

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF PENNSYLVANIA

IN RE: : CASE NO. 17-20526(TPA)

UNIQUE VENTURES GROUP, LLC, :

Debtor. :

CHAPTER 11

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M. COLETTE GIBBONS, as Chapter 11  
Trustee, :

Movant, :

v. :

3D ACQUISITIONS, LP, ACCESS  
POINT, INC., BAINBRIDGE LIMITED  
PARTNERS, ELMHURST PROPERTIES,  
INC., GAR FIELD CLUB LP, GERALD  
FRY COMPANY, PERKINS & MARIE  
CALLENDER'S LLC, PERKINS  
HOLDINGS, LLC, REINHART  
FOODSERVICE, LLC, PENNSYLVANIA  
DEPARTMENT OF REVENUE, ALLY  
BANK, US FOODS, INC., WARREN  
COUNTY TAX CLAIM BUREAU,  
BUTLER COUNTY TAX CLAIM  
BUREAU, ERIE WATER WORKS,  
MCKEAN COUNTY TAX CLAIM  
BUREAU, SPIRIT MASTER FUNDING  
IV, LLC, SPIRIT FINANCE  
ACQUISITIONS, LLC, SPIRIT MASTER  
FUNDING V, LLC, and SPIRIT  
MASTER FUNDING III, LLC,

HEARING DATE & TIME:  
TBD

RESPONSE DATE:  
TBD

Respondents. :

JUDGE THOMAS AGRESTI

**MOTION OF CHAPTER 11 TRUSTEE FOR AN ORDER (A) AUTHORIZING THE  
SALE OF SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS FREE AND CLEAR  
OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS; (B) AUTHORIZING  
THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS  
AND UNEXPIRED LEASES; AND (C) GRANTING RELATED RELIEF**

M. Colette Gibbons, Chapter 11 Trustee (the “Trustee”) of Unique Ventures Group LLC (the “Debtor”), by and through her undersigned counsel, hereby moves the Court (this “Motion”), pursuant to sections 105, 363, and 365 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”), Rules 2002, 6004, and 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 6004-1 of the Local Rules of the United States Bankruptcy Court for the Western District of Pennsylvania (the “Local Rules”), for the entry of an order (the “Sale Order”): (a) authorizing the sale of substantially all of the Debtor’s assets free and clear of all liens, claims, encumbrances, and interests; (b) authorizing the assumption and assignment of certain executory contracts and unexpired leases; and (c) granting related relief.

In support of the Motion, the Trustee represents as follows:

**Background**

1. On February 13, 2017 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. On March 23, 2017, the Court appointed the Trustee as Chapter 11 Trustee for the Debtor and its estate pursuant to an Order (Docket No. 158).

2. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The venue of the Debtor’s chapter 11 case and this Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. Contemporaneous with the filing of this Motion, the Trustee filed the Motion of Chapter 11 Trustee for an Order: (I) Approving Bid Procedures for Sale of Substantially All of the Debtor’s Assets; (II) Authorizing and Scheduling an Auction; (III) Scheduling Hearing for Approval of the Sale of Assets Free and Clear of Liens and the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases to the Successful Bidder; (IV) Approving Expense Reimbursement; (V) Approving Certain Deadlines and the Form, Manner, and Sufficiency of Notice; and (VI) Granting Other Related Relief (the “Procedures Motion”), which

seeks approval of certain sale and bid procedures for the sale, as more particularly set forth therein (the “Bid Procedures”).

4. The Trustee anticipates that the Court will approve Bid Procedures in some form, and such Bid Procedures will govern the sale process.

**The Stalking Horse Offer for the Debtor’s Assets**

5. The Trustee and her advisors have worked diligently to identify a potential purchaser for the Debtor’s Assets. During that process, SFR II Holdings, LLC, a Delaware limited liability company (the “Stalking Horse Bidder”), came forward and expressed an interest in entering into a stalking horse agreement for the sale of substantially all of the Debtor’s Assets. The Trustee negotiated at arm’s length with the Stalking Horse Bidder and determined, after consulting with her advisors, that the terms proposed by the Stalking Horse Bidder constitute the best available stalking horse bid for the Assets and could serve to set a floor for the auction process.

6. Thereafter, on October 12, 2017, the Trustee and the Stalking Horse Bidder entered into that certain asset purchase agreement (as amended, supplemented, or modified from time to time, the “Stalking Horse APA”), pursuant to which Trustee agreed to sell the Assets to the Stalking Horse Bidder in exchange for \$2,868,000 plus payment of cure costs for any contracts to be assumed and any specified assumed liabilities (the “Stalking Horse Bid”), subject to higher or better bids. The sale terms proposed by the Stalking Horse Bidder are set forth with particularity in the Stalking Horse APA, a copy of which is attached hereto as Exhibit A. In general, however, the Stalking Horse Bidder has agreed to purchase substantially all of the Debtor’s assets (collectively, the “Assets”), other than cash, cash equivalents, pre-closing accounts receivable and certain non-operating assets, such as causes of action arising under chapter 5 of the Bankruptcy

Code and other assets not associated with the intellectual property of Perkins and Marie Callender's LLC, all of which will be left behind for the Debtor's estate.<sup>1</sup>

**Postpetition Marketing Process**

7. From the time of execution of the Stalking Horse APA, the Trustee and her advisors intend to conduct a postpetition marketing process to qualify any potential buyers and sell the Assets to the highest and best bidder through the Court-approved process as set forth in the Bid Procedures. Prior to the execution of the Stalking Horse APA, the Trustee's advisors prepared a transaction introduction teaser that was distributed to potential purchasers, which summary provided a brief overview of the Debtor and its operations. This teaser was sent to parties whom the Trustee believed might have a potential interest in the Debtor's business and assets and the financial wherewithal to consummate the transaction. A form of nondisclosure agreement ("NDA") was also sent to potentially interested parties responding to the teaser.

8. For those interested parties that executed an NDA and provided a further written indication of interest, the Trustee's advisors sent a confidential information memorandum (the "Memorandum") relating to the Debtor, which includes a more comprehensive analysis of the Debtor's history, operations, strategy and financial performance. The Trustee's advisors also set up an electronic data room website (the "Data Room"), which contains financial information as well as leases, contracts and other documents pertaining to the Debtor's operations and financial performance. All of the information can be accessed by potential bidders (once such parties execute the NDA and provide a further written indication of interest) via password through the Data Room. The Trustee and her professionals intend to continue to reach out to prospective bidders up to the deadline for submission of bids.

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<sup>1</sup> In the event of a conflict between the summary descriptions of the Stalking Horse APA contained here and the Stalking Horse APA, the latter shall control.

9. As set forth with the Procedures Motion, the Trustee requests that the Court schedule an auction in December 2017 (the “Auction”) at which time the Court will accept bids for substantially all of the Assets. The Court will set a sale hearing immediately following the Auction (the “Sale Hearing”).

10. The Trustee intends to supply further testimony and evidence of the postpetition marketing and sale process prior to or at the Sale Hearing, which will further describe the steps she and her advisors took after the filing of this Motion to solicit offers and ultimately consummate a deal for the Assets.

**Proposed Sale**

11. The sale of substantially all of the Assets, approval of which is sought by this Motion, shall be either to (a) the Stalking Horse Bidder pursuant to the Stalking Horse APA or (b) the highest and best bidder at the Auction. A successful bidder (i.e., the party or parties to whom the Trustee will seek Court approval to sell the Assets) – whether the Stalking Horse Bidder or the highest and best bidder at the Auction (which may also be the Stalking Horse Bidder) – is referred to herein as a “Successful Bidder.”

**Relief Requested**

12. The Trustee respectfully requests that the Court: (a) authorize the sale of the Assets to the Successful Bidder, free and clear of all liens, claims, encumbrances, or other interests pursuant to sections 363(b), (f), and (m) and 365 of the Bankruptcy Code, with such liens, claims, rights, interests, and encumbrances (collectively, the “Interests”) to attach to the sale proceeds of the Assets with the same validity, priority, extent, and perfection as existed immediately prior to

such sale;<sup>2</sup> (b) approve the assumption and assignment of the Assigned Contracts (defined below) under section 365 of the Bankruptcy Code, subject to, and at the time of, closing of the sale; and (c) grant such other relief as may be necessary or appropriate.

### **BASIS FOR RELIEF**

#### **A. The Sale Was Negotiated in Good Faith and Made for Sound Business Reasons; The Purchase Price Is Fair and Reasonable**

13. Section 363(b) of the Bankruptcy Code specifically authorizes asset sales outside the ordinary course of business. See 11 U.S.C. § 363(b)(1) (“[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate”). To approve the use, sale, or lease of property outside of the ordinary course of business, the Court must find some articulated business justification for the proposed action. See In re Abbotts Dairies of Pa. Inc., 788 F.2d 143, 145-47 (3d Cir. 1986) (implicitly adopting the articulated business justification and good faith tests of Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1070 (2d Cir. 1983)); see also In re Del. & Hudson Ry. Co., 124 B.R. 169, 175-76 (D. Del. 1991) (concluding that the Third Circuit had adopted a “sound business purpose” test in Abbotts Dairies).

14. Generally, courts examine four factors when determining whether a sale of a debtor’s assets should be approved: (a) whether a sound business reason exists for the proposed transaction; (b) whether fair and reasonable consideration is provided; (c) whether the transaction has been proposed and negotiated in good faith; and (d) whether adequate and reasonable notice is provided. See Lionel, 722 F.2d at 1071 (setting forth the “sound business purpose” test); Abbotts

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<sup>2</sup> In the case caption to this Motion, the Trustee listed as Respondents all parties that the Trustee believes have asserted or may assert an Interest in the Assets. The Trustee reserves her right to object to any Interest asserted against the Assets.

Dairies, 788 F.2d at 145-57 (implicitly adopting the articulated business justification test and adding the “good faith” requirement); Del. & Hudson Ry., 124 B.R. at 176.

15. In the instant case, the sale of the Assets serves a sound business purpose: it is the most viable exit strategy for the Debtor’s chapter 11 case that can yield a recovery to creditors. The sale is designed to preserve and enhance the value of the Assets as a whole, and ensures that the Assigned Contracts (as defined below) are assigned while they have their highest value, prior to any risk of premature termination. The sale of the Assets will preserve the Debtor’s enterprise value and will return a greater benefit to the Debtor’s estate than any of the alternatives, including a sale at a future date or the liquidation of the Assets on a piecemeal basis.

16. In addition, the incidental impact of the Debtor’s bankruptcy to interested stakeholders will be minimized by a sale. For example, the proposed sale price under the Stalking Horse APA provides a potential recovery to the Debtor’s stakeholders, many executory contracts and unexpired leases will be assumed and assigned, and the Successful Bidder is likely to hire a significant number of the Debtor’s employees. Absent a sale, the Trustee may have to begin the wholesale liquidation of the Assets to the detriment of the Debtor’s estate and its creditors. The Trustee believes that the proposed sale is the best restructuring choice currently available for the Debtor’s estate and concludes that the sale is supported by a number of sound business reasons.

17. Whether or not the Stalking Horse Bidder is ultimately a Successful Bidder, the Stalking Horse APA is the product of good faith and arm’s length negotiations and is on commercially reasonable terms. The Trustee and the Stalking Horse Bidder, with the assistance of their advisors, negotiated the terms of Stalking Horse APA. The Stalking Horse Bidder provided substantial value to the estate in providing a baseline value for the Assets. The bidding at the Auction will be conducted in accordance with the Bid Procedures and the Procedures Order.

If the Stalking Horse Bidder is not the Successful Bidder, the purchase agreement between the Trustee and the Successful Bidder will also be the product of good faith and arm's length negotiations. In addition, the Successful Bidder's purchase agreement will be the result of higher and better offers and the product of a Court-sanctioned process set forth in the Bid Procedures.

18. Moreover, no prejudice will result to any parties in interest because the sale has been noticed in accordance with the notice provisions established by the Bankruptcy Rules, the Local Rules, and/or as provided by the Procedures Order. Such notice has: (a) afforded all creditors and parties in interest with adequate and reasonable notice of the sale; (b) provided sufficient information regarding the sale of the Assets and the time for filing objections to the sale; and (c) met the requirements of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and legal due process.

19. The fairness and reasonableness of the consideration that will be paid by the Successful Bidder, pending Court approval, is demonstrated by the marketing efforts that the Trustee engaged in over the past several months and which will continue until the sale. The Trustee and her professionals then engaged a fair, reasonable, and competitive sale process under the Bid Procedures (including the Auction), ultimately culminating in a proposed sale of the Assets. Each of these efforts by the Trustee demonstrates that the purchase price obtained, after completion of this process, is fair and reasonable and supported by sound business reasons.

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

20. In accordance with section 363(f) of the Bankruptcy Code, a debtor in possession may sell property "free and clear of any interest in such property of an entity other than the estate" if any one of the following conditions is satisfied: (a) such a sale is permitted under applicable non-bankruptcy law; (b) the party asserting such a lien, claim, or interest consents to such sale;



(c) the interest is a lien and the purchase price for the property is greater than the aggregate amount of all liens on the property; (d) the interest is the subject of a bona fide dispute; or (e) the party asserting the lien, claim, or interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction for such interest. See 11 U.S.C. § 363(f).

21. The term “any interest,” as used in section 363(f), is not defined in the Bankruptcy Code. Folger Adam Security v. DeMatteis/MacGregor, JV, 209 F.3d 252, 259 (3d Cir. 2000). In Folger Adam Security, the Third Circuit specifically addressed the scope of the term “any interest” and observed that, while some courts have “narrowly interpreted that phrase to mean only *in rem* interests in Property,” the trend in modern cases is towards “a broader interpretation which includes other obligations that may flow from ownership of the Property.” Id. at 258. As the Fourth Circuit determined in In re Leckie Smokeless Coal Co., 99 F.3d 573, 581-582 (4th Cir. 1996), section 363(f) is not limited to *in rem* interests. Thus, a debtor “could sell [its] assets under § 363(f) free and clear of successor liability that otherwise would have arisen under federal statute.” Id. at 581-582; see also In re Appalachia Fuels, LLC, 503 F.3d 538 (6th Cir. 2007) (approving a sale free and clear of “claims” arising as coal commission sales).

22. Importantly, section 363(f) of the Bankruptcy Code is drafted in the disjunctive. Thus, satisfaction of any of the requirements enumerated therein will suffice to allow the sale of the Assets free and clear of all the Interests, except with respect to any Interests that constitute assumed liabilities pursuant to a Successful Bidder’s asset purchase agreement (collectively, the “Assumed Liabilities”). See In re Gulf States Steel, Inc. of Ala., 285 B.R. 497, 506 (Bankr. N.D. Ala. 2002); Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot), 94 B.R. 343, 345 (E.D. Pa. 1988). The Trustee submits that each Interest (that is not one of the Assumed Liabilities) satisfies at least one of the five conditions of section 363(f) of the Bankruptcy Code, and that any such

Interest will be adequately protected by either being paid in full at the time of closing, or attaching to the proceeds of the sale, subject to any claims and defenses the Debtor and/or the Trustee may possess with respect thereto. The Trustee accordingly requests authority to convey the Assets to the Successful Bidder, free and clear of all Interests except the Assumed Liabilities under the express terms of a Successful Bidder's asset purchase agreement, with such Interests to attach to the proceeds from the sale of the Assets, with the same validity, extent, priority, and perfection as existed immediately prior to the Sale, subject to the terms of the Successful Bidder's asset purchase agreement and the proposed Sale Order.

23. Finally, the Trustee submits that the sale should not expose the Successful Bidder to any liability as a successor of the Debtor or its estate. Courts have also consistently held that a buyer of a debtor's assets pursuant to a Bankruptcy Code section 363 sale takes free and clear from successor liability relating to the debtor's business. See, e.g., In re Trans World Airlines, Inc., 322 F.3d 283, 288-90 (3d Cir. 2003) (sale of assets pursuant to section 363(f) barred successor liability claims for employment discrimination and rights under travel voucher program); In re Leckie Smokeless Coal Co., 99 F.3d at 585 (affirming the sale of debtors' assets free and clear of certain taxes); In re Insilco Techs., Inc., 351 B.R. 313, 322 (Bankr. D. Del. 2006) (stating that a 363 sale permits a buyer to take ownership of property without concern that a creditor will file suit based on a successor liability theory); see also In re Chrysler LLC, 405 B.R. 84, 111 (Bankr. S.D.N.Y. 2009) (“[I]n personam claims, including any potential state successor or transferee liability claims against New Chrysler, as well as in rem interests, are encompassed by section 363(f) and are therefore extinguished by the Sale Transaction.”).

