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# **Acquiring Financially Distressed Businesses During the Pandemic: How to Avoid Traps for the Unwary**

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# Acquiring Financially Distressed Businesses during the Pandemic: How to Avoid Traps for the Unwary

Presented by:

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November 30, 2021

# **ACQUIRING FINANCIALLY DISTRESSED BUSINESSES DURING THE PANDEMIC-HOW TO AVOID TRAPS FOR THE UNWARY**

## I. INTRODUCTION

- a. The current pandemic has created financial and other disruptions to numerous businesses throughout the country. As a result, the possibility of acquiring a distressed business has become a real opportunity for numerous companies that might not otherwise have engaged in such an approach. This presentation will discuss key strategies, opportunities, and risks involved in acquiring distressed businesses both in and out of bankruptcy court proceedings. There is little doubt that a well-planned and structured acquisition of a distressed business can provide immense benefits to a buyer, but at the same time there are numerous risks and traps for the unwary that need to be recognized and managed for an acquisition to be successful.

## II. DIFFERENCES BETWEEN A DISTRESSED ACQUISITION AND A “NORMAL” ACQUISITION

- a. The differences between a distressed acquisition and a non-distressed or “normal” acquisition are many. The process (including the speed of the process) is different, the risks are different, the diligence needs to be different, and the protections available from a seller are different,

just to mention a few issues. The balance of this presentation focuses on these and other issues in greater detail.

- b. It is almost always the case that a distressed acquisition will take the form of an asset acquisition instead of a stock or entity purchase or merger. This is because the selling entity likely has unwanted (and often unknown) liabilities given its distressed circumstances that the buyer does not want to assume. Hence the need for an asset acquisition as the form of the transaction since generally (with exceptions) the buyer of assets does not assume the seller's liabilities unless it agrees to do so. As will be discussed in greater detail below, however, the selection of this form of transaction does not standing alone eliminate the risk of assuming unwanted liabilities.

### III. THE PROCESS

- a. Often times a distressed acquisition opportunity presents itself through unusual channels as opposed to a more "structured" approach with an investment banker representing the seller, a formal teaser about the opportunity, an NDA, a data room, and the opportunity to present a bid via a term sheet. A distressed opportunity, sometimes of a competitor, is often suddenly available because the distressed company suddenly recognizes that it is under significant cash or

creditor pressure and starts looking for alternatives. Other times, distressed companies have sufficient foresight to recognize that the ability to “right the ship” is limited and they begin to look for alternatives before a crisis is imminent. Sometimes an investment banker or broker is involved, but that also may not be the case. In short, there is no single process involved in a distressed acquisition and each situation is highly dependent on the facts and circumstances including the decision making of the distressed entity’s leadership team.

- b. Notwithstanding this, there is usually one constant theme in the process of a distressed acquisition: the need to move quickly. Stated simply, the selling entity is often under extreme pressure from secured and/or unsecured creditors, is often facing material issues with maintaining its workforce and customers, and may be confronting a short term cash flow crisis. All of these issues (and others) put immense pressure on the selling entity including immense pressure on the continued viability of the business itself. It is not wrong to analogize a distressed business to a melting ice cube; if the ice cube is not saved quickly, there is simply nothing left to save or, leaving the analogy, in the case of a distressed acquisition, a business left to buy.

This means that a buyer considering the acquisition of a distressed business often has to move very quickly if it wants to preserve the going concern value of the assets. And to move quickly in this distressed environment requires a deep understanding of the process—moving quickly without such an understanding is a prescription for an unhappy result. It also usually requires a material and immediate commitment of time and resources to the process, with all the attendant costs. For some potential buyers this can be difficult especially because there is no predetermined outcome or guaranteed return on this investment of time and money.

