name of Counterparty</u></b>	<b><u>Agreement</u></b>

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**EXHIBIT E**

**ZEICHNER ELLMAN & KRAUSE LLP**

1211 Avenue of the Americas, 40<sup>th</sup> Floor  
 New York, New York 10036  
 Telephone: (212) 223-0400  
 Facsimile: (212) 753-0396  
 Nathan Schwed

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

**UNITED STATES BANKRUPTCY COURT  
 EASTERN DISTRICT OF NEW YORK**

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In re	:
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SEASONS CORPORATE LLC, <i>et al.</i> ,	:
	:
	:
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	:
Debtors. <sup>1</sup>	:
-----X	

Chapter 11  
 Case No. 18-45284 (NHL)  
 Jointly Administered

**NOTICE OF CURE COSTS FOR  
 UNEXPIRED LEASES AND EXECUTORY CONTRACTS**

**TO ALL NON-DEBTOR COUNTERPARTIES TO  
 EXECUTORY CONTRACTS OR LEASES WITH THE DEBTORS:**

**PLEASE TAKE NOTICE** that, on October 15, 2018, the above-captioned debtors and debtors-in-possession (collectively, the “**Debtors**”) filed their *Amended Motion For Orders Pursuant to Sections 105(a), 363, 365, and 503 of the Bankruptcy Code, Bankruptcy Rules 2002, 6004 and 6006, Local Rules 6004-1, 6006-1 and 9006-1: (A)(i) Establishing Bidding Procedures*

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<sup>1</sup> The Debtors in these Chapter 11 cases, together with the last four digits of each Debtor’s federal tax identification number, are as follows: Blue Gold Equities LLC (7766), Central Avenue Market LLC (7961), Amsterdam Avenue Market LLC (7988), Wilmot Road Market LLC (8020), Seasons Express Inwood LLC (1703), Seasons Lakewood LLC (0295), Seasons Maryland LLC (1895), Seasons Clifton LLC (3331), Seasons Cleveland LLC (7367), Lawrence Supermarket LLC (8258), Upper West Side Market LLC (8895) and Seasons Corporate LLC (2266). The mailing address for the Debtors, solely for purposes of notices and communications, is: 5 Dougherty Boulevard, Inwood, NY 11096.

*and Bidding Protections in Connection with the Sale of Certain of the Assets of the Debtors, (ii) Approving the Form and Manner of Notices, (iii) Approving the Asset Purchase Agreement Subject to Higher and Better Offers and (iv) Settling a Sale Hearing Date; and (B)(i) Approving the Sale of Certain Assets of the Debtors Free and Clear of Liens, Claims and Encumbrances, (ii) Authorizing the Assumption and Assignment of Certain Unexpired Leases and Executory Contracts; and (iii) Granting Related Relief [Docket No. \_\_\_\_] (the “**Amended Sale Motion**”).*

**PLEASE TAKE FURTHER NOTICE** that, on October \_\_\_\_, 2018, the Bankruptcy Court entered an order [Docket No. \_\_\_\_] (the “**Bidding Procedures Order**”) that, among other things, approved procedures relating to the assumption and assignment by the Debtors’ of their unexpired leases and executory contracts to the New Purchaser (the “**Transferred Contracts**”) in accordance with the Amended Asset Purchase Agreement, including the filing of (i) an Assumption Schedule and a separate Cure Notice with respect to the Transferred Contracts and (ii) any objections to (a) adequate assurance of future performance and (b) proposed cure costs (the “**Cure Costs**”), with respect to the Transferred Contracts.

**PLEASE TAKE FURTHER NOTICE** that in connection with the Amended Sale Transaction,<sup>2</sup> the Debtors have filed the *Notice of Potential Assumption and Assignment of Executory Contracts and Unexpired Leases For Non-Debtor Counterparties to Executory Contracts and Unexpired Leases* [Docket No. \_\_\_\_] in connection with the Transferred Contracts. Under the Bidding Procedures Order, the deadline to file any objection to the assumption and assignment of the Transferred Contracts, but solely on the based on adequate assurance of future performance, expires on November 13, 2018 at 4:00 p.m. (EST).