24. Accordingly, the Court should approve the sale of the Assets to the Successful Bidder free and clear of Interests under section 363(f) of the Bankruptcy Code, and all potential

claimants should be compelled to look exclusively to the proceeds of the sale for satisfaction of their claims.

**C. The Sale Is in Good Faith Under Section 363(m) of the Bankruptcy Code and Not in Violation of Section 363(n) of the Bankruptcy Code**

25. Section 363(m) of the Bankruptcy Code provides:

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

11 U.S.C. § 363(m). Section 363(n) of the Bankruptcy Code, among other things, provides, in turn, that a trustee may avoid a sale under such section if the sale price was controlled by an agreement among potential bidders at the sale. While the Bankruptcy Code does not define “good faith,” the Third Circuit in Abbotts Dairies has held that:

[t]he requirement that a Buyer act in good faith . . . speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a Buyer’s good faith status at a judicial sale involves fraud, collusion between the Buyer and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

788 F.2d at 147 (citations omitted).

26. As explained above, the asset purchase agreement between the Trustee and the Successful Bidder is or will be the product of good faith and free from self-dealing. The Trustee intends to establish at the Sale Hearing that such asset purchase agreement was a negotiated, arm’s length transaction, in which the Successful Bidder has acted in good faith, without collusion or fraud of any kind, and in compliance with the Abbotts Dairies standard. Moreover, if there is an Auction, the Successful Bidder will have the corresponding benefit of the Court overseeing the Auction where the Successful Bidder was determined. The evidence at the Sale Hearing will

further establish that neither the Trustee nor the Successful Bidder have engaged in any conduct that would prevent the application of section 363(m) of the Bankruptcy Code or allow the Trustee to avoid the sale pursuant to section 363(n) of the Bankruptcy Code with respect to the consummation of the sale transaction or the transfer of the Assets and the assignment of the Assigned Contracts to the Successful Bidder.

27. Accordingly, the Trustee requests that the Court find that the Successful Bidder has purchased the Assets in good faith within the meaning of section 363(m) of the Bankruptcy Code, and is, therefore entitled to the protections of sections 363(m) of the Bankruptcy Code.

**D. Authorization of Assumption and Assignment of Assigned Contracts**

28. In order to enhance the value to the Debtor's estate, the Trustee requests approval of the assumption and assignment of certain executory contracts and unexpired leases (the "Assigned Contracts")<sup>3</sup> to the Successful Bidder upon the closing of the transaction contemplated under the Successful Bidder's purchase agreement and payment of the cure costs (the "Cure Costs"). The Cure Costs have been identified in a separate omnibus motion to establish cure amounts for executory contracts and unexpired leases pursuant to 11 U.S.C. § 365 (the "Cure Motion"), which has been filed and served on the counterparties to the Assigned Contracts (collectively the "Counterparties") contemporaneously with this Motion. The amounts listed in the Cure Motion are what the Trustee believes are owed to each Counterparty to an Assigned Contract in order to cure any defaults that exist under such contract or lease.

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<sup>3</sup> The inclusion of any agreement as an Assigned Contract does not constitute an admission by the Trustee that such agreement actually constitutes an executory contract or unexpired lease under section 365 of the Bankruptcy Code, and the Trustee expressly reserves the right to challenge the status of any agreement included as an Assigned Contract at any time prior to the Auction. The Trustee also reserves her right to supplement the list of Assigned Contracts due to additional information received.

29. Any asset purchase agreement that the Trustee enters into for the sale of the Assets will contemplate that the Successful Bidder shall promptly pay or cause to be paid the Cure Costs with respect to the Assigned Contracts. The Successful Bidder shall also be responsible for satisfying any requirements regarding adequate assurance of future performance that may be imposed under section 365(b) of the Bankruptcy Code in connection with the proposed assignment of any Assigned Contracts. The Trustee proposes that the Court make its determination concerning the adequate assurance of future performance under the Assigned Contracts pursuant to section 365(b) of the Bankruptcy Code at the Sale Hearing, or, in the case of any Assigned Contracts not assumed and assigned to the Successful Bidder at the Sale Hearing, at such other properly noticed hearing to approve assumption and assignment of such Assigned Contract to the Successful Bidder.

30. Except to the extent otherwise provided in the Successful Bidder's purchase agreement, and subject to the payment of any Cure Costs, the Trustee requests that the Successful Bidder not be subject to any liability to a counterparty to an Assigned Contract that accrued or arose before the closing of the sale of the Assets, and that the Trustee and the Debtor be relieved of all liability accruing or arising after the closing pursuant to section 365(k) of the Bankruptcy Code.

31. The Trustee further requests that the order approving the sale provide that the Assigned Contracts will be assigned to, and remain in full force and effect for the benefit of the Successful Bidder, notwithstanding any provisions in the Assigned Contracts, including those described in sections 365(b)(2), (f)(1), and (3) of the Bankruptcy Code, that prohibit such assignment.

32. Section 365(f) of the Bankruptcy Code provides, in pertinent part, that the trustee may assign an executory contract or unexpired lease of a debtor only if:

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

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2). 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.”

Section 365(b)(1) of the Bankruptcy Code, in turn, clarifies the requirements for assuming an unexpired lease or executory contract of a debtor, providing that:

(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).

33. The standard applied by the Third Circuit in determining whether an executory contract or unexpired lease should be assumed is the “business judgment” test, which requires a debtor to determine that the requested assumption or rejection would be beneficial to its estate. See Sharon Steel Corp. v. Nat’l Fuel Gas Distrib. Corp., 872 F.2d 36, 40 (3d Cir. 1989). Courts generally will not second-guess a debtor’s business judgment concerning the assumption of an

executory contract. See In re Decora Indus., Inc., No. 00-4459 JJF, 2002 WL 32332749, at \*8 (D. Del. May 20, 2002); Official Comm. for Unsecured Creditors v. Aust (In re Network Access Solutions, Corp.), 330 B.R. 67, 75 (Bankr. D. Del. 2005) (“The standard for approving the assumption of an executory contract is the business judgment rule”); In re Exide Techs., 340 B.R. 222, 239 (Bankr. D. Del. 2006) (“The propriety of a decision to reject an executory contract is governed by the business judgment standard”).

34. To determine if the business judgment standard is met, the court is “required to examine whether a reasonable business person would make a similar decision under similar circumstances.” In re AbitibiBowater Inc., 418 B.R. 815, 831 (Bankr. D. Del. 2009). “This is not a difficult standard to satisfy and requires only a showing that rejection will benefit the estate.” Id. (citations omitted). Specifically, a court should find that the assumption or rejection is elected on “an informed basis, in good faith, and with the honest belief that the assumption . . . [is] in the best interests of [the debtor] and the estate.” In re Network Access Solutions Corp., 330 B.R. at 75. Under this standard, a court should approve a debtor’s business decision unless that decision is the product of bad faith or a gross abuse of discretion. See In re Federal Mogul Global, Inc., 293 B.R. 124, 126 (D. Del. 2003).

35. The assumption and assignment of the Assigned Contracts is a necessary part of the sale of the Assets, relieves certain liabilities upon assignment, and otherwise benefits the Debtor’s estate. Therefore, the assumption and assignment of the Assigned Contracts to the relevant Successful Bidder meets the business judgment standard and satisfies the requirements of section 365 of the Bankruptcy Code. The Assigned Contracts will likely be necessary for the Successful Bidder to conduct business going forward, and since no Successful Bidder would take

the Assets without certain executory contracts and unexpired leases, the assumption and assignment of such agreements is essential to securing the highest and best offer for the Assets.

36. As set forth above, the Trustee will serve a copy of the Cure Motion on the Counterparties, notifying such Counterparties of the potential assumption by the Debtor and assignment to the Successful Bidder of the Assigned Contracts. The Cure Motion provides the Counterparties with a sufficient opportunity to file an objection to the proposed Cure Costs. To the extent no objection is filed with regard to a particular Cure Cost, such Cure Costs shall be binding on the applicable Counterparty. The payment of the Cure Costs will be in full and final satisfaction of all obligations to cure defaults and compensate the Counterparties for any pecuniary losses under such contracts or leases pursuant to section 365(b)(1) of the Bankruptcy Code, unless the Court determines that a particular contract is not truly executory, and does not need to be cured to transfer the Assets to the Successful Bidder.

37. Any Cure Costs disputed by any Counterparties, with respect to any Assigned Contracts to be assumed and assigned to the Successful Bidder at the closing of the sale of the Assets (that are not otherwise resolved by the parties) will be resolved by the Court at a hearing date as determined by the Court.

38. The Successful Bidder is responsible for providing evidence of “adequate assurance of future performance” to the extent required in connection with the assumption and assignment of any Assigned Contracts. The meaning of “adequate assurance of future performance” for the purpose of the assumption of executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code depends on the facts and circumstances of each case, but should be given “practical, pragmatic construction.” EBG Midtown South Corp. v. McLaren/Hart Envtl. Eng’g Corp. (In re Sanshoe Worldwide Corp.), 139 B.R. 585, 592 (S.D.N.Y. 1992) (citations omitted);



see also Carlisle Homes, Inc. v. Arrari (In re Carlisle Homes, Inc.), 103 B.R. 524, 538 (Bankr. D.N.J. 1989); In re Natco Indus., Inc., 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985); In re Bon Ton Rest. & Pastry Shop, Inc., 53 B.R. 789, 803 (Bankr. N.D. Ill. 1985). If necessary, the Successful Bidder will provide evidence of its ability to provide adequate assurance to Counterparties at the Sale Hearing.

#### **Waiver of Rules 6004 and 6006**

39. Bankruptcy Rule 6004(h) provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” FED. R. BANKR. P. 6004(h). Similarly, Bankruptcy Rule 6006(d) provides that “[a]n order authorizing the [debtor] to assign an executory contract or unexpired . . . is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” FED. R. BANKR. P. 6006(d).

40. Notwithstanding the possible applicability of Bankruptcy Rules 6004 and 6006 or otherwise, the Trustee requests the relief sought by this Motion be immediately effective and enforceable upon entry of the order requested hereby. In order to allow the immediate realization of value for the Assets and close the transaction, the Trustee requests that any order granting this Motion be effective immediately and not subject to the 14-day stay imposed by Bankruptcy Rules 6004(h) and 6006(d).

#### **Reservation of Rights**

41. Nothing contained herein is intended, or should be construed, as an admission of the validity of any claim against the Debtor or a waiver of the Trustee’s rights to dispute any claim. Nothing contained herein is intended, or should be construed, as an approval, assumption, or rejection of any agreement, contract, or lease under section 365 of the Bankruptcy Code.

**Notice**

42. This Motion has been served on the following parties or, in lieu thereof, to their counsel, if known: (i) the United States Trustee for the Western District of Pennsylvania; (ii) counsel for the Official Committee of Unsecured Creditors; (iii) counsel to Spirit Finance Acquisition; (iv) the District Director of Internal Revenue; (v) counsel for Perkins and Marie Callender's LLC.; (vi) all counterparties to any contract or lease; (vii) all parties who have asserted a lien on the Debtor's Assets; (viii) all entities that were sent the sale teaser or otherwise known to have expressed an interest in bidding on the Assets; and (ix) all other parties requesting notice in the Debtor's chapter 11 case. In addition, notice of this Motion was served on all parties in accordance with Local Rule 6004-1. In light of the nature of the relief requested herein, the Trustee submits that no other or further notice need be given.

**No Prior Request**

43. No prior request for the relief sought herein has been made to this Court or any other court.

WHEREFORE, the Trustee requests that the Court enter an order: (i) authorizing the sale of the Assets to the Successful Bidder pursuant to the terms of the asset purchase agreement entered into between the Trustee and the Successful Bidder, free and clear of all Interests; (ii) approving the assumption and assignment of the Assigned Contracts in accordance with the Successful Bidder's asset purchase agreement; and (iii) granting such other and further relief as is just and proper.

Dated: October 13, 2017

Respectfully submitted,

/s/ Nicholas R. Pagliari

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SPECIAL COUNSEL FOR CHAPTER 11 TRUSTEE

**PRIVILEGED & CONFIDENTIAL**

**EXECUTION COPY**

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**ASSET PURCHASE AGREEMENT**

between

**SFR II HOLDINGS, LLC,**

as “Buyer”

and

**UNIQUE VENTURES GROUP, LLC**

as “Seller”

Closing Date: [ ], 2017

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**EXHIBIT  
A**

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## ASSET PURCHASE AGREEMENT

THIS ASSET PURCHASE AGREEMENT (this “**Agreement**”), dated as of October 12, 2017 (the “**Execution Date**”), is made by and between Unique Ventures Group, LLC, a Pennsylvania limited liability company (“**Seller**”), and SFR II Holdings, LLC, a Delaware limited liability company (“**Buyer**”). Unless otherwise set forth, capitalized terms used in this Agreement are defined or cross-referenced in Article X.

### RECITALS

WHEREAS, on February 13, 2017 (the “**Petition Date**”), Seller commenced voluntary cases (the “**Bankruptcy Case**”) under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101-1532 (the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the Western District of Pennsylvania (the “**Bankruptcy Court**”);

WHEREAS, on March 23, 2017, the Bankruptcy Court entered an order appointing M. Colette Gibbons as the Chapter 11 Trustee (the “**Chapter 11 Trustee**”) of the Seller and its bankruptcy estate (Docket No. 158);

WHEREAS, this Agreement shall constitute the Asset Purchase Agreement (as such term is defined in the Sale Procedures);

WHEREAS, Buyer desires to purchase the Acquired Assets and assume the Assumed Liabilities from Seller, and Seller desires to sell, assign, transfer and deliver to Buyer the Acquired Assets together with the Assumed Liabilities, all in the manner and subject to the terms and conditions set forth in this Agreement and the Sale Order and in accordance with sections 105, 363, 365, 1146 and all other applicable provisions of the Bankruptcy Code; and

WHEREAS, Buyer will make a deposit in an amount equal to five percent (5%) of the Purchase Price (the “**Deposit**”) in accordance with Section 3.3(a).

NOW, THEREFORE, in consideration of the foregoing and their respective representations, warranties, covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Buyer hereby agree as follows:

### **ARTICLE I. PURCHASE AND SALE OF THE ACQUIRED ASSETS**

**Section 1.1 Transfer of Acquired Assets.** At the Closing, and upon the terms and conditions set forth herein, Seller shall sell, assign, transfer and deliver to Buyer, and Buyer shall purchase from Seller, all of Seller’s right, title and interest in, to and under the following properties, assets and rights owned by Seller free and clear of Encumbrances (other than Permitted Encumbrances) (collectively the “**Acquired Assets**”):

- (a) The real property that is listed as owned by Seller on Schedule 1.1(a) (collectively, the “**Owned Real Property**”);

- (b) The real property leases that are listed on Schedule 1.1(b) to which Seller is a party, to the extent assignable and transferable, including all Leasehold Improvements thereon (collectively, the “**Real Property Leases**”);
- (c) The franchise agreements between Seller and Franchisor that are listed on Schedule 1.1(c) (collectively, the “**Franchise Agreements**”);
- (d) Except as otherwise excluded under Section 1.2, all machinery, equipment, furniture, fixtures, office equipment, computer hardware and other related tangible personal property owned or leased by Seller at the Acquired Restaurants, and all warranties and licenses of Seller thereunder or related thereto;
- (e) All prepaid expenses of Seller relating to the Acquired Restaurants (“**Prepaid Expenses**”);
- (f) All deposits paid by Seller related to or arising from the Acquired Assets at the Acquired Restaurants, including, without limitation, any deposits under the Real Property Leases (“**Acquired Deposits**”), but excluding the Utility Deposits;
- (g) All advertising and promotional materials and any rights thereto possessed, or entitled to be used, by Seller;
- (h) The Contracts that are listed on Schedule 1.1(h) to which Seller is a party, to the extent assignable and to which Buyer elects to take assignment of at or before the Closing in accordance with the process described in Section 1.6 (collectively, the “**Designated Contracts**”);
- (i) All Inventory on-hand at the Acquired Restaurants;
- (j) All permits, authorizations and licenses (collectively, the “**Permits**”) issued to Seller by any Government with respect to the Acquired Restaurants, to the extent assignable;
- (k) Except as otherwise excluded under Section 1.2(f), all insurance benefits, rights and proceeds arising from or relating to any event or incident that effects, impacts or alters any Acquired Asset between the Execution Date and the Closing Date;
- (l) Except as otherwise excluded under Section 1.2, all rights, claims, rights of offset, causes of action, lawsuits, judgments and other claims or demands of any nature against any third party arising out of, and only with respect to, the Acquired Assets or Assumed Liabilities;
- (m) All books, files and records held or otherwise owned by Seller that relate to current or former employees and other personnel employed at the Acquired Restaurants, including, without limitation, books, files and records that are related to medical history, medical insurance or other medical matters and to workers’ compensation and to the evaluation, appraisal or performance of current or former employees and other personnel of Seller (collectively, the “**Employee Records**”);



- (n) Copies of all books, files and records of sales and general business operations, and Seller's supplier lists at the Acquired Restaurants; and
- (o) All vehicles owned by Seller that are listed on Schedule 1.1(o) (collectively, the "**Acquired Vehicles**").