- c. Although speed is usually an element of a distressed transaction, merely to state this fact begs the next question: how much time does the distressed business have and how quickly must the process move to preserve the melting ice cube? Obviously, each situation is different but evaluating the answers to these questions is a key component of a distressed acquisition. Many times even the distressed seller itself does not have clear answers to these questions.
- d. In trying to evaluate these issues, a thirteen week cash flow is an important tool. Such an analysis is always done on a cash basis (not an accrual basis) and shows the ability (or inability) of the distressed

entity to meet payroll, pay critical vendors, and make other essential payments during the thirteen week period. It also shows anticipated cash receipts. Such an analysis is extremely helpful in answering the questions presented above: how much time does the business have before it cannot continue to pay its debts and how quickly must the process move to save the melting ice cube. The answers to these questions also often influence the strategy of a potential buyer in structuring an offer.

#### IV. DUE DILIGENCE

- a. Due diligence in a distressed acquisition is critical. There are often few meaningful protections from the seller (such as indemnities or escrows) and the risks are different and broader than in a “regular” acquisition. A commitment to a thoughtful and thorough due diligence process is essential.
- b. Often times a data room is available for review, but many times that is not the case. In either case, a comprehensive due diligence request list is essential. A sample list is attached to these materials as Exhibit A. Having said this, the ability to obtain the requested information is often difficult. Key people may no longer be with the company and

information that is presented often is incomplete without anyone disclosing (or even aware of) that fact.

- c. Undertaking a comprehensive and thorough review of available diligence is essential and it should be done by individuals experienced in reviewing this type of information. If diligence is not properly done or understood, a buyer may find itself saddled with liabilities from the seller that it did not expect. Having said this, often times the need for speed makes complete due diligence impractical and decisions have to be made on what due diligence to do and what not to do. Many times the risks associated with incomplete due diligence can be tolerated because they can be “built in” to the purchase price.
- d. Among the many topics for due diligence are:
  - i. Employment issues including PTO and other accrued liabilities;
  - ii. Employment benefit issues including future COBRA liabilities;
  - iii. Regulatory issues including all licenses and permits required to operate the business;
  - iv. Federal, state, and local tax issues including all possible successor tax liabilities;
  - v. Contract issues including the assignability of key contracts and termination provisions;



- vi. Financial issues including monies owed to secured creditors and key suppliers;
  - vii. Anticipated customer retention;
  - viii. Insurance issues including the types of coverage (claim or occurrence);
  - ix. Environmental issues especially when owned or leased real estate is involved;
  - x. Intellectual Property issues;
  - xi. Technology issues including software issues;
  - xii. Lease and other real property review;
  - xiii. Any issues as a result of COVID including supply chain issues;
  - xiv. Legal issues including all litigation against the company whether covered by insurance or not;
  - xv. Valuation of assets as it pertains to fraudulent transfer risks (discussed in more detail below); and
  - xvi. Integration issues post-closing.
- e. There are also often industry specific due diligence issues that must be analyzed. For example, if the distressed business has a Medicare provider number with CMS, understanding the successor liability

exposure that goes with the acquisition of that provider number is critical.

## V. FRAUDULENT TRANSFER RISK

- a. The issue of a fraudulent transfer (or fraudulent conveyance) is almost never present in a “normal” acquisition. In a distressed acquisition, however, the risk arises because oftentimes unsecured creditors of the selling entity are not paid in full after the sale. Instead, the secured creditor(s) are paid and the unsecured creditors may be left receiving a small percentage on the dollar. In other words, the selling entity was insolvent on a balance sheet basis because the sale price of all of its assets was insufficient to pay all creditors in full.
- b. Although the laws on fraudulent transfer vary somewhat around the country depending on the particular state or whether the bankruptcy court is involved, in general if these creditors (or a trustee in bankruptcy acting on their behalf) can prove that the assets were sold to the buyer for less than their reasonably equivalent value, those creditors (or the trustee) have the ability to “avoid” the sale or recover the difference between the selling price and the “true” value of the assets. This possibility usually plays out in court with appraisers or other experts testifying on the “true” value of the assets as compared

to the selling price. The risk to the buyer of distressed assets is twofold: first it has to incur the costs of defending the fraudulent transfer action and second, it has the risk of paying additional “purchase price” should it lose. And of course this plays out in a litigation environment where it is usual possible to get a credible “expert” to opine on virtually anything within reason.