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<sup>2</sup> Capitalized terms not defined herein shall have the meaning ascribed to them in the Bidding Procedures Order.

**PLEASE TAKE FURTHER NOTICE** that pursuant to the Bidding Procedures Order, the Debtors are filing and sending this Cure Notice listing the contracts and leases that may be assumed and assigned to the New Purchase and the corresponding Cure Costs set forth on **Exhibit A hereto**.

**PLEASE TAKE FURTHER NOTICE** that you are receiving this Cure Notice because the Debtors may elect, pursuant and subject to the terms of the Amended Asset Purchase Agreement, to assume and assign your contract to the New Purchaser.

**PLEASE TAKE FURTHER NOTICE** that the Bankruptcy Court has established **November [ ] , 2018 at 4:00 p.m.** (the “**Cure Objection Deadline**”) as the date by which all non-Debtor counterparties parties to the Transferred Contracts must electronically file with the Clerk of the Bankruptcy Court an objection to the proposed Cure Costs for the Transferred Contract to which they are parties (an “**Cure Objection**”), which filing must describe in detail in writing the basis of any such objection and the amount the party asserts as the correct Cure Cost, and serve a copy of the Cure Objection upon (i) the proposed attorneys for the Debtors, Zeichner Ellman & Krause LLP, 1211 Avenue of the Americas, 40<sup>th</sup> Floor, New York, New York 10036 (Attn: Nathan Schwed), (ii) the attorneys for the New Purchaser, (a) Klestadt Winters Jureller Southard & Stevens, LLP, 200 West 41<sup>st</sup> Street, 17<sup>th</sup> Floor, New York, New York 10036 (Attn: Tracy L. Klestadt), and (b) Norton Rose Fulbright US LLP, 1301 Avenue of the Americas, New York, New York 10019-6022 (Attn. Samuel S. Kohn and James A. Copeland), (iii) the Office of the United States Trustee for the Eastern District of New York, U.S. Federal Office Building, 201 Varick Street, Room 1006, New York, New York 10014 (Attn: William Curtin) and (iv) proposed counsel for the Committee, Goldberg Weprin Finkel Goldstein LLP, 1501 Broadway, 22nd Floor, New York, NY 10036 (Attn: Kevin Nash).

**PLEASE TAKE FURTHER NOTICE** that, pursuant to the Bidding Procedures Order, any counterparty that files a Cure Objection shall also provide to the Debtors appropriate documentation in support of the alleged alternative Cure Cost.

**PLEASE TAKE FURTHER NOTICE** that any party that is required to file an Cure Objection, but fails to do so shall be forever barred from asserting any other Cure Objection against the Debtors, their estates, the New Purchaser, or its designee, arising under such Transferred Contract.

**PLEASE TAKE FURTHER NOTICE** that the inclusion of any agreement as an contract or lease on this Cure Notice does not constitute an admission by the Debtors that such agreement actually constitutes an executory contract or unexpired lease under section 365 of the Bankruptcy Code, and the Debtors expressly reserve the right to challenge the status of any agreement included as an Transferred Contract. The Debtors further reserve any and all rights with respect to any contracts, leases, the Transferred Contracts, the Cure Costs, and any document or issue related thereto.

Dated: New York, New York  
October \_\_, 2018

**ZEIHCNER ELLMAN & KRAUSE LLP**

By: \_\_\_\_\_  
Nathan Schwed  
1211 Avenue of the Americas, 40<sup>th</sup> Floor  
New York, New York 10036  
Telephone: (212) 223-0400  
Facsimile: (212) 753-0396  
Email: nschwed@zeklaw.com

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

**Exhibit A**  
**Proposed Cure Costs**

<b><u>Name of Counterparty</u></b>	<b><u>Agreement</u></b>	<b><u>Cure Cost</u></b>

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