**Section 1.2 Excluded Assets.** Notwithstanding anything to the contrary in this Agreement, Seller shall retain its right, title and interest in, to and under all of its properties, assets and rights not otherwise an Acquired Asset (collectively, the "**Excluded Assets**"), and:

- (a) All of Seller's cash and cash equivalents, including any cash on hand at the Acquired Restaurants as of the Closing Date;
- (b) All trade accounts receivable and credit card receivables of Seller in existence as of the Closing Date (collectively, the "**Accounts Receivable**");
- (c) All amounts and funds (rebates and dividends) on account of, accrued by or due from vendors, including the vendors set forth on Schedule 1.2(c) to Seller pursuant to any agreement or arrangement for all periods prior to the Closing (collectively, the "**Rebates**");
- (d) All equity ownership interests in Seller;
- (e) All rights to refunds of or credits for Taxes of Seller previously paid by Seller prior to the Closing Date, and any records relating to Taxes of Seller;
- (f) all insurance policies, contracts and coverage obtained by Seller and all rights to insurance proceeds or other Contracts of insurance or indemnity (or similar agreement) recoveries relating to the Excluded Assets; provided, however, all insurance proceeds relating to the Brooklyn, Ohio location received by Seller shall be an Excluded Asset;
- (g) All avoidance claims and causes of action arising under Chapter 5 of the Bankruptcy Code and any related claims and causes of action under applicable non-bankruptcy law arising out of the same set of facts, and the proceeds from any of the foregoing;
- (h) All rights of and benefits to Seller under this Agreement, the Ancillary Agreements or any other agreements or instruments otherwise delivered, executed or made in connection with this Agreement;
- (i) The Contracts to which Seller is a party that is not an Acquired Contract and all deposits, claims, rebates or refunds thereunder or related thereto (collectively, the "**Excluded Contracts**");
- (j) All utility deposits paid by Seller prior to the Closing Date and all rights to the refund of all or any portion thereof ("**Utility Deposits**");

- (k) All Employee Benefit Plans;
- (l) Corporate seals, minute books, charter documents, stock transfer records, record books, original Tax and financial records and such other files, books and records relating to any of the Excluded Assets or to the organization, existence or capitalization of Seller or required to be retained by Seller pursuant to applicable law;
- (m) All of Seller's equity interests in CBK Futures, Inc., an Ohio corporation;
- (n) Any amounts due under any and all Promissory Note and/or Promissory Notes due from Damon's Restaurants, Inc. and/or its affiliates;
- (o) All of Seller's ownership or rights with respect to property, intellectual property and/or franchise rights sold to Seller by Damon's International, Inc., Damon's Restaurants, Inc., and/or Damon's Management, Inc. as more described in the Asset Purchase Agreement attached as Exhibit A to that certain Order Authorizing the Sale of Substantially All Remaining Assets Free and Clear of All Liens, Claims, and Encumbrances and for Assumption and Assignment of Franchise Agreements entered on January 9, 2014 by the United States Bankruptcy Court for the Western District of Pennsylvania in Chapter 11 Case No. 09-27920-JAD, Docket No. 1697; and
- (p) All assets of Seller located at 348 West Main Street, Conneaut, OH 44030, including the cash on hand, related real property lease and all machinery, equipment, furniture, fixtures, office equipment, computer hardware and other related tangible personal property owned or leased by Seller at such location, and all warranties and licenses of Seller thereunder or related thereto.

**Section 1.3 Assumption of Liabilities.** At the Closing, Buyer shall assume, and thereafter pay, perform and discharge when due, the following liabilities of Seller (collectively, the "**Assumed Liabilities**"):

- (a) The Prorated Amounts that relate to any time period up to, but not including, the Closing Date as described in Section 2.3;
- (b) The obligation to pay all invoices relating to food inventory orders made by the Seller within seven (7) days prior to the Closing Date; provided, that, Buyer has the opportunity to review and consent to such orders prior to being placed by the Seller;
- (c) All liabilities and obligations under the Acquired Contracts (defined below), including, without limitation, (i) all pre-petition cure costs required to be paid pursuant to section 365 of the Bankruptcy Code in connection with the assumption and assignment of the Acquired Contracts (such pre-petition cure costs are, collectively, the "**Cure Costs**"); and (ii) the liability and obligations pursuant to the transfer provisions of the Franchise Agreements, whether such liability or obligation is set forth in the Franchise Agreements as the responsibility

of Franchisee (as defined in the Franchise Agreements) or the transferee thereunder;

- (d) All accrued but unpaid real estate and personal property Taxes related to the Acquired Restaurants, and other related assessments and fees, if any, related to or arising from the ownership of the Acquired Assets at the Acquired Restaurants (collectively, the “**Property Taxes**”); and
- (e) Those liabilities and obligations assumed by or made the responsibility of Buyer as set forth elsewhere in this Agreement.

**Section 1.4 Excluded Liabilities.** Notwithstanding anything to the contrary in this Agreement, Seller shall retain, and remain liable and obligated for any of its respective liabilities not otherwise included in the Assumed Liabilities (collectively, the “**Excluded Liabilities**”), including, without limitation:

- (a) Any liability arising from or related to the Excluded Assets, including, without limitation, the Excluded Contracts;
- (b) All Employee Benefit Plan liabilities and obligations;
- (c) Any liability for income, franchise, sales, or similar Taxes arising out of or resulting from Seller’s operations prior to the Closing Date;
- (d) Any liability arising from contract rejection damages for Contracts or Real Property Leases not assumed; and
- (e) Any liability relating to (A) events or conditions occurring or existing in connection with, or arising out of, the business as operated on or prior to the Closing Date, or (B) the ownership, rise, possession, operation or sale or other disposition on or prior to the Closing Date of any Acquired Assets (or any other assets, properties, rights or interests asserted, at any time on or prior to the Closing Date, of the business).

**Section 1.5 Post-Closing Liabilities.** Buyer acknowledges that Buyer shall be responsible for all liabilities and obligations relating to Buyer’s ownership or use of, or right to use, the Acquired Assets and the Assumed Liabilities after the Closing Date, including, without limitation, all Taxes arising out of or related to the Acquired Assets or the operation of conduct of the business acquired pursuant to this Agreement for all Tax periods beginning on or after the Closing Date.

**Section 1.6 Assumption and Assignment of Designated Contracts.**

(a) Not later than one (1) Business Days prior to the deadline for all parties in interest to submit bids for the Acquired Assets as set forth in the Sale Procedures Order (the “**Contract Designation Date**”), Seller and Buyer agree to work together to create Schedule 1.1(h) to identify all of the Designated Contracts that Buyer elects to assume (in its sole discretion) (such elected Designated Contracts, together, with the Real Property Leases and Franchise

Agreements, collectively, the “**Acquired Contracts**”) and that Seller will assign to Buyer at Closing. Appropriate additions to Schedule 1.1(h) shall be made to reflect such elections made by Buyer. Schedules 1.1(b), 1.1(c) and 1.1(h) shall also (A) set forth the amounts necessary to cure any defaults under each of the Acquired Contracts as determined by Seller based on Seller’s books and records or as otherwise determined by the Bankruptcy Court, and (B) delineate a procedure for transferring to Buyer the rights to any security deposits with the other party to any Acquired Contract. Upon the Closing, all the Designated Contracts remaining on Schedule 1.1(h), the Real Property Leases and the Franchise Agreements shall be Acquired Contracts, as the case may be, for purposes of this Agreement. For the avoidance of doubt, Buyer may not elect to delete or exclude any Real Property Lease or Franchise Agreement from the Acquired Contracts.

(b) If, at any time after the earlier of (i) the date hereof through the ninetieth (90<sup>th</sup>) day after the Closing Date, or (ii) the date (A) the Bankruptcy Case is converted to a Chapter 7 case or (B) an order is entered approving or confirming a plan of liquidation in the Bankruptcy Case, any party to this Agreement becomes aware that Seller is a party to any Contract or Real Property Lease related to the business that is not an Excluded Asset and is not disclosed on Schedules 1.1(b) and 1.1(h) (each, an “**Undisclosed Contract**”), the discovering party shall promptly notify the other parties in writing (the “**Notification**”) of such Undisclosed Contract. For a period of thirty (30) days after the date of Buyer’s receipt or delivery, as the case may be, of the Notification, Buyer shall have the right, in its sole discretion, to require Seller to file one or more motions with the Bankruptcy Court (which motion(s) shall be in form and substance reasonably satisfactory to Buyer) seeking the entry of an order (the “**Undisclosed Contract Assignment Order**”), pursuant to Sections 363 and 365 of the Bankruptcy Code, to assign, transfer, convey and deliver to Buyer such Undisclosed Contract as if it had been disclosed on Schedules 1.1(b) and 1.1(h), or to otherwise transfer the benefits of such Undisclosed Contract to Buyer without any additional consideration (other than the payment by Buyer of the Cure Costs, if any, associated with such Undisclosed Contract). In the event that Buyer notifies Seller of Buyer’s desire to assume any Undisclosed Contract, Seller shall, as soon as practicable after receiving such notification, file with the Bankruptcy Court the motion(s) seeking the entry of the Undisclosed Contract Assignment Order. Seller shall not take any action that would reasonably be expected to delay, prevent or impede the entry of, or result in the revocation, modification or amendment of, the Undisclosed Contract Assignment Order. Any Undisclosed Contract that Buyer elects to assume pursuant to Schedules 1.1(b) and 1.1(h) and for which an Undisclosed Contract Assignment Order is entered shall constitute an Acquired Asset.

(c) The Sale Order shall provide that, as of the Closing, Seller shall (i) assume the Acquired Contracts in the Bankruptcy Case and (ii) assign the Acquired Contracts to Buyer.

(d) Notwithstanding anything to the contrary herein, this Agreement shall not constitute an agreement to assign or transfer any interest in any Acquired Contract or any claim or right arising thereunder if such assignment or transfer without the approval of a third party would constitute a breach thereof or affect adversely the rights of Buyer thereunder (after giving effect to the Sale Order and the Bankruptcy Code), and any such transfer or assignment shall be made subject to such approval being obtained. In the event any such approval is not obtained prior to Closing, Seller shall continue its reasonable best efforts to obtain any such approval after Closing, and Seller will cooperate with Buyer in any lawful and economically feasible

arrangement to provide that Buyer shall receive the interest of Seller in the benefits under any such Acquired Contract, including performance by Seller as agent, provided, that Buyer shall undertake to pay or satisfy the corresponding liabilities for the enjoyment of such benefit to the extent Buyer would have been responsible therefor if such Approval had been obtained.

## ARTICLE II. CONSIDERATION

**Section 2.1 Purchase Price.** The aggregate consideration for the Acquired Assets shall be: (a) an amount in cash equal to \$2,868,000 (the “**Purchase Price**”); (b) *plus* the Seller’s Proration Amount, if any, or *less* the Buyer’s Proration Amount, if any, as determined pursuant to Section 2.6, *plus* (c) the assumption by Buyer of the Assumed Liabilities (such assumption, together with the Final Purchase Price, the “**Total Consideration**”). For the avoidance of doubt, no items included in the definitions of Assumed Liabilities and Proration Amount shall be double counted for purposes of calculating the Purchase Price.

**Section 2.2 Payment of Cure Costs.** On or before the Closing, Buyer shall pay any Cure Costs as determined by the Bankruptcy Court in the Sale Order directly to the appropriate counterparties to the Acquired Contracts; provided, however, that in the event any such cure amount remains the subject of a dispute at the Closing Date, Buyer shall pay any such cure amount upon the entry of an order of the Bankruptcy Court settling such dispute.

**Section 2.3 Prorations.** Seller shall calculate, in good faith, prorated amounts (the “**Proration**”) for (a) rent and related charges under the Real Property Leases, (b) Prepaid Expenses, (c) Property Taxes, (d) charges for sewer, water, fuel, telephone, electricity and other utilities, and (e) Rebates (items (a) through (e) together, the “**Prorated Amounts**”), as of the Closing Date. For purposes of calculating the Proration, Seller shall be liable to the extent the Prorated Amounts relate to any time period up to, but not including, the Closing Date, and Buyer shall be liable to the extent the Prorated Amounts relate to periods including and following the Closing Date. Seller shall provide Buyer the Proration, and reasonable supporting documentation, at least two (2) days prior to the Closing Date. The Proration shall be based on the latest available rates, valuations, readings, or such other information or documents that most accurately reflect current charges or accrued amounts for the Prorated Amounts. Notwithstanding that the Proration may contain Seller’s good faith estimates to prorate one or more of the Prorated Amounts, the Proration shall be final, unless based on materially incorrect information. The Purchase Price shall be (i) increased by the net amount of the Proration if such amount is in Seller’s favor (“**Seller’s Proration Amount**”), and (ii) decreased by the net amount of the Proration if such amount is in Buyer’s favor (“**Buyer’s Proration Amount**”).

**Section 2.4 Transaction Taxes.** All Taxes, including, without limitation, all state and local Taxes in connection with the transfer of the Acquired Assets and all recording and filing fees (collectively, “**Transaction Taxes**”), that may be imposed by reason of the sale, transfer, assignment and delivery of the Acquired Assets and that are not exempt under section 1146(a) of the Bankruptcy Code, shall be borne by Buyer. Buyer and Seller shall cooperate to (a) determine the amount of Transaction Taxes payable in connection with the transactions contemplated under this Agreement; (b) provide all requisite exemption certificates; and (c) prepare and file any and all required Tax Returns for or with respect to such Transaction Taxes with any and all appropriate Government taxing authorities.

**Section 2.5 Allocation of Purchase Price.** Buyer and Seller shall allocate the Total Consideration among the Acquired Assets in accordance with Schedule 2.5 (the “**Allocation**”). The Allocation will be binding upon Buyer and Seller and their respective successors and assigns, and none of the parties to this Agreement will take any position (whether in returns, audits or otherwise) that is inconsistent with the Allocation. Buyer and Seller will report the purchase and sale of the Acquired Assets on all tax returns, including, without limitation, Form 8594 as provided for in section 1060 of the Code, in accordance with the Allocation and will cooperate in timely filing with the Internal Revenue Service their respective Forms 8594.

### **ARTICLE III. CLOSING AND DELIVERIES**

**Section 3.1 Closing.** The consummation of the transactions contemplated by this Agreement (the “**Closing**”) shall take place on the first (1st) Business Day following the satisfaction or waiver by the appropriate party of all the conditions contained in Article VI or on such other date or at such other time as may be mutually agreed to by the parties (the “**Closing Date**”) and shall be effective as of 12:01 a.m. Eastern Standard Time on the Closing Date. Subject to such different procedures agreed upon by the parties, the Closing shall take place via a “paper” close wherein Buyer and Seller shall exchange such documents and instruments or copies thereof sufficient to effect the Closing by electronic or other means without the use of a “roundtable” closing at a particular location. All proceedings to be taken and all documents to be executed and delivered by all parties at the Closing shall be deemed to have been taken and executed simultaneously and no proceedings shall be deemed to have been taken nor documents executed or delivered until all have been taken, executed and delivered.

**Section 3.2 Seller’s Deliveries.** Seller shall deliver to Buyer at or prior to the Closing or such other time as set forth:

- (a) A bill of sale for all of the Acquired Assets that are tangible personal property, without representation, warranty or covenant of any kind;
- (b) An agreement for the assumption of the Assumed Liabilities, without representation, warranty or covenant of any kind;
- (c) For the Owned Real Property, if any, a recordable quit-claim deed;
- (d) For all intangible Acquired Assets, including all Acquired Contracts, (i) an agreement of assignment and assumption, without any representation, warranty or covenant of any kind, or (ii) an order of the Bankruptcy Court effecting the same;
- (e) A certificate, dated the Closing Date, signed by the Trustee, certifying to the accuracy of the matters set forth in Section 5.1(a); and
- (f) Such other agreements, documents or instruments of assignment and transfer that Buyer may reasonably request; the form and substance of which are acceptable to Seller.

**Section 3.3 Buyer’s Deliveries.** Buyer shall deliver to Seller at or prior to the Closing or such other time as set forth:

- (a) The Purchase Price, as follows: (i) the Deposit, by wire transfer of immediately available funds within ten (10) Business Days of the Execution Date to an account specified in writing by Seller, or by the Bankruptcy Court, as the case may be; and (ii) the remaining balance of the Purchase Price, by wire transfer of immediately available funds on or before the Closing Date to an account specified in writing by Seller;
- (b) A duly executed counterpart of Buyer to each of the documents listed in Section 3.2(b) and 3.2(d);
- (c) A certificate, dated the Closing Date, signed by its Secretary, certifying the accuracy of the matters set forth in Section 5.2(a); and
- (d) Such other agreements, documents or instruments of assignment and transfer that Seller may reasonably request; the form and substance of which are acceptable to Buyer.