- c. Note that although the risk here uses the term “fraudulent” that is somewhat of a misnomer because the risk pertains whether there is actual fraudulent behavior or not. An overly simplified example helps make that clear.
  - i. Assume a buyer of a distress business acquires all of the assets of the distressed seller for a purchase price of \$1,000,000 and at the time of the closing, the seller has unsecured creditors of \$2,000,000.
  - ii. Obviously, after deduction for transaction costs, the creditors will only get a portion of the amount they are due. If we assume the transaction costs were \$200,000, this would leave \$800,000 from the \$1,000,000 purchase price to divide among the \$2,000,000 in creditor claims, leaving a shortfall of \$1,200,000.

- iii. If the creditors could establish in court that the real value of the transferred assets at the time of the transaction were \$2,200,000, they would argue that the sale of the assets for only \$1,000,000 was a fraudulent transfer and that the buyer should pay the difference as damages. In other words, they would argue that the buyer should have paid \$2,200,000 for the assets, leaving \$2,000,000 available to pay creditors (in full) after transaction costs.
  - iv. If this valuation could be established through expert testimony, the buyer would have to pay as damages the additional \$1,200,000 to the creditors (plus of course the fees to defend itself).
- d. In the real world, nothing is as simple as this overly simplified example, but understanding the probable valuation of the assets, understanding how the sale proceeds will be distributed, understanding insider guaranties (which complicate and affect this analysis), and understanding, quantifying, and perhaps even cutting deals with key unsecured creditors/suppliers, all goes into analyzing any possible fraudulent transfer risk.

- e. As will be discussed further below, if the risk on this issue is too significant, it may be better to go through a bankruptcy sale process, instead of a non-bankruptcy sale process, to better immunize against this risk.
- f. In addition, trying to quantify this fraudulent transfer risk is essential. Again, over simplifying, if the risk is quantified at \$500,000 and that risk is worth absorbing because the overall deal structure is such that absorbing that risk makes good business sense, then that informs the decision making of the buyer.

## VI. SUCCESSOR LIABILITY RISK

- a. In any asset acquisition there is a risk of successor liability of the buyer to the seller's customers and creditors. For example, if a buyer buys the assets of a consumer products company, there is a risk (dependent on state law) that the buyer would have exposure to consumers who bought defective products from the seller and were injured. Generally a risk such as this can be insured against.
- b. In a distressed circumstance, where creditors and customers with claims may be unpaid by the selling entity, which also has no remaining assets after the acquisition, there is a greater practical risk

that these creditors and customers of the seller will look to the buyer for recovery.

- c. The risk of successor liability is highly dependent on the facts and circumstances and the particular state law involved. In some cases, statutes may impose express successor liability. Successor liability risks for environmental claims, consumer claims, employee claims, tax and other regulatory claims (e.g. OSHA or CMS), and claims under assumed contracts should be of particular focus for a buyer during due diligence.
- d. In order to assess properly this successor liability risk, it is essential that the buyer identify (and attempt to quantify) these risks as part of its due diligence. Once identified and perhaps quantified, protective measures can be considered and possibly put in place to address these issues. For example, new arrangements can be negotiated with unpaid creditor/suppliers for future sales to the buyer in exchange for a release of any successor liability claims; or it may involve specialized insurance policies to protect against future consumer claims.
- e. Although it is often difficult to obtain meaningful indemnities and escrows from a seller of a distressed business, there are circumstances where these types of protections also can be put in place to manage

the risk of successor liability. Or sometimes there is future contingent purchase price consideration that is likely to be paid (i.e. an earn out) and that consideration can serve as an escrow (to the extent paid of course).

## VII. MISCELLANEOUS ISSUES TO CONSIDER IN A DISTRESSED ACQUISITION

### a. Limited Seller Recourse

#### i. Reps and Warranties, Indemnities and Escrows

1. In a “normal” transaction, reps and warranties from the seller backed by indemnities and escrows are standard fare and often present some of the most highly negotiated issues in a transaction (after purchase price). Although reps and warranties play an important role in a distressed acquisition, there is a practical problem that usually exists: the seller will be dissolving or completing a liquidation post-closing and will have little or no ability to “stand behind” the reps and the warranties with meaningful indemnities and escrows.
2. Notwithstanding this fact, reps and warranties (and the disclosure schedules that accompany them) almost

always should be part of the process in a distressed acquisition because they force the seller and its principals to make disclosures consistent with the negotiated reps and warranties. This exercise is not a substitute for thoughtful due diligence, but it does serve to highlight issues pre-closing. In addition, if some or all of the seller's principals expect to be part of the buyer post-closing, this provides additional incentive to make sure that the seller's disclosure schedules are done properly.

3. Often times, meaningful indemnities and escrows in a distressed acquisition are not practical because the entire purchase price is required to satisfy secured and other obligations as a condition of the closing. Having said this, a buyer should not forgo these protections absent good reason to do so. Each transaction is different, but this issues should be addressed and negotiated thoughtfully given the identified risks.

b. Seller Fiduciary Duties

- i. When a company is insolvent or entering the “zone of insolvency” the directors, officers, and managers may have



fiduciary duties to the company's creditors. The law on this issue varies from state to state, but it is often the case that creditor stakeholders take on greater importance in a distressed acquisition.

c. Tax Considerations

- i. Every acquisition brings unique tax issues that a professional tax attorney should review and weigh in on. A distressed acquisition is no different.
- ii. A seller or its principals may also be confronting discharge of indebtedness income issues as a result of a distressed transaction. In simple terms, if an obligor on debt does not have to pay the debt in full, it is possible (depending on a myriad of factors including the form of the seller entity) that the discharged debt will be considered taxable income to the obligor (or its principals) with the attendant consequences.
- iii. This topic is very complicated and is beyond the scope of this presentation, but it is an issue to consider because it may have serious implications to the seller side of a transaction.

VIII. PARTICULAR STRATEGIES TO CONSIDER IN A DISTRESSED ACQUISITION

a. Loan to the Selling Entity

- i. As noted above, distressed sellers often find themselves in a “cash crisis.” Their existing secured debt is in default and borrowing availability has been terminated. Principals may have contributed cash to the company as debt or equity in the recent past, but the willingness or ability to continue this is limited. Unsecured creditors may be demanding payment as a condition of continued supply or even worse, insisting on cash in advance or cash on delivery.
- ii. The combination of some or all of these factors often create the opportunity for a potential buyer to loan funds to the seller pre-acquisition. This presents a multitude of issues including:
  1. Is there meaningful collateral to secure the new loan especially given that the prior secured lender (whose loan likely is in default) probably has a security interest on all or most of the seller’s assets?
  2. Is it possible to negotiate a subordination from the prior secured lender on a particular class of assets to allow those assets to secure the new loan? A secured lender may be willing to do this if the possible sale to the

buyer/lender presents the best possible outcome to the secured lender.