#### **ARTICLE IV. REPRESENTATIONS AND WARRANTIES**

**Section 4.1 Representations and Warranties of Seller.** Seller hereby represents and warrants to Buyer as of the Execution Date as follows:

- (a) Authorization and Validity. Subject to the Bankruptcy Court's entry of the Sale Order, (i) Seller has all requisite power and authority to enter into this Agreement and any Ancillary Agreements to which Seller is a party and to perform its obligations hereunder and thereunder; and (ii) this Agreement constitutes Seller's valid and binding obligation, enforceable against Seller in accordance with its respective terms.
- (b) No Conflict or Violation. The execution, delivery and performance by Seller of this Agreement and any Ancillary Agreement to which Seller is a party does not violate or conflict with any provision of Seller's articles or organization or operating agreement or similar organizational documents.
- (c) Title to Assets. Seller owns, and has good, valid, and marketable title to, all of the Acquired Assets. At the Closing, Seller will transfer title to all the Acquired Assets free and clear of all Encumbrances as set forth in the Sale Order.
- (d) No Brokers. Except as set forth on Schedule 4.1(d), neither Seller nor any Person acting on behalf of Seller has paid or become obligated to pay any fee or commission to any other broker, finder or intermediary for or on account of the transactions contemplated under this Agreement.

**Section 4.2 Representations and Warranties of Buyer.** Buyer hereby represents and warrants to Seller as of the Execution Date as follows:

- (a) Corporate Organization. Buyer is a Delaware limited liability company duly organized, validly existing and in good standing under the laws of the State of

Delaware and has all requisite corporate power and authority to own its properties and assets and to conduct its business as now conducted.

- (b) Qualification to Conduct Business. Buyer is duly qualified to do business as a foreign corporation and is in good standing in every jurisdiction in which the character of the properties owned or leased by it or the nature of the business conducted by it makes such qualification necessary.
- (c) Authorization and Validity. Buyer has all requisite corporate power and authority to enter into this Agreement and any Ancillary Agreement to which Buyer is a party and to perform its obligations hereunder and thereunder. The execution and delivery of this Agreement and any Ancillary Agreement to which Buyer is a party and the performance of Buyer's obligations hereunder and thereunder have been, or on the Closing Date will be, duly authorized by all necessary corporate action of Buyer, and no other corporate proceedings on the part of Buyer are necessary to authorize such execution, delivery and performance. This Agreement has been, and any Ancillary Agreement to which Buyer is a party has been duly executed by Buyer and constitutes Buyer's valid and binding obligations, enforceable against it in accordance with their respective terms.
- (d) No Conflict or Violation. The execution, delivery and performance by Buyer of this Agreement and any Ancillary Agreement to which Buyer is a party does not (i) violate or conflict with any provision of Buyer's certificate of incorporation or bylaws or similar organizational documents; (ii) violate any provision of law, or any order, judgment or decree of any court or Government applicable to Buyer or any of its properties or assets; or (iii) violate or result in a breach of or constitute (with due notice or lapse of time or both) a default under any material Contract to which Buyer is party or by which Buyer is bound or to which any of Buyer's properties or assets is subject.
- (e) Consents and Approvals. No consent, waiver, authorization or approval of any Person or declaration, filing or registration with any Government is required in connection with the execution and delivery by Buyer of this Agreement or any Ancillary Agreement to which Buyer is a party or the performance by Buyer of its obligations hereunder or thereunder.
- (f) Adequate Assurances Regarding Acquired Contracts. Buyer is capable of satisfying the conditions contained in sections 365(b)(1)(C) and 365(f)(2)(B) of the Bankruptcy Code with respect to the Acquired Contracts.
- (g) Litigation. There are no claims, actions, suits, proceedings or investigations pending, threatened in writing or against Buyer, or any Related Person of Buyer, that could affect the ability of Buyer to consummate the transactions contemplated by this Agreement and each Ancillary Agreement.



- (h) Adequacy of Funds. Buyer has cash on hand, existing availability under existing lines of credit, or other immediately available financial resources sufficient to pay the balance of the Purchase Price at Closing.

**Section 4.3 Warranties Are Exclusive**. The parties acknowledge that the representations and warranties contained in this Article IV are the only representations or warranties given by the parties and that all other express or implied warranties are disclaimed. Without limiting the foregoing, Buyer acknowledges that, except for the representations and warranties contained in Section 4.1, the Acquired Assets are conveyed “AS IS,” “WHERE IS” and “WITH ALL FAULTS” and that all warranties of merchantability or fitness for a particular purpose are disclaimed. WITHOUT LIMITING THE FOREGOING, BUYER ACKNOWLEDGES THAT, EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES CONTAINED IN SECTION 4.1, SELLER AND ITS RELATED PERSONS AND AFFILIATES HAVE MADE NO REPRESENTATION OR WARRANTY CONCERNING ANY (A) USE TO WHICH THE ACQUIRED ASSETS MAY BE PUT, (B) FUTURE REVENUES, COSTS, EXPENDITURES, CASH FLOW, RESULTS OF OPERATIONS, FINANCIAL CONDITION OR PROSPECTS THAT MAY RESULT FROM THE OWNERSHIP, USE OR SALE OF THE ACQUIRED ASSETS OR THE ASSUMPTION OF THE ASSUMED LIABILITIES, OR (C) OTHER INFORMATION OR DOCUMENTS MADE AVAILABLE TO BUYER OR ITS AFFILIATES OR RELATED PERSONS. Buyer further acknowledges that Buyer has conducted, or has had an adequate opportunity to conduct, all necessary due diligence related to Seller’s business, the Acquired Assets, the Assumed Liabilities, and all such other matters relating to or affecting any of the foregoing. In proceeding with the transactions contemplated in this Agreement, except for any representations and warranties expressly set forth in Section 4.1, Buyer is doing so based solely upon its own due diligence and review, all of which has been completed to the satisfaction of the Buyer, and Buyer has not relied upon any oral or written statements, representations or guaranties whatsoever, whether express or implied, made by Seller or its agents and representatives.

## **ARTICLE V. COVENANTS AND OTHER AGREEMENTS**

**Section 5.1 Covenants of Seller**. Seller covenants to Buyer that, during the period from the Execution Date through and including the Closing or the earlier termination of this Agreement:

- (a) Conduct of Business Before the Closing. Unless otherwise agreed by Seller and Buyer, Seller shall use commercially reasonable efforts to conduct its business in all material respects in the manner in which it has been conducted since the Petition Date and to preserve intact its respective business or organization and relationships with third parties. Consistent with the foregoing, except as consented to by Buyer and approved by the Bankruptcy Court as appropriate, Seller shall (i) keep and maintain the Acquired Assets in good operating condition and repair subject to normal wear and tear; (ii) use its best efforts consistent with good business practice to maintain its business intact and to preserve the goodwill of the suppliers, licensors, employees, customers, distributors and others having business relations with Seller; (iii) maintain (except for expiration due to lapse of time) all Acquired Contracts in effect without change, except those Acquired

Contracts which expire or terminate by their terms or in which the customer ceases making payments or as otherwise expressly provided herein; (iv) comply in all material respects with the provisions of all Legal Requirements applicable to Seller, the Acquired Assets and the conduct of Seller's business; (v) not alter the rate or basis of compensation of any of its officers, directors or employees other than in accordance with the orders of the Bankruptcy Court; (vi) not sell, lease or otherwise dispose of any properties or assets, except in accordance with the orders of the Bankruptcy Court and otherwise in the ordinary course of business consistent with past practice; and (vii) not enter into any Contract with any shareholder of Seller or any Affiliate of any shareholder of Seller.

- (b) Cooperation. Seller shall use commercially reasonable efforts to (i) take, or cause to be taken, all action and to do, or cause to be done, all things necessary or proper, consistent with applicable law, to consummate and make effective as soon as possible the transactions contemplated hereby; and (ii) assist Buyer's efforts to transfer or obtain any Permits required to own the Acquired Assets.
- (c) Alternate Transactions. From the Execution Date until the date of entry of the Sale Procedures Order, Seller shall not (i) execute an agreement with respect to an Alternative Transaction, or (ii) seek or support Bankruptcy Court approval of a motion or order inconsistent in any material respect with the transactions contemplated under this Agreement. Following entry of the Sale Procedures Order, Seller shall promptly (and in any event within one (1) Business Day) notify Buyer in writing at such time as any Person proposing an Alternate Transaction has been determined to be a Qualified Bidder (as defined in the Sale Procedures Order).
- (d) Confidentiality. Seller acknowledges that it has knowledge of Confidential Information of the business and Seller. Except to the extent disclosure is required by applicable law or Bankruptcy Court proceedings, after the Closing Date, Seller agrees to, and to cause its Affiliates to, hold the Confidential Information in the strictest confidence and agrees that it shall not disclose, make known, reveal or expose, directly or indirectly, nor directly or indirectly, use for its own benefit or for the benefit of any other Person, the Confidential Information of the business of Seller.
- (e) Notification. From the Execution Date until the Closing Date, Seller will give Buyer prompt written notice upon becoming aware of any material development affecting the Acquired Assets, the Assumed Liabilities, Seller's business, the financial condition, operations or prospects of Seller, or any event or circumstance that could reasonably be expected to result in a breach of, or inaccuracy in, any representation or warranty contained in Section 4.1; provided, however, that no such disclosure will be deemed to prevent or cure any such breach of, or inaccuracy in, amend or supplement any Schedule to, or otherwise disclose any exception to, any of the representations and warranties of Seller set forth in this Agreement. Seller will furnish to Buyer, promptly after filing with the

Bankruptcy Court, a copy of the time stamped monthly operating report filed by Seller with the Bankruptcy Court.

**Section 5.2 Covenants of Buyer.** Buyer covenants to Seller that, during the period from the Execution Date through and including the Closing or the earlier termination of this Agreement:

- (a) Cooperation. Buyer shall use commercially reasonable efforts to take, or cause to be taken, all action and to do, or cause to be done, all things necessary or proper, consistent with applicable law, to consummate and make effective as soon as possible the transactions contemplated hereby.
- (b) Adequate Assurances Regarding Acquired Contracts and Required Orders. With respect to each Acquired Contract, Buyer shall provide adequate assurance of the future performance of such Acquired Contract by Buyer. Buyer shall promptly take such actions as may be reasonably requested by Seller to assist Seller in obtaining the Bankruptcy Court's entry of the Sale Order and any other order of the Bankruptcy Court reasonably necessary to consummate the transactions contemplated by this Agreement.

**Section 5.3 Other Covenants.**

- (a) Improper Receipt of Payment. From and after the Closing, (i) Seller shall promptly forward to Buyer any and all payments received by it that constitutes part of the Acquired Assets; and (ii) Buyer shall promptly forward to the Seller any and all payments received by Buyer that constitute part of the Excluded Assets.
- (b) Records. From and after the Closing, Buyer shall provide Seller, and its agents and representatives, as the case may be, access to, reasonable means of copying, i.e., provide a copy machine, or copies of, the Employee Records for use by each Seller in any dispute, claim, action or controversy regarding any employee matter, and permit Seller to either make copies or, as may be necessary to fully comply with any law, regulation or court mandate, borrow the original Employee Records for such time as may be reasonably needed by Seller. Buyer shall provide Seller at least ninety (90) days written notice prior to the destruction or permanent deletion of any Employee Records, upon which Seller may consent to such destruction, request copies, or obtain possession of such Employee Records, or any combination thereof, by written notice delivered to Buyer before the expiration of such ninety (90) day period.
- (c) Employee Matters. Immediately prior to the Closing, Seller shall terminate the employment of all employees of Seller. At or prior to the Closing, Seller agrees that Buyer may, at its option, accept applications for employment from any or all such employees previously employed by Seller, which applications shall include privacy releases authorizing Seller to release to Buyer each such employee's personnel records. For the avoidance of doubt, Buyer shall have no obligation to

employ or offer employment to any of Seller's employees. Under no circumstances shall Buyer assume or be obligated to pay, and the Acquired Assets shall not be or become liable for or subject to, any claims of Seller's employees, including but not limited to, any claims or liabilities related to employment practices, COBRA for Seller employees not hired by Buyer, equal employment opportunity, nondiscrimination, harassment, wrongful termination, breach of contract, immigration, wage and hour Legal Requirements, any other state, federal or local labor and employment Legal Requirements, Liability under the WARN Act, salaries, vacations, sick pay, incentives, severance pay, bonus, overtime, meal period, pension, profit sharing, retirement and/or deferred compensation and any other compensation or benefits for any period prior to the Closing Date (the "**Employee Claims**"), which Employee Claims shall be and remain the liability, responsibility and obligations of Seller.

**Section 5.4 Bankruptcy Matters; Bidding Process.**

- (a) Seller and Buyer acknowledge that this Agreement and the Transactions are subject to Bankruptcy Court approval.
- (b) Five (5) business days after the Execution Date, Seller shall file with the Bankruptcy Court motions (the "**Sale Motions**"), notices and proposed orders, each in form and substance reasonably satisfactory to Buyer, seeking the Bankruptcy Court's issuance of:
  - (i) an order approving the process respecting the sale of the Acquired Assets in substantially the form attached as Exhibit 5.4(b)(i) (to be provided no later than sixty (60) days following the filing of the Sale Motions) (the "**Sale Procedures Order**"), and
  - (ii) an order approving this Agreement in substantially the form attached as Exhibit 5.4(b)(ii) (to be provided no later than ninety (90) days following the filing of the Sale Motions) (the "**Sale Order**").
- (c) Seller shall serve a copy of the Sale Motions on: (i) all Persons that claim any interest in or Encumbrance upon the Acquired Assets, (ii) all parties to Acquired Contracts, (iii) all Governmental Authorities with taxing power that have, or as a result of the sale of the Acquired Assets may have, claims, contingent or otherwise, against Seller, (iv) all Persons that file requests for notices under Bankruptcy Rule 9010(b) or are entitled to notice under Bankruptcy Rule 2002, (v) the twenty (20) largest unsecured creditors (whether liquidated, contingent or unmaturing) of Seller, (vi) all interested Governmental Authorities, (vii) the Office of the United States Trustee, and (viii) all Persons that expressed to Seller an interest in purchasing the Acquired Assets since March 23, 2017.
- (d) Seller shall use its reasonable best efforts to provide Buyer with a copy of the Sale Motions or any motion to approve the Sale Procedures Order (including any related forms of orders and notices to interested Persons) at least two (2) Business

Days (unless the exigencies of time prevent the period from being that long) prior to the filing thereof in the Bankruptcy Case so as to allow Buyer to provide reasonable comments for incorporation into same.

- (e) Buyer agrees that it will promptly take such actions as are reasonably requested by Seller to assist in obtaining the Sale Procedures Order and the Sale Order, including furnishing affidavits or other documents or information for filing with the Bankruptcy Court for the purposes, among others, of demonstrating that Buyer is a "good faith" Buyer under Section 363(m) of the Bankruptcy Code.

## **ARTICLE VI. CONDITIONS PRECEDENT TO PERFORMANCE BY PARTIES**

**Section 6.1 Conditions Precedent to Performance by Seller.** The obligation of Seller to consummate the transactions contemplated by this Agreement is subject to the fulfillment, at or before the Closing, of the following conditions, any one or more of which, other than the condition contained in Section 6.1(c), may be waived by Seller, in its discretion:

- (a) Representations and Warranties of Buyer. The representations and warranties of Buyer made in Section 4.2 of this Agreement, in each case, shall be true and correct in all material respects as of the Execution Date and as of the Closing as though made by Buyer as of the Closing, except to the extent such representations and warranties expressly relate to an earlier date, in which case such representations and warranties shall be true and correct on and as of such earlier date.
- (b) Performance of the Obligations of Buyer. Buyer shall have performed in all material respects all obligations required under this Agreement and any Ancillary Agreement to which Buyer is party to be performed by Buyer on or before the Closing.
- (c) Higher and Better Offer; Governmental Consents and Approvals. The Seller has held an auction to entertain higher and better offers for the sale of the Acquired Assets, and the Bankruptcy Court shall have entered the Sale Order, the Sale Order shall be in full force and effect, and no order staying, reversing, modifying, vacating or amending the Sale Order shall be in effect on the Closing Date.
- (d) Closing Deliveries. Buyer shall have made the deliveries contemplated under Section 3.3.

**Section 6.2 Conditions Precedent to the Performance by Buyer.** The obligations of Buyer to consummate the transactions contemplated by this Agreement are subject to the fulfillment, at or before the Closing, of the following conditions, any one or more of which, other than the condition contained in Section 6.2(c), may be waived by Buyer, in its discretion:

- (a) Representations and Warranties of Seller. The representations and warranties of Seller made in Section 4.1 of this Agreement shall be true and correct in all material respects as of the Execution Date and as of the Closing Date as though made by Seller as of the Closing Date, except to the extent such representations

and warranties expressly relate to an earlier date, in which case such representations and warranties shall be true and correct on and as of such earlier date.

- (b) Performance of the Obligations of Seller. Seller shall have performed in all material respects all obligations required under this Agreement or any Ancillary Agreement to which Seller is a party to be performed by Seller on or before the Closing Date.
- (c) Governmental Consents and Approvals. Bankruptcy Court shall have entered the Sale Order, the Sale Order shall be in full force and effect, and no order staying, reversing, modifying, vacating or amending the Sale Order shall be in effect on the Closing Date.
- (d) Closing Deliveries. Seller shall have made the deliveries contemplated under Section 3.2.

## **ARTICLE VII. TERMINATION**

**Section 7.1 Conditions of Termination by Buyer Prior to the Specified Date.** This Agreement may be terminated by Buyer by 5:00PM eastern standard time on the date that is three (3) Business Days prior to the hearing date on the Sale Procedures Order set by the Bankruptcy Court (the “**Specified Date**”) by providing written notice to Seller of its election to terminate this Agreement (the “**Specified Notice**”) if (a) Buyer is not satisfied with the results of its due diligence (including, without limitation, the quality of earnings report to be prepared by Buyer’s advisors) in its reasonable discretion or (b) Buyer is not satisfied with Schedule 2.5, to be supplemented by the Seller prior to the Specified Date. Buyer will be deemed to have waived its right to terminate this Agreement pursuant to this Section 7.1 if it does not deliver the Specified Notice by 5:00PM eastern standard time on the Specified Date.

**Section 7.2 Conditions of Termination at Any Time Prior to Closing.** This Agreement may be terminated only in accordance with this Article VII. This Agreement may be terminated at any time before the Closing as follows:

- (a) By mutual consent of Seller and Buyer;
- (b) By Seller, by notice to Buyer, if Seller has provided Buyer with notice of any inaccuracy of any representation or warranty contained in Section 4.2, or of a failure to perform any covenant or obligation of Buyer contained in this Agreement or any Ancillary Agreement to which Buyer is party, and Buyer has failed, within three (3) Business Days after such notice, to remedy such inaccuracy or perform such covenant or provide reasonably adequate assurance to Seller of Buyer’s ability to remedy such inaccuracy or perform such covenant or obligation; provided, however, that Seller shall not have the right to terminate this Agreement under this Section 7.2(b) if Seller is then in material breach of this Agreement;

- (c) By Seller, if the Bankruptcy Court dismisses the Seller's chapter 11 case or converts the chapter 11 case to a case under chapter 7 of the Bankruptcy Code; if the Bankruptcy Court confirms a chapter 11 plan in the Seller's chapter 11 case; or if the Bankruptcy Court appoints an examiner with expanded powers;
- (d) By Buyer, by notice to Seller, if Buyer has previously provided Seller with notice of any material inaccuracy of any representation or warranty of Seller contained in Section 4.1 or a material failure to perform any pre-Closing covenant of Seller contained in this Agreement or any Ancillary Agreement to which Seller is a party, either of which would have a material adverse effect upon the Acquired Assets after Closing, and Seller has failed, within three (3) Business Days after such notice, to remedy such inaccuracy or perform such covenant or provide reasonably adequate assurance to Buyer of Seller's ability to remedy such inaccuracy or perform such covenant; provided, however, that Buyer shall not have the right to terminate this Agreement under this Section 7.2(d) if Buyer is then in material breach of this Agreement; and
- (e) By Buyer, in the event Franchisor exercises any right of first refusal or similar option or right with respect to the Acquired Restaurants;
- (f) Automatically, upon the consummation of an Alternative Transaction;
- (g) By Buyer prior to the Bid Deadline, in the event that (i) Buyer is not satisfied with the amendments to the terms of the applicable Real Property Leases with Spirit in its reasonable discretion; and (ii) Buyer is not satisfied with the remodel schedule with Franchisor in its reasonable discretion.
- (h) By Buyer in the event the Bankruptcy Court issues a Sale Order in a form that materially differs from the form of Sale Order attached as Exhibit 5.4(b)(ii).
- (i) By Buyer in the event the Bankruptcy Court does not approve this Agreement as the "stalking horse" Purchase Agreement pursuant to the Sale Procedures Order.

**Section 7.3 Effect of Termination; Remedies.**

- (a) In the event of termination pursuant to Section 7.1 or Section 7.2, this Agreement shall become null and void and have no effect (other than Article VII, Article VIII and Article IX, which shall survive termination), with no liability on the part of Seller, Buyer, or their respective Affiliates or respective Related Persons, with respect to this Agreement or any Ancillary Agreement, except for any liability provided for in this Article VII.
- (b) If this Agreement is terminated pursuant to Section 7.1, Section 7.2(a), 7.2(c), 7.2(d) or 7.2(i) then, within five (5) Business Days after such termination, the Deposit shall be returned to Buyer, without interest.

- (c) If this Agreement is terminated pursuant to Section 7.2(b) then all right, title and interest to the Deposit shall automatically vest in Seller, and Seller may pursue any and all other remedies at law.
- (d) If this Agreement is terminated pursuant to Section 7.2(e) or Section 7.2(f) then, subject to the approval of the Bankruptcy Court, (i) the Deposit shall be returned to Buyer, without interest, within five (5) Business Days; and (ii) Seller shall pay to Buyer the Buyer's reasonable transaction expenses related to the negotiation, execution and performance of this Agreement up to a maximum of \$100,000 ("**Buyer Expenses**"), as evidenced in writing to Seller in reasonable detail and approved by the Bankruptcy Court. Any payments of the Buyer Expenses under this Section 7.3(d) shall be made by Seller from the proceeds of the Alternative Transaction or from the proceeds of the exercise of the right of first refusal, by wire transfer of immediately available funds to an account designated in writing by Buyer within five (5) Business Days from the closing of such Alternative Transaction.
- (e) Notwithstanding anything contained herein to the contrary, if this Agreement is terminated pursuant to Section 7.2(g) or Section 7.2(h), then, subject to the approval of the Bankruptcy Court (i) the Deposit shall be returned to Buyer within five (5) Business Days and (ii) if an Alternative Transaction is consummated, Seller shall pay to Buyer the Buyer Expenses. Any payments of the Buyer Expenses under this Section 7.3(e) shall be made by Seller from the proceeds of the Alternative Transaction to an account designated in writing by Buyer within five (5) Business Days from the closing of such Alternative Transaction.
- (f) Seller acknowledges that Buyer Expenses (or any portion thereof) are necessary and appropriate expenses for the administration of its estate, pursuant to sections 503 and 507 of the Bankruptcy Code, and that the Buyer Expenses (or any portion thereof) are allowed administrative expenses against its estate subject to Bankruptcy Court approval.

**Section 7.4 Exclusive Remedy; Waiver.** Prior to the Closing, the parties' sole and exclusive remedies for any claim arising out of or in connection with this Agreement shall be termination in accordance with, and obtaining the remedies provided in, this Article VII. The failure by either Seller or Buyer to pursue or foreclose on any right or remedy against the other party, by itself, shall not constitute a waiver, and any waiver under this Article VII shall be effective only if made in writing.

## **ARTICLE VIII. SURVIVAL AND INDEMNIFICATION**

**Section 8.1 Survival; Indemnification.** None of the representations and warranties of Seller and of Buyer made in this Agreement shall survive the Closing Date, and all of such representations and warranties shall be extinguished by the Closing. All covenants and agreements of the parties contained in this Agreement shall survive the Closing, unless otherwise expressly stated therein. Seller shall have no monetary obligation to Buyer for breach of any covenant or agreement except under the covenant set forth in Section 7.2(d). If the Closing



occurs, Buyer shall indemnify and hold harmless Seller and its respective Affiliates and Related Persons against any and all losses, liability, expense or damage that result from or arise out of the Assumed Liabilities, and shall promptly pay such Assumed Liabilities as they become due and payable.

**Section 8.2 Specific Performance.** Buyer acknowledges that in case of any breach of its respective covenants after the Closing, Seller would suffer immediate and irreparable harm, which money damages would be inadequate to remedy, and accordingly, in case of any such breach Seller shall be entitled to obtain specific performance.

## ARTICLE IX. MISCELLANEOUS

**Section 9.1 Allowed Administrative Expenses.** Subject to approval of the Bankruptcy Court, any and all amounts owed to Buyer by Seller hereunder or under any Ancillary Agreement after the Execution Date shall constitute allowed administrative expenses of the Seller under sections 503(b)(1) and 507(A)(1), as applicable, of the Bankruptcy Code.

**Section 9.2 Alternative Transaction.** Notwithstanding anything herein or in any Ancillary Agreement to the contrary, Seller may furnish information concerning Seller, the Acquired Assets and the Assumed Liabilities to any Person in connection with a potential Alternative Transaction and negotiate, enter into and consummate an Alternative Transaction.

**Section 9.3 Further Assurances.** At the request and the sole expense of the requesting party, Buyer or Seller, as applicable, shall execute and deliver, or cause to be executed and delivered, such documents as Buyer or Seller, as applicable, or their respective counsel may reasonably request to effectuate the purposes of this Agreement and the Ancillary Agreements.

**Section 9.4 Successors and Assigns.** This Agreement shall inure to the benefit of and shall be binding upon the successors and assigns of the parties hereto.

**Section 9.5 Governing Law; Jurisdiction.** This Agreement shall be construed, performed and enforced in accordance with, and governed by, the laws of the State of Pennsylvania (without giving effect to the principles of conflicts of laws thereof), except to the extent that the laws of such State are superseded by the Bankruptcy Code or other applicable federal law. For so long as Seller is subject to the jurisdiction of the Bankruptcy Court, the parties irrevocably elect, as the sole judicial forum for the adjudication of any matters arising under or in connection with the Agreement, and consent to the exclusive jurisdiction of, the Bankruptcy Court.

**Section 9.6 Expenses.** Except as otherwise provided in this Agreement, Seller and Buyer shall pay their own expenses in connection with this Agreement and the transactions contemplated hereby, including, without limitation, any legal and accounting fees, whether or not the transactions contemplated hereby are consummated.

**Section 9.7 Severability.** In the event that any part of this Agreement is declared by any court or other judicial or administrative body to be null, void or unenforceable, said provision shall survive to the extent it is not so declared, and all of the other provisions of this

Agreement shall remain in full force and effect only if, after excluding the portion deemed to be unenforceable, the remaining terms shall provide for the consummation of the transactions contemplated hereby in substantially the same manner as set forth on the Execution Date.

**Section 9.8 Notices.**

- (a) All notices, requests, demands, consents and other communications under this Agreement shall be in writing and shall be deemed to have been duly given: (i) on the date of service, if served personally on the party to whom notice is to be given; (ii) on the day of transmission, if sent via facsimile transmission to the facsimile number given below or by electronic mail to the electronic mail address given below; (iii) on the day after delivery to Federal Express or similar overnight courier or the Express Mail service maintained by the United States Postal Service addressed to the party to whom notice is to be given; or (iv) on the fifth (5<sup>th</sup>) day after mailing, if mailed to the party to whom notice is to be given, by first class mail, registered or certified, postage prepaid and properly addressed, to the party as follows:

If to Seller:

M. Colette Gibbons, Chapter 11 Trustee  
Ice Miller, LLP  
600 Superior Avenue East, Suite 1701  
Cleveland, OH 44114  
Email: Colette.gibbons@icemiller.com  
Facsimile: 216.621.6502

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

McDonald Hopkins LLC  
600 Superior Avenue, E., Suite 2100  
Cleveland, OH 44114  
Attention: Scott N. Opincar, Esq. and Christal L. Contini, Esq.  
Email: sopincar@mcdonaldhopkins.com and ccontini@mcdonaldhopkins.com  
Facsimile: 216.348.5474

If to Buyer, all notice shall be directed to legal counsel below, and notice to such legal counsel shall constitute notice to Buyer for all purposes under this Agreement:

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P.  
Wells Fargo Capitol Center  
150 Fayetteville Street, Suite 2300  
Raleigh, NC 27601  
Attention: Bart Norman  
Facsimile: 919.821.6800  
Email: bnorman@smithlaw.com

- (b) Any party may change its address, facsimile number or email address for the purpose of this Section 9.8 by giving the other parties written notice of its new address in the manner set forth above.

**Section 9.9 Amendments; Waivers.** This Agreement may only be amended or modified, and any of the terms, covenants, representations, warranties or conditions hereof may only be waived, by a written instrument executed by Buyer and Seller, or in the case of a waiver, by the party waiving compliance. Any waiver by any party of any condition, or of the breach of any provision, term, covenant, representation or warranty contained in this Agreement, in any one or more instances, shall not be deemed to be or construed as a furthering or continuing waiver of any such condition, or of the breach of any other provision, term, covenant, representation or warranty of this Agreement.

**Section 9.10 Public Announcements.** Promptly after the Closing, the parties shall make a joint press release in form and substance reasonably satisfactory to both of them regarding the transactions contemplated herein. Except as provided in the foregoing sentence, no party shall make any press release or public announcement concerning the transactions contemplated by this Agreement without first coordinating their communications strategy with the other party, unless a press release or public announcement is required by law, the rules of any stock exchange, or is permitted by, or required by an order of, the Bankruptcy Court. If any such announcement or other disclosure is required by law, the rules of any stock exchange or is permitted by, or required by an order of, the Bankruptcy Court, the disclosing party shall use reasonable efforts to give the non-disclosing party or parties prior notice of, and an opportunity to comment on, the proposed disclosure; provided, there shall be no liability to the disclosing party for failure to notify the other party. The parties acknowledge that Seller shall file this Agreement with the Bankruptcy Court in connection with obtaining the Sale Order and that Franchisor may provide or release its own press release or announcement without the consent or input of either Buyer or Seller.

**Section 9.11 Entire Agreement.** This Agreement and the Ancillary Agreements contain the entire understanding between the parties with respect to the transactions contemplated hereby and supersede and replace all prior and contemporaneous agreements and understandings, oral or written, with regard to such transactions. The Recitals and all Exhibits and Schedules hereto and any documents and instruments delivered pursuant to any provision

hereof are expressly made a part of this Agreement as fully as though completely set forth herein.

**Section 9.12 No Third Party Beneficiaries.** Nothing in this Agreement is intended to or shall confer any rights or remedies under or by reason of this Agreement on any Persons other than Seller and Buyer and their respective successors and permitted assigns. Nothing in this Agreement is intended to or shall relieve or discharge the obligator or liability of any third Persons to Seller or to Buyer. This Agreement is not intended and shall not give any third Persons any right of subrogation or action over or against Seller or Buyer.

**Section 9.13 Headings.** The article and section headings in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement.

**Section 9.14 Counterparts; Delivery.** This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute the same agreement. The signature of any of the parties may be delivered and made by facsimile, portable document format (“pdf”) or other electronic means capable of creating a printable copy, and each such signature shall be treated as original signatures for all purposes.

**Section 9.15 Construction.** Any reference to any law shall be deemed also to refer to all rules and regulations promulgated thereunder, unless the context requires otherwise. The word “including” shall mean “including without limitation”, whether or not it is in fact followed by those words or words of like import. Any reference to the singular in this Agreement shall also include the plural and vice versa. The phrase “to which Seller is a party,” or similar construction, is intended to limit the applicable listing of any items, properties, assets, or Contracts to only those items that a Seller actually owns or to which Seller is actually a party, as the case may be, and is meant to exclude any listed property or Contract otherwise.

**Section 9.16 Bulk Sales.** Buyer waives compliance with any laws governing bulk sales, including any applicable provisions of the Uniform Commercial Code.

## **ARTICLE X. DEFINITIONS**

As used in this Agreement, the following terms have the following meanings:

“**Accrued Expenses**” has the meaning set forth in Section 1.3(b).

“**Accounts Payable**” has the meaning set forth in Section 1.3(a).

“**Accounts Receivable**” has the meanings set forth in Section 1.2(b).

“**Acquired Assets**” has the meaning set forth in Section 1.1.

“**Acquired Contracts**” has the meaning set forth in Section 1.6(a).

“**Acquired Deposits**” has the meaning set forth in Section 1.1(f).

“**Acquired Restaurants**” means all Perkins restaurants located on the Leased Real Property and Owned Real Property.

“**Acquired Vehicles**” has the meaning set forth in Section 1.1(o).

“**Affiliate**” means, with respect to any Person, any other Person directly or indirectly controlling, controlled by or under direct or indirect common control with such Person.

“**Agreement**” has the meaning set forth in the Preamble.

“**Allocation**” has the meaning set forth in Section 2.5.

“**Alternative Transaction**” means any transaction (regardless of the form thereof) involving a sale of all or any substantial portion of the Acquired Assets by Seller to a purchaser or purchasers other than Buyer; provided, that such transaction is undertaken pursuant to section 363 of the Bankruptcy Code.

“**Ancillary Agreements**” means the Confidentiality Agreement, any bill of sale, assignment or assumption agreement or other related agreements by and between Seller and Buyer effecting or evidencing the transactions contemplated under this Agreement.

“**Assumed Liabilities**” has the meaning set forth in Section 1.3.

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

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

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

“**Bid Deadline**” shall have the meaning given to such term in the Sale Motion seeking the Bankruptcy Court’s issuance of the Sale Procedures Order.

“**Business Day**” means any day other than Saturday, Sunday and any day that is a federal legal holiday.

“**Buyer**” has the meaning set forth in the Preamble.

“**Buyer’s Proration Amount**” has the meaning set forth in Section 2.3.

“**Buyer Expenses**” has the meaning set forth in Section 7.3(d).

“**Chapter 11 Trustee**” has the meaning set forth in the Recitals.

“**Closing**” has the meaning set forth in Section 3.1.

“**Closing Date**” has the meaning set forth in Section 3.1.

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

**“Confidentiality Agreement”** means the confidentiality agreement Buyer executed in conjunction with its review of Seller’s records.

**“Confidential Information”** means information that is not generally known or available to the public and that is used, developed or obtained by the Seller in connection with the business, and all proprietary or confidential business information of the Seller or otherwise relating to the business of the Seller, whether in oral, written, graphic, machine-readable, code or tangible or intangible form, whether or not registered, and including financial information, business reports and other confidential and proprietary information, data and documents, regardless of whether any such information, data or documents qualify as “trade secrets” under applicable federal or state law.

**“Contract”** means any contract, agreement, lease or sublease, license or sublicense, instrument, indenture, commitment or undertaking, whether in written form or otherwise.

**“Contract Designation Date”** has the meaning set forth in Section 1.6(a).

**“Cure Costs”** has the meaning set forth in Section 1.3(c).

**“Deposit”** has the meaning set forth in the Recitals.

**“Designated Contracts”** has the meaning set forth in Section 1.1(h).

**“Employee Records”** has the meaning set forth in Section 1.1(m).

**“Employee Benefit Plans”** means (i) all employee benefit plans as defined in section 3(3) of ERISA; (ii) all compensation, pay, severance pay, salary continuation, bonus, incentive, stock option, retirement, pension, profit sharing or deferred compensation plans, Contracts, programs, funds or arrangements of any kind; and (iii) all other employee benefit plans, programs, funds or arrangements (whether written or oral, qualified or nonqualified, funded or unfunded, foreign or domestic, currently effective or terminated, and whether or not subject to ERISA) and any trust, escrow or similar agreement related thereto, whether or not funded.

**“Employee Claims”** has the meaning set forth in Section 5.3(c).

**“Encumbrance”** means any lien, license to a third party, option, pledge, security interest, mortgage, right of way, easement, encroachment, right of first offer or first refusal, buy/sell agreement and any other material restriction or covenant with respect to, or material condition governing the use, voting (in the case of any security or equity interest), transfer, receipt of income or exercise of any other material attribute of ownership.

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

**“Excluded Assets”** has the meaning set forth in Section 1.2.

**“Excluded Contracts”** has the meaning set forth in Section 1.2(i).

**“Excluded Liabilities”** has the meaning set forth in Section 1.4.

“**Execution Date**” has the meaning set forth in the Preamble.

“**Franchise Agreements**” is defined in Section 1.1(c).

“**Franchisor**” means Perkins & Marie Callender’s LLC, a Delaware corporation, d/b/a Perkins Restaurant & Bakery, or its successors-in-interest, whether by merger, acquisition of equity or acquisition of all or substantially all of its assets.

“**Government**” means any agency, division, subdivision or governmental or regulatory authority, or any adjudicatory body thereof, of the United States or any state or territory thereof.

“**Governmental Authority**” means any United States federal, foreign, state or local government, or political subdivision thereof, or any authority, agency or commission entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power, any court or tribunal (or any department, bureau or division thereof), or any arbitrator or arbitral body, and includes any contractor, acting on behalf of a Governmental Authority.

“**Inventory**” means all of Seller’s goods, raw materials, consumable food and beverages and all of Seller’s tangible property used in the preparation of, serving, and cleaning-up from meals, including, without limitation, napkins, silverware, plates and dining ware, cups, mugs, cooking and cleaning utensils, and other related items. “**Leased Real Property**” means the real property leased by Seller pursuant to the Real Property Leases.

“**Leasehold Improvements**” means those fixtures, structures and other improvements located on any Leased Real Property used in the operation of Seller’s business.

“**Legal Requirement**” means any federal, state or local law, statute, ordinance; common law ruling or regulation, or any Government order, or any license, franchise, permit or similar right granted under any of the foregoing, or any similar provision having the force or effect of law, or the regulations or requirements promulgated pursuant to any of such statutes.

“**Notification**” has the meaning set forth in Section 1.6(b).

“**Owned Real Property**” has the meaning set forth in Section 1.1(a).

“**Perkins**” means any Person operating a Perkins restaurant, whether Franchisor or any franchisee thereof.

“**Permits**” has the meaning set forth in Section 1.1(j).

“**Permitted Encumbrances**” means Encumbrances for ad valorem personal property Taxes not yet due and payable and Encumbrances which secure only the Assumed Liabilities.

“**Person**” means any individual, corporation, partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization or Government.

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

“**Prepaid Expenses**” has the meaning set forth in Section 1.1(e).

“**Property Taxes**” has the meaning set forth in Section 1.3(d).

“**Prorated Amounts**” has the meaning set forth in Section 2.3.

“**Proration**” has the meaning set forth in Section 2.3.

“**Purchase Price**” has the meaning set forth in Section 2.1.

“**Real Property Leases**” has the meaning set forth in Section 1.1(b).

“**Rebates**” has the meaning set forth in Section 1.2(c).

“**Related Person**” means, with respect to any Person, all past, present and future directors, officers, members, managers, stockholders, employees, controlling persons, agents, professionals, attorneys, accountants, lenders, investment bankers or representatives of any such Person.

“**Sale Motions**” has the meaning set forth in Section 5.4(b).

“**Sale Order**” has the meaning set forth in Section 5.4(b)(ii).

“**Sale Procedures Order**” has the meaning set forth in Section 5.4(b)(i).

“**Seller**” has the meaning set forth in the Preamble.

“**Seller’s Proration Amount**” has the meaning set forth in Section 2.3.

“**Specified Date**” has the meaning set forth in Section 7.1.

“**Specified Notice**” has the meaning set forth in Section 7.1.

“**Spirit**” means, collectively, Spirit Master Funding III, LLC, Spirit Master Funding IV, LLC and Spirit Finance Acquisitions, LLC.

“**Tax Return**” means any report, return, information return, filing or other information, including any schedules, exhibits or attachments thereto, and any amendments to any of the foregoing required to be filed or maintained in connection with the calculation, determination, assessment or collection of any Taxes (including estimated Taxes).

“**Taxes**” means all taxes, however denominated, including any interest, penalties or additions to tax that may become payable in respect thereof, imposed by any Government, whether payable by reason of contract, assumption, transferee liability, operation of law or Treasury Regulation section 1.1502-6(a) (or any predecessor or successor thereof or any analogous or similar provision under state, local or foreign law), which taxes shall include all income taxes, payroll and employee withholding, unemployment insurance, social security (or similar), sales and use, excise, franchise, gross receipts, occupation, real and personal property, stamp, transfer, workmen’s compensation, customs duties, registration, documentary, value added, alternative or



add-on minimum, estimated, environmental (including taxes under section 59A of the Code) and other assessments or obligations of the same or a similar nature, whether arising before, on or after the Closing Date.

**“Total Consideration”** has the meaning set forth in Section 2.1.

**“Transaction Taxes”** has the meaning set forth in Section 2.4.

**“Transactions”** means, collectively, the transactions contemplated by this Agreement.

**“Trustee”** means M. Collette Gibbons, not individually, but in her capacity as the Bankruptcy Court appointed Chapter 11 Trustee of Seller.

**“Undisclosed Contract”** has the meaning set forth in Section 1.6(b).

**“Undisclosed Contract Assignment Order”** has the meaning set forth in Section 1.6(b).

**“Utility Deposits”** has the meaning set forth in Section 1.2(j).

**“WARN Act”** means the Worker Adjustment and Retraining Notification Act of 1988, as amended.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties hereto have caused this Asset Purchase Agreement to be executed as of the Execution Date.

**BUYER:**

**SFR II Holdings, LLC**

By:  \_\_\_\_\_  
Name: Kevin Attkisson  
Title: Manager

**SELLER:**

**Unique Ventures Group, LLC**

By: \_\_\_\_\_  
Name: M. Colette Gibbons, not individually, but in her capacity as the Bankruptcy Court appointed Chapter 11 Trustee of Unique Ventures Group, LLC

IN WITNESS WHEREOF, the parties hereto have caused this Asset Purchase Agreement to be executed as of the Execution Date.

**BUYER:**

**SFR II Holdings, LLC**

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**SELLER:**

**Unique Ventures Group, LLC**

By: M Colette Gibbons, Chapter 11 Trustee

Name: M. Colette Gibbons, not individually, but in her capacity as the Bankruptcy Court appointed Chapter 11 Trustee of Unique Ventures Group, LLC

**Exhibit 5.4(b)(i)**

**Sale Procedures Order**

(See attached)

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	CASE NO. 1720526(TPA)
	:	
UNIQUE VENTURES GROUP, LLC	:	
	:	
Debtor.	:	
	:	CHAPTER 11
<hr/> M. COLETTE GIBBONS, as Chapter 11	:	
Trustee,	:	
	:	
Movant,	:	RELATED TO DOCKET NO.
	:	
v.	:	
	:	
3D ACQUISITIONS, LP, ACCESS	:	
POINT, INC., BAINBRIDGE LIMITED	:	HEARING DATE & TIME:
PARTNERS, ELMHURST PROPERTIES	:	TBD
INC., GAR FIELD CLUB LP, GERALD	:	
FRY COMPANY, PERKINS & MARIE	:	
& \$/(1'(5¶6 // & 3(5., 16	:	RESPONSE DATE:
HOLDINGS, LLC, REINHART	:	TBD
FOODSERVICE, LLC, PENNSYLVANIA	:	
DEPARTMENT OF REVENUE, ALLY	:	
BANK, US FOODS, INC., WARREN	:	
COUNTY TAX CLAIM BUREAU,	:	
BUTLER COUNTY TAX CLAIM	:	
BUREAU, ERIE WATER WORKS,	:	
MCKEAN COUNTY TAX CLAIM	:	
BUREAU, SPIRIT MASTER FUNDING	:	
IV, LLC, SPIRIT FINANCE	:	
ACQUISITIONS, LLC, SPIRIT MASTER	:	
FUNDING V, LLC, and SPIRIT	:	
MASTER FUNDING III, LLC,	:	
	:	
Respondents.	:	JUDGE THOMAS AGRESTI
	:	

ORDER: (I) APPROVING BID PROCEDURES FOR SALE OF SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS; (II) AUTHORIZING AND SCHEDULING AN AUCTION; (III) SCHEDULING HEARING FOR APPROVAL OF THE SALE OF ASSETS FREE AND CLEAR OF LIENS AND THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES TO THE SUCCESSFUL BIDDER; (IV) APPROVING CERTAIN DEADLINES AND THE FORM, MANNER, AND SUFFICIENCY OF NOTICE; AND (V) GRANTING OTHER RELATED RELIEF

This matter coming before the Court on the Motion Chapter 11 Trustee for an Order: (i) Approving Bid Procedures for Sale of Substantially All of the Debtor's Assets; (ii) Authorizing and Scheduling an Auction; (iii) Scheduling Hearing for Approval of the Sale of Assets Free and Clear of Liens and the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases to the Successful Bidder; (iv) Approving Certain Deadlines and the Form, Manner and Sufficiency of Notice; and (v) Granting Other Related Relief. Docket No. \_\_\_\_\_

(the 3 3 U R F H G X U H N e d b y W L & Q O H W W H \* L E E R Q V & K D S W H U 7 U R I 8 Q L T X H 9 H Q W X U H V \* U R X S // & W K H 3 ' H E W R U '

And it appearing that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(a); the Court having considered the Procedures Motion and it appearing that the relief requested in the Procedures Motion is in the best interests of the Debtor's bankruptcy estate, its creditors and other parties in interest; and objections, if any, having been withdrawn, resolved, or overruled by the Court, and after due deliberation and sufficient cause appearing therefor;

THE COURT HEREBY FINDS AND CONCLUDES THAT:

A. Notice of the Procedures Motion was adequate and sufficient under the circumstances of the Debtor's chapter 11 case and such notice complied with all applicable requirements of title 11 of the United States Code, 11 U.S.C. §§ 1-1532 W Bankruptcy & R C, the Federal Rules of Bankruptcy Procedure W K H 3 % D Q N U X a n d t h e L o c a l 5 K O H V ' Bankruptcy Rules of the United States Bankruptcy Court for the Western District of Pennsylvania W K H 3 / R F D O 5 X O H V '

B. The bid procedures attached hereto as Schedule A W Bid Procedures' D U H reasonable and appropriate under the circumstances of the Debtor's chapter 11 case

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

C. The Notice of Bid Procedures, Auction Date and Sale Hearing, substantially in the form attached hereto as Schedule B W K H 3 6 B I D P R O C E D U R E S H E A R I N G A N D S A L E H E A R I N G provide adequate notice concerning the proposed sale of the Assets, and are intended to provide due and adequate notice of the relief sought in the Sale Motion.

D. The entry of this Order is in the best interests of the Debtor's estate its creditors and other parties in interest.

NOW, THEREFORE, BASED UPON ALL OF THE FOREGOING, THE COURT HEREBY ORDERS THAT :

1. The Procedures Motion shall be, and hereby is, GRANTED
2. The Bid Procedures are approved in their entirety and are incorporated into this Order as though fully set forth therein and shall apply to the Auction and sale of the Assets.
3. The Trustee is authorized to take any and all actions necessary or appropriate to implement the Bid Procedures.
4. The Sale Hearing shall be held on December \_\_, 2017, at 10:00 a.m. (prevailing Eastern Time), at the United States Bankruptcy Court for the Western District of Pennsylvania, U.S. Bankruptcy Court, U.S. Courthouse, 17 South Park Row, Erie, PA.16501
5. If the Trustee receives more than one Qualified Bid (as defined in the Bid Procedures) as part of the Sale Hearing.
6. Any objections to any of the relief to be requested at the Sale Hearing must be in writing, state the basis of such objections with specificity, and shall be filed with the Court on or before December \_\_, 2017, at 4:00 p.m. (prevailing Eastern Time), and such objections shall be served in accordance with the Sale Bid Procedures Notice.
7. The proposed sale of the Assets and the Auction shall be conducted by the Court in accordance with the provisions of this Order and Bid Procedures.

8. The Sale and Bid Procedures Notice provides proper notice to all parties in interest and is hereby approved.

9. Within three business days following entry of this Order, the Trustee shall serve by first class mail the Sale and Bid Procedures Notice on the following parties: (a) the United States Trustee for the Western District of Pennsylvania; (b) counsel to Spirit Finance Acquisitions; (c) counsel to the Official Committee of Unsecured Creditors; (d) all parties known to be asserting a lien on any of the Assets; (e) all known counterparties to contracts and leases that may be assumed and assigned; (f) all parties that were provided with the sale teaser or otherwise known to have expressed an interest in bidding on the Assets; (g) the state and local taxing authorities where the Debtor operates; (h) the United States; (i) the District Director of Internal Revenue; (j) Perkins and Marie Callender, LLC.; (k) all other parties that filed a notice of appearance and demand for service of papers in Debtor's bankruptcy case under Bankruptcy Rule 9010(b) as of the date of entry of the Bid Procedures Order, and (l) all known creditors of the Debtor DV VHW IRUWK LQ WKH FUHGLWRUV P DWUL Liabilities as filed with Court

10. The Trustee is directed, no more than thirty nor less than fourteen calendar days prior to the Sale Hearing, to publish the Sale and Bid Procedure Notice in the Erie Times News, the Erie County Legal Journal, and the Nation. V 5 H V W D X S U D Q W L C A T I O Z Notice shall constitute an additional component of Sale and Bid Procedure Notice.

11. Within seven business days following entry of this Order, the Trustee shall upload the information required by Local Rule 6004 to the Electronic Access to Sales Information V \ V W H P R Q W K H . & R X U W V Z H E V L W H

12. Compliance with the foregoing notice provisions shall constitute sufficient notice of the proposed sale of the Assets free and clear of all liens, claims, interests



encumbrances, and except as set forth in this Order, no other or further notice of the sale shall be required to be provided by the Trustee

13. Notwithstanding the possible applicability of Bankruptcy Rules 604(h) 6006(d) and 7062 or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry, and no automatic stay of execution shall apply to this Order.

14. In the event there is any inconsistency between the Procedures Manual, Procedures, or this Order, this Order shall govern.

15. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation of this Order. All matters arising from or related to the implementation of this Order may be brought before the Court as a contested matter without the necessity of commencing an adversary proceeding.

IT IS SO ORDERED, this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

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THOMAS P. AGRESTI, JUDGE  
UNITED STATES BANKRUPTCY COURT

**Exhibit 5.4(b)(ii)**

**Sale Order**

(see attached)

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	CASE NO. 1720526(TPA)
	:	
UNIQUE VENTURES GROUP, LLC,	:	
	:	
Debtor.	:	
	:	CHAPTER 11
<hr/> M. COLETTE GIBBONS, as Chapter 11 Trustee,	:	
	:	
Movant,	:	RELATED TO DOCKET NO.
	:	
v.	:	
	:	
3D ACQUISITIONS, LP, ACCESS POINT, INC., BAINBRIDGE LIMITED PARTNERS, ELMHURST PROPERTIES INC., GAR FIELD CLUB LP, GERALD FRY COMPANY, PERKINS & MARIE HOLDINGS, LLC, REINHART FOODSERVICE, LLC, PENNSYLVANIA DEPARTMENT OF REVENUE, ALLY BANK, US FOODS, INC., WARREN COUNTY TAX CLAIM BUREAU, BUTLER COUNTY TAX CLAIM BUREAU, ERIE WATER WORKS, MCKEAN COUNTY TAX CLAIM BUREAU, SPIRIT MASTER FUNDING IV, LLC, SPIRIT FINANCE ACQUISITIONS, LLC, SPIRIT MASTER FUNDING V, LLC, and SPIRIT MASTER FUNDING III, LLC,	:	HEARING DATE & TIME: TBD
	:	
Respondents.	:	RESPONSE DATE: TBD
	:	
<hr/>	:	JUDGE THOMAS AGRESTI

ORDER APPROVING MOTION OF CHAPTER 11 TRUSTEE FOR AN ORDER  
(A) \$87,250,000 + 1% of the remaining assets of the estate, less the costs of administration, to be distributed to the unsecured creditors of the estate; (B) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND  
(C) GRANTING RELATED RELIEF

After a hearing commenced on December 10, 2017, the Court granted the Debtor's Motion for an Order: (a) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (b) Granting Relief, Docket No. \_\_\_ WKH 36DOH +HDULQJ' notice to all persons and parties entitled thereto; (b) upon consideration of Chapter 11 Trustee for an Order: \$ \$XWKRU LJLQJ WKH 6DOH RI 6XEVDQWLDOO and Clear of All Liens, Claims, Encumbrances, and Interests; (b) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (c) Granting Relief, Docket No. \_\_\_ WKH 36DOH F SXUVXDQW WR VHFWRQRV of the United States Code, 11 U.S.C. §§-101 WKH 3%DQNUXSWF\ &RGH' G Rules 2002, 6004, 6006 and 9014 of the Federal Bankruptcy Procedure (the 3%DQNUXSWF\ 5XOHV' H EDVHG XSRQ SURFHGLQJV KHCO pleadings and proceedings of record at the Sale Hearing; and (g) upon determination of this Court, for good and sufficient cause why that consummation of the Asset Purchase Agreement GDWHG DV RI BBBBBBBBBB WKH 3\$3\$' DQEXHHA FXWHG F hereto, by and between \_\_\_\_\_ WKH 33XUFKDVHU' DQG WKH 'HEWRU substantially all of KH GHEWRU JV DVVHWV FROOHFWLYHO\ WKH 3\$ APA) and the assumption and assignment of the certain executory contracts and unexpired leases FROOHFWLYHO\ WKH 3\$VVLJQH G &RQWUDFWV rúp,LLVCLQ WKH WKH 3'HEWRU' LWV EDQNUXSWF\ HVWDWH FUHGLWRUV D

following findings of fact:

A. On October 10, 2017, the Debtor filed the Sale Motion pursuant to sections 105, 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006 and 9014, seeking authorization and approval to FRQVXPPDWH WKH VDOH RI VXEVDQWLDOO\ DOO RI WKH Assigned Contrast

B. The Trustee has complied with all applicable procedures for providing notice of the sale of the Acquired Assets and the assignment and assumption of the Assigned Contracts. Proper, timely, adequate and sufficient notice of the Sale Motion and Sale Hearing and a reasonable opportunity to object and be heard with respect to the Sale Motion and the relief requested therein was provided and such notice was properly served on all required persons and entities, including, but not limited to, all creditors, parties with liens against or security interests in any of the Acquired Assets, creditor parties to the Assigned Contracts, local, state and federal taxing authorities, all parties requesting notice in accordance with the Bankruptcy Rules, and all persons claiming any interest in or related to the Acquired Assets.

C. Proper, timely and adequate and sufficient notice of the Sale Motion, Auction and the Sale Hearing has been provided in accordance with sections 105(a), 363, 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006 and 9014, and Local Rule 6004 such other applicable sections of the Bankruptcy Code, Bankruptcy Rules and Local Rules. Such notice was good and sufficient, and appropriate under the particular circumstances and no other or further notice of the Sale Motion, Auction and the Sale Hearing is or shall be required. In compliance with Local Rule of Bankruptcy Procedure 6004 the Trustee advertised the Sale Motion, Auction and Sale Hearing in the Erie County Legal Journal on \_\_\_\_\_, 2017, in the Erie County Electronic Access to Sales Information (EASI) website beginning on \_\_\_\_\_, 2017.

D. The notice adequately and accurately discloses the full terms of the proposed sale and the justification for the proposed sale.

E. The sale of the Acquired Assets pursuant to the terms and conditions set forth in the Sale Motion, Auction and Sale Hearing is or shall be required.

Trustee has demonstrated both (i) good, sufficient and sound business purpose and justification pursuant to sections 105 and 363 of the Bankruptcy Code, for the sale of the Acquired Assets, and (ii) compelling circumstances for the sale pursuant to section 363(b) of the Bankruptcy Code prior to, and outside of, a plan of reorganization.

F. Assumption and assignment of the Assigned Contracts is proper under section 365 of the Bankruptcy Code and represents the valid and reasonable exercise of the Purchaser's business judgment and is in the best interests of the Debtor, its estate, its creditors and all parties in interest. The Assigned Contracts are an integral part of the assets being purchased by Purchaser and, accordingly, the assumption and assignment of the Assigned Contracts is UH D V R Q D E O H D Q G H Q K D Q F H V W K H Y D O X H R I W K H ' H E W R U

G. The terms and conditions of the APA are non-exclusive, fair and reasonable. The APA:

- (i) was negotiated, proposed and entered into without collusion, in good faith I U R P D U P V O H Q J W K E D U J D L Q L Q J S R V L W L R Q V
- (ii) constitutes the highest or best offer for the Acquired Assets.

Neither the Trustee nor the Purchaser has engaged in any conduct that would cause or permit the APA to be avoided, or costs or damages to be imposed, under section 363(n) of the Bankruptcy Code.

H. The consideration to be paid by the Purchaser for the Acquired Assets under the APA (i) is fair and reasonable, (ii) is the highest and best offer for the Acquired Assets, (iii) will provide a high K H U D Q G E H W W H U U H F R Y H U \ I R U W K H ' H E W R U V F U would be provided by any other practical available alternative, and (iv) constitutes reasonably

equivalent value and fair consideration under the Bankruptcy Code and the laws of the United States, any state, territory, possession, or the District of Columbia.

J. As to all ~~par~~ ~~WLHV LGHQWLILHG LQ WKH FDSWLRQ, KHUHR~~ the Trustee may and shall sell the Acquired Assets free and clear of ~~and~~ all liens, encumbrances, claims, demands, rights, other interests, debts, or commitments, whether absolute or contingent, matured or unmatured, accrued or unaccrued, asserted or unasserted, liquidated or unliquidated, senior or subordinated, known ~~or~~ unknown, including, without limitation, any claims predicated upon any theory of successor liability or any similar theory excluding any ~~\$VVXPHG /LDELOLWLHV GHILQH LQ WKH \$3\$ FROOHFWL~~ when any such Interest ~~is~~ may have arisen or arise, because:

- (i) applicable ~~non~~ bankruptcy law permits such a sale;
- (ii) bankruptcy law permits such a sale;
- (iii) each applicable creditor consents to the sale as proposed in the Sale Motion;
- (iv) if such Interest is or are ~~in~~ lien, the aggregate value to be received in consideration of the sale of the Acquired Assets exceeds the value of any liens upon and security interests in the Acquired Assets;
- (v) applicable creditors could be compelled, in a legal or equitable proceeding to accept a money satisfaction of such Interests; and/or
- (vi) this Court, pursuant to its equitable powers and jurisdiction, has the power and authority to authorize and effectuate the sale of the Acquired Assets to the Purchaser free and clear of ~~all~~ interests.

K. The Purchaser has available (or will have available on the Closing) (as defined in the APA) all necessary cash and other resources required to consummate the APA in accordance with its terms and has provided adequate assurance of its ability to perform its obligations under each of the Assigned Contracts within the meaning of sections 365(b)(1) and 365(f) of the Bankruptcy Code.

L. The Trustee and the Purchaser have represented that, as of the date of the Sale Hearing, neither is aware of any material breaches of any provisions of the APA.

M. The APA is in the best interest of the Debtor, its creditors, its bankruptcy estate, and all other parties in interest.

N. A reasonable opportunity to bid, to object or to be heard regarding the relief requested in the Sale Motion has been offered to all interested parties.

O. The sale is in good faith, and the Purchaser is a good faith purchaser within the meaning of 363(m) of the Bankruptcy Code and in accordance with Abbotts Dairies of Pa., Inc., 788 F.2d 193 (3d Cir. 1986). The Purchaser and the Trustee will be acting in good faith within the meaning of section 363(m) in consummating the sale and the Purchaser is entitled to all of the protections afforded by section 363(m) of the Bankruptcy Code.

NOW, THEREFORE, based upon the findings of fact as set forth above and the pleadings and proceedings of record at the Sale Hearing, this Court renders conclusions of law as follows:

1. This Court has jurisdiction to hear and determine the Sale Motion pursuant to 28 U.S.C. § 1334.

2. Venue of this bankruptcy case in this Court is proper pursuant to 28 U.S.C. § 1409.



3. The Sale Hearing constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (N), and (O).

4. The statutory predicates for the requested relief, inter alia, sections 105, 363 and 365 of the Bankruptcy Code.

5. No other or further notice of the Sale Motion, the auction, the Sale Hearing or the entry of this Order is necessary.

6. The notice of the Sale Motion, the auction and the Sale Hearing ~~was~~ sufficient and proper notice under the circumstances and timely served upon all creditors, non debtor parties to the Assigned Contracts, and other parties in interest upon whom service is required, and the notice satisfies the provisions of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, 6006 and 9014, Local Rule 6004 and any other requirements of due process. No further or other notice of the Sale Motion, the auction or the Sale Hearing and the relief requested therein is or shall be required.

7. The notice of the Sale Motion, the auction and the Sale Hearing served upon creditors, nondebtor parties to the Assumed Contracts, and other parties in interest adequately discloses the business justification for consummation of the APA and all ancillary agreements with the Debtor (and the assumption and assignment of the Assigned Contracts), which execution and delivery of the APA and ancillary agreements (and which assumption and assignment of the Assigned Contracts) is required by the Purchaser ~~as a~~ precedent to closing, and the consequences of such consummation for creditors and other parties in interest and for the bankruptcy estate.

8. The Trustee has demonstrated good, sufficient and sound business reasons for the V D O H R I W K H ' p u r s u a n t t o t h e A P A a n d H o m e p e n n e l l i n g reasons for the sale pursuant to

section 363(b) of the Bankruptcy Code prior to, in contemplation of, and outside of, a plan of UHRUJDQLJDWLRQ DQG WKH FRQVXPPDWLRQ RI WKH \$3\$ creditors, the bankruptcy estate and other parties in interest. Subject to the entry of this Order, the Trustee has full power and authority to execute the APA and all other documents contemplated thereby, and has all of the power and authority necessary to consummate the transactions contemplated by the APA. The APA is a valid and binding contract which, upon entry of this Order, shall be enforceable according to its terms.

9. Assumption and assignment of the Assigned Contracts is proper under section 365 of the Bankruptcy Code. The sale of the Acquired Assets could not be consummated, or could be consummated only upon terms substantially less favorable to other parties in interest.

10. Without a sale free and clear of all interests, the sale of the Acquired Assets could not be consummated, or could be consummated only upon terms substantially less favorable to other parties in interest.

11. Sufficient cause and justification exist under sections 105(a), 363 and 365 of the Bankruptcy Code to approve the Sale Motion.

12. The sale is in good faith and the Purchaser is a good faith purchaser within the meaning of section 363(m) of the Bankruptcy Code and in accordance with Abbotts Dairies of Pa., Inc., 788 F.2d 193 (3d Cir. 1986). The Purchaser is entitled to all of the protections afforded by section 363(m) of the Bankruptcy Code.

13. In the event the parties to the APA consummate the transactions contemplated hereby while an appeal of this Order is pending, the Purchaser shall be entitled to rely upon the protections of section 363(m) of the Bankruptcy Code (without limiting in any way the

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Closing (as defined in the APA) by a court of competent jurisdiction

14. Accordingly, as to all Respondents, the Acquired Assets may and shall be sold free and clear of all Interests, regardless of how or when any such Interests may have arisen or arise, because:

- a. Applicable nonbankruptcy law permits such a sale;
- b. Bankruptcy law permits such a sale;
- c. Each applicable creditor consents to the sale as proposed in the Sale Motion;
- d. If such Interests is or are a lien, the aggregate value to be received in consideration of the sale of the Acquired Assets exceeds the value of any liens upon and security interests in the Acquired Assets;
- e. Applicable creditors could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such Interests;
- f. this Court, pursuant to its equitable powers and jurisdiction, has ~~the~~ the power and authority to authorize and effectuate the sale of the Acquired Assets to the Purchaser free and clear of all Interests, and/or
- g. because such Interests shall attach to the proceeds of the sale of the Acquired Assets to the same extent, with the ~~same~~ same priority, in the same order of priority, and with the same degree of perfection (if applicable) as existed on the Petition Date.

15. The amounts necessary to pay the Cure Amounts set forth in the Order granting the Omnibus Motion to Establish Cure Amounts ~~For~~ Executive Contracts and Unexpired Leases

Pursuant to 11 U.S.C. § 363 (the "Cure Amount Order"), Docket No. \_\_\_\_, for the Assigned Contracts as set forth on Schedule 1.1(g) of the APA will compensate or provide adequate assurance as provided for in sections 365(b)(1) and 365(f). The Purchaser has provided adequate assurance of future performance as required by sections 365(b)(1) and 365(f) of the Bankruptcy Code.

16. All the transactions contemplated by the APA are properly authorized under sections 105, 363 and 365 of the Bankruptcy Code.

17. There is no law which prohibits or restricts assignment, conveyance or transfer of any of the Acquired Assets to the Purchaser.

18. Cause exists to waive the 14-day stay of this Sale Order pursuant to Bankruptcy Rules 6004(h) and 607(d).

NOW, THEREFORE, based upon the findings of fact and conclusions of law set forth above and the pleadings and proceedings of record at the Sale Hearing,

1. The Sale Motion is granted in its entirety. The APA (including all ancillary agreements to which the Debtor is a party and which have been previously identified to the Court) is hereby approved in all respects and the sale of the Acquired Assets is hereby authorized under, inter alia, sections 105(a), 363(b) and 365 of the Bankruptcy Code. To the extent objections to the Sale Motion have not been withdrawn, waived or resolved, such objections are hereby denied and overruled.

2. The findings of fact and conclusions of law set forth above shall constitute this & R X U W ¶ V I L Q G L Q J V R I I D e f W u r s u a n g t o B a n k r u p t c y R u l e 7 0 5 2, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any finding of fact

later shall be determined to be a conclusion of law, it shall be so deemed; and to the extent any conclusion of law shall later be determined to be a finding of fact, it shall be so deemed.

3. The Debtor is hereby authorized and directed to execute, deliver and perform the APA and all agreements and documents (each in form and substance acceptable to the Purchaser and its counsel and executed by the Trustee) contemplated thereby, including, without limitation, (i) delivery of a customary bill of sale for the Acquired Assets; (ii) assignment of the Assigned Contracts or Schedule 1.1(g) to the APA; and (iii) such other documents and other instruments of transfer and conveyance, and to take any and all actions as necessary or appropriate to the performance of the obligations contemplated by the APA, as may reasonably be requested by the Purchaser. The Debtor is hereby further authorized and directed to sell all of its right, title and interest in and to the Acquired Assets to the Purchaser, free and clear of any and all Interests, in accordance with the terms of the APA. The APA is, and shall be, binding upon and enforceable against the Debtor and its estate, according to its terms.

4. Pursuant to sections 105(a), 363(f) and 365(b) of the Bankruptcy Code and this & R X U W ¶ V H T X L W D E O H S R Z H U V D Q G D X W K R U L W \ D V W R D O deliver to the Purchaser good, marketable and transferable title to each of the Acquired Assets in Z K L F K L W K D V D Q L Q W H U H V W D W W K H & O R V L Q J D V G H I L Q H conveyance and delivery of title to the Acquired Assets, as to all Respondents, is and shall be free and clear of all Interests, including, without limitation, all security interests, if any, in and all liens upon the Acquired Assets, (ii) the transfer of the Acquired Assets shall vest Purchaser with all right, title and interest in and to the Acquired Assets, and (iii) each of the Assigned Contracts shall be deemed assumed by the Debtor and assigned to Purchaser as of the Closing Date, as provided in and contemplated and required by the APA with any such

modifications as are required thereunder or as mutually agreed by the Purchaser and the counterparty to any Assigned Contract.

5. Except as expressly permitted or otherwise specifically provided by the APA or this Order, all persons and entities, including, without limitation, all security holders, equity security holders, governmental, tax, and regulatory authorities, lenders, trade and other creditors, holding claims or interests of any kind or nature whatsoever, including the Interests, in or against the Debtor or any of the Acquired Assets (whether legal or equitable, secured or unsecured, matured or unmatured, fixed, liquidated, unliquidated, contingent or noncontingent, senior or subordinated), arising under or out of, in connection with, or in any way relating to, the Debtor the Acquired Assets, or the transfer of the Acquired Assets to the Purchaser, hereby are forever barred, estopped, and permanently enjoined from asserting any claims or interests against the Purchaser, its successors or assigns, its property, or the Acquired Assets.

6. To the greatest extent allowed by applicable law, except as expressly provided in the APA, the Purchaser is not assuming nor shall it, in any way whatsoever, be or be deemed to be liable or responsible, as successor or otherwise, for any liabilities of the Debtor (other than Assumed Liabilities), or any liabilities in any way whatsoever relating to or arising from the 'HEWRU¶V DVVHWV EXVLQHV V RU RSHUDWLRQV RU E\ YLU Purchaser (other than Assumed Liabilities). Without limiting the generality of the foregoing, and except as otherwise specifically provided herein and in the APA, the transfer of the Acquired Assets to the Purchaser and assumption and assignment to the Purchaser of the Assigned Contracts and the Assumed Liabilities shall be free and clear of all Liens and Interests, and not cause Purchaser to be liable for any claims against the Debtor or any of its predecessors or affiliates, except as expressly set forth in the APA as an Assumed Liability, and the Purchaser

shall have no successor or vicarious liabilities of any kind or character, whether known or unknown as of the Closing Date, now existing or hereafter arising, whether fixed or contingent, with respect to the Debtor or any obligations of the Debtor arising prior to the Closing Date, including, but not limited to, liabilities on account of any taxes arising, accruing, or payable under, out of, in connection with, or, in any way, relating to the operation or transfer of the ' H E W Business of assets prior to the Closing Date. All liabilities and obligations of the Debtor other than those expressly assumed under the APA, including without limitation liability under ERISA (including COBRA liability) or any potential or contingent liability under any pending or threatened litigation against the Debtor, shall be retained by and remain obligations and liabilities of the Debtor in accordance with the terms and conditions of the APA.

7. The Trustee is authorized to execute and deliver such instruments, take or perform such acts, and do such other things as may be necessary to effect and carry out the provisions of the APA, all of the transactions related thereto and this Order.

8. Neither conversion of this case to a case under Chapter 7 of the Bank Code nor dismissal of this case shall have any effect upon the rights of the Purchaser under or in connection with the APA or this Order, and the Purchaser shall be entitled to all of the rights and benefits afforded to it under (i) the APA, (ii) the instruments and documents executed or to be executed in connection with or pursuant to the APA, and (iii) this Order, notwithstanding any such conversion or dismissal. The APA and this Order shall be binding upon and enforceable against any trustee appointed in this case or in any case to which this case may be converted. No plan of reorganization or liquidation filed or confirmed in this case shall alter in any way the terms of the APA or this Order, including (without limitation) any of the rights of the Purchaser under the APA or this Order. The provisions of the APA and of this Order shall remain in full

force and effect notwithstanding the confirmation of any plan. In the event of any conflict between the terms of the APA and the terms of any plan of reorganization or liquidation confirmed in this case, the terms of the APA shall govern and control. Each provision of this Order is a material inducement to the Purchaser to consummate the transactions contemplated by the APA and, therefore, the provisions of this Order are and shall be non-reversible.

9. The assumption by the Debtor and assignment to the Purchaser of the Assigned Contracts is hereby authorized and approved. The Debtor parties to the Assigned Contracts are bound to the Cure Amounts set forth in the Cure Amount Order. The Purchaser shall be responsible for curing all pre-petition monetary and non-monetary defaults with respect to each of the Assigned Contracts.

10. All defaults or other obligations of the Debtor under the Assigned Contracts arising or accruing prior to the Closing Date shall be deemed cured, subject to the satisfaction of the provisions of the immediately preceding paragraph (relating to payment of the applicable cure amounts), and the Purchaser shall have no liability or obligation arising or accruing under the Assigned Contracts prior to the Closing Date, except as otherwise expressly provided in the APA or this Order. As of the Closing, subject to the provisions of this Order, the Purchaser shall succeed to the entirety of the Assigned Contracts, consistent with the provisions contained herein, shall be assigned to, and remain in full force and effect for the benefit of the Purchaser, in accordance with their respective or mutually agreed modified terms, notwithstanding any provision in any such Assigned Contract (including those of the type described in section 365(b)(2) of the Bankruptcy Code) that prohibits, restricts, or conditions such assignment or transfer pursuant to section 365(k) of the Bankruptcy Code, the Debtor shall be relieved from any further claims or liability



of any kind whatsoever with respect to the Assigned Contracts after such assignment to the Purchaser.

11. The APA has been undertaken by Purchaser and Debtor in good faith, and Purchaser is a good faith purchaser within the meaning of Section 363(m) of the Bankruptcy Code because: (a) Debtor and Purchaser engaged in good faith, lengthy negotiations in connection with the APA; and (b) in the absence of a stay pending appeal, Purchaser will be acting in good faith within the meaning of section 363(m) of the Bankruptcy Code in closing the sale as contemplated by the APA at any time after the entry of this Sale Order, and such closing in the face of an appeal will not deprive Purchaser of its status as a good faith purchaser. The reversal or modification on appeal of the authorizations provided herein to consummate the sale shall not affect the validity of the sale to Purchaser, including the assumption and assignment of the Assigned Contracts.

12. This Court retains sole and exclusive jurisdiction to resolve any and all matters or disputes arising under or relating to the APA (including, without limitation all-closing obligations thereunder), the sale of the Acquired Assets, the assumption and assignment of the Assigned Contracts, the administration of the sales proceeds by the Trustee, the implementation, interpretation or enforcement of this Order, and the relief and protection afforded to the Purchaser by this Order.

13. This Order shall be effective and enforceable immediately upon entry and the 14 day stay imposed by Bankruptcy Rules 6004(h) and 6006(d) is hereby waived.

IT IS SO ORDERED, this \_\_\_\_\_ day of \_\_\_\_\_, 2017

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THOMAS P. AGRESTI, JUDGE  
UNITED STATES BANKRUPTCY COURT

**Schedule 1.1(a)**

**Owned Real Property**

Elm Road – Elm Road, OH  
Building on Ground Lease

R. 358 Hadley Rd. PA - Greenville, PA  
Building on Ground Lease

Wilmington Rd., PA - New Castle, PA  
Building on Ground Lease

**Schedule 1.1(b)**

**Real Property Leases**

Contract Counterparty	Description of Contract or Lease	Contact	Estimated Cure Amount <sup>1</sup>
3D Acquisitions, LP	Lease of 20013 Route 19, Mars, PA	Vincent A. DiAntonio 1520 Gilmore Drive Jefferson Hills, PA 15025 Tel: (412) 443-6317 Email: <a href="mailto:vdianton@aol.com">vdianton@aol.com</a>  Dixon R. Rich, Jr., Esquire 525 William Penn Place 28th Floor Pittsburgh, PA 15219 Tel: (412) 931-8995 Email: <a href="mailto:dixon@dixonrich.com">dixon@dixonrich.com</a>	\$148,520.83
Bainbridge Limited Partners	Lease of 11299 Baco Road, Meadville, PA	John Bainbridge 10245 Nancy Drive Meadville, PA 16335 Tel: (814) 336-2174 Email: <a href="mailto:baco@zoominternet.net">baco@zoominternet.net</a>	\$2,131.62
Elmhurst Properties, Inc.	Lease of 3870 Elm Road NE, Warren, OH	Tom Terleski, President  2170 Millennium Boulevard Suite K  Cortland, OH 44410 Tel: Email: <a href="mailto:turksail@gmail.com">turksail@gmail.com</a>	\$1,255.60
Gar Field Club LP	Lease of 3334 Wilmington Road, New Castle, PA	John A. Mueller, Esquire Lippes Mathias Wexler Friedman LLP 50 Fountain Plaza, Ste. 1700 Buffalo, NY 14202-2216 Tel: (716) 362-7614 Email: <a href="mailto:jmueller@lippes.com">jmueller@lippes.com</a>	\$16,503.12
Gerald Fry	Lease of Route 358	Brian Scott	\$2,800.00

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<sup>1</sup> Such Cure Amounts are subject to change based on Bankruptcy Court approval.

Company	Hadley Road, Greenville, PA	170 Hadley Road  Greenville, Pennsylvania 16125 Tel: (724) 588-8803 Email: <a href="mailto:flyby.bws@verizon.net">flyby.bws@verizon.net</a>	
Spirit Master Funding III, LLC	Master Lease of 7175 Engle Road, Middleburg Heights, OH	Tyler Sorensen 2727 N. Harwood St., Ste. 300 Dallas, TX 75201 Tel: (972) 476-1900 Email: <a href="mailto:tsorenson@spiritrealty.com">tsorenson@spiritrealty.com</a>  Jared S. Roach, Esquire ReedSmith LLP Reed Smith Centre 225 Fifth Avenue Pittsburgh, PA 15222 Tel: (412) 288-3131 Email: <a href="mailto:jroach@reedsmith.com">jroach@reedsmith.com</a>	\$596,983.754
	Master Lease of 1601 Prospect Road, Ashtabula, OH		
	Master Lease of 4334 Buffalo Road, Erie, PA		
	Master Lease of 1871 Oakland Avenue, Indiana, PA		
	Master Lease of 587 East Main Street, Canfield, OH		
	Master Lease of 115 Ludlow Street, Warren, PA		
	Master Lease of 2714 West Lake Road, Erie, PA		
	Master Lease of		

	915 West Main Street, Grove City, PA		
	Master Lease of 78 Perkins Road, Clarion, PA		
	Master Lease of 18276 Conneaut Lake Road, Meadville, PA		
	Master Lease of 207 Plum Street, Edinboro, PA <sup>2</sup>		
	Master Lease of 1953 Niles-Cortland Road, Warren, OH		
	Master Lease of 4403 Peach Street, Erie, PA		
	Master Lease of 31-35 Bolivar Drive, Bradford, PA		
	Master Lease of 2728 West State Road, Olean, NY		
	Master Lease of 310 West Columbus Avenue, Corry, PA		
	Master Lease of 5550 Interstate Boulevard, Austintown, OH		

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<sup>2</sup> This location has been closed due to a fire on the premises.

	Master Lease of 4896 Everhard Road, Canton, OH		
	Master Lease of 804 Boardman-Poland Road, Youngstown, OH		
Spirit Master Funding IV, LLC	Lease of 658 US Route 250, Ashland, OH	<p>Tyler Sorensen 2727 N. Harwood St., Ste. 300 Dallas, TX 75201 Tel: (972) 476-1900 Email: <a href="mailto:tsorensen@spiritrealty.com">tsorensen@spiritrealty.com</a></p> <p>Jared S. Roach, Esquire ReedSmith LLP Reed Smith Centre 225 Fifth Avenue Pittsburgh, PA 15222 Tel: (412) 288-3131 Email: <a href="mailto:jroach@reedsmith.com">jroach@reedsmith.com</a></p>	\$20,408.67
Spirit Finance Acquisitions, LLC	Lease of 5180 Tiedeman Road, Brooklyn, OH <sup>3</sup>	<p>Tyler Sorensen 2727 N. Harwood St., Ste. 300 Dallas, TX 75201 Tel: (972) 476-1900 Email: <a href="mailto:tsorensen@spiritrealty.com">tsorensen@spiritrealty.com</a></p> <p>Jared S. Roach, Esquire ReedSmith LLP Reed Smith Centre 225 Fifth Avenue Pittsburgh, PA 15222 Tel: (412) 288-3131 Email: <a href="mailto:jroach@reedsmith.com">jroach@reedsmith.com</a></p>	\$72,470.02
	Lease of 2945 East State Street, Hermitage, PA		\$25,461.12
	Lease of 219 East Central Avenue, Titusville, PA		\$25,189.86

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<sup>3</sup> This location has been closed due to a fire on the premises.

**Schedule 1.1(c)**

**Franchise Agreements**

1. Ashland - License Agreement
2. Ashtabula - License Agreement
3. Brooklyn - License Agreement
4. Bradford - License Agreement
5. Canfield - License Agreement
6. Clarion - License Agreement
7. Boardman - License Agreement
8. Corry - License Agreement
9. Edinboro - License Agreement
10. Elm Road - License Agreement
11. Erie East - License Agreement
12. Erie South - License Agreement
13. Erie West - License Agreement
14. Greenville - License Agreement
15. Grove City - License Agreement
16. Indiana - License Agreement
17. Meadville - License Agreement
18. New Castle - License Agreement
19. Niles - License Agreement
20. Olean - License Agreement
21. Sharon - License Agreement
22. Titusville - License Agreement
23. Austintown - License Agreement
24. Warren - License Agreement
25. Mars - License Agreement
26. Canton - License Agreement
27. Middleburg Heights - License Agreement

Contract Counterparty	Description of Contract or Lease	Contact	Estimated Cure Amount <sup>4</sup>
Perkins & Marie Callender's, LLC	Various Perkins franchise agreements	Joel M. Walker, Esquire Duane Morris, LLP Suite 5010 600 Grant Street Pittsburgh, PA 15219 Tel: (412) 497-1042	\$138,631.56

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<sup>4</sup> Such Cure Amounts are subject to change based on Bankruptcy Court approval.



		Email: <a href="mailto:jmwalker@duanemorris.com">jmwalker@duanemorris.com</a>	
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**Schedule 1.1(h)**

**Designated Contracts**

All Real Property Leases and all Franchise Agreements listed in Schedules 1.1(b) and 1.1(c).

Other contracts to be designated in accordance with Section 1.6.

**Schedule 1.1(o)**

**Acquired Vehicles**

2003 Workhorse Food Truck and grill with trailer

2009 Ford Focus

2009 Chevy Impala

2008 Chevy Impala

2015 Jeep Grand Cherokee

**Schedule 1.2(c)**

**Rebates**

NextEra Energy Services Pennsylvania, LLC
The Cleveland Electric Illuminating Company
The East Ohio Gas Company d/b/a Dominion East Ohio
Ohio Edison Company
West Penn Power Company
Other Gas Providers
Other Electric Providers
Water
Sewer

Various minor rebates from small food vendors

Certain rebates for I.C.E. Pinnacle toy crane machines at each location, pursuant to that certain 3D Amusements Location Agreement dated July 15, 2015.

**Schedule 2.5**

**Allocation**

To be supplemented prior to the Specified Date.

**Schedule 4.1(d)**

**No Brokers**

None.