3. Is there other credit support that may be available on either a secured or unsecured basis? This often takes the form of secured or unsecured guaranties from principals.
4. Does making the loan put the buyer/lender in the “driver’s seat” for getting a deal closed? In other words, can a potential buyer leverage a loan into some form of exclusivity or other benefit that makes it the likely buyer?
5. Are there other strategic reasons to justify such a loan?
6. If the potential buyer becomes a lender, does it run the risk of lender liability issues and how should those be managed?

b. Acquisition of the Secured Debt and Friendly Foreclosure or Secured Party Sale

- i. Another strategy that a buyer may pursue is to acquire the existing secured debt (often at a discount) as a means to obtain additional leverage over and rights against the seller and its assets. Again this presents a series of issues including:

1. What is the purchase price for the secured debt and how does that relate to the proposed purchase price for the distressed business?
2. What due diligence must be done concerning the secured debt to establish its validity, the perfection of the related security interests on the collateral, and the absence of any borrower defenses? This is important because sellers of secured debt rarely provide meaningful reps and warranties on these issues.
3. Does acquisition of the secured debt violate any NDA or confidentiality agreement signed by the buyer?
4. What is the strategy post-acquisition of the secured debt? How does this acquisition affect the negotiations with the distressed seller and what is the desired outcome?
5. Is it possible to use the secured debt acquisition to negotiate a “friendly foreclosure” of the assets from the seller?
6. What lender liability risks will the buyer run post-acquisition?

7. Will it be possible for the buyer to use the acquired secured debt position to foreclose or conduct a secured party sale of the assets under UCC Article 9 and to use that process as a vehicle to acquire the assets and the business?
8. Are there other strategic reasons to justify acquiring the secured debt?

c. Employment Agreement to Senior Executives

- i. On occasion there may be a need or value to the buyer in hiring key owner/executives from the distressed seller. This possibility affects the motivations of the seller and provides an opportunity to use this as an additional negotiating tool.

d. Earn out or other Contingent Purchase Price

- i. It is often the case that a seller and a buyer differ on the appropriate purchase price. This is especially common in a distressed acquisition where the buyer is understandably concerned about the future prospects of the distressed business given all the issues confronting it. Returning to the melting ice cube analogy, it is often very difficult to predict how large the ice cube will be in a year after it is salvaged.

- ii. Conversely, sellers are confronting their own pressures and history including pressures from investors and creditors that are confronting their own losses.
  - iii. A possible way to “bridge” these gaps is the use of contingent purchase price consideration or an “earn out.” Such a bridge provides possible upside to the seller while at the same time providing protection to the buyer in the sense that it will only pay the contingent consideration if the future metrics justify it.
  - iv. There are numerous ways to structure such contingent purchase price consideration and every transaction is different. The key points are to structure the metrics properly.
  - v. From a buyer perspective, this type of contingent purchase price consideration comes with a reporting obligation because the seller will want and be entitled to have information about whether the metrics were met and to what extent.
- e. Rep and Warranty Insurance
- i. Rep and warranty insurance is an insurance product that has now been available for multiple years effectively to replace indemnities and escrows from a seller. Overly simplified, the insurance company issues a policy and that policy becomes the

“backstop” to the buyer for any breach of the reps and warranties by the seller post-closing.

- ii. The terms of these policies are very specific and a buyer needs to understand them because they become the “backstop” to the deal post-closing.
- iii. Rep and warranty insurance may be available in a distressed acquisition situation often times dependent on the quality of the due diligence available to the insurance company. It can however be expensive depending on the facts and circumstances including the size of the transaction.

f. Bid Protections and Other Similar Protections

- i. In a bankruptcy sale process, it is common that a buyer will get bid protections as discussed below. These are less common in a distressed non-bankruptcy acquisition, but are still something to be considered.
- ii. These can take the form of “break-up fees” or “expense reimbursements” depending on the facts and circumstances.
- iii. The point of these are to provide the buyer with some degree of financial protection and expense reimbursement should the due diligence of the seller not justify the transaction.

## IX. BANKRUPTCY ACQUISITIONS

### a. 363 Sale of Assets

- i. As discussed above, there may be risks involved in a particular distressed acquisition that are such that the buyer is not willing to proceed. For example, the risk of a fraudulent transfer claim or the risk of successor liability may be such that it is simply not financially prudent for a buyer to proceed with the distressed acquisition notwithstanding the time and money invested to date.
- ii. In such a circumstance, a sale process in bankruptcy (often a sale process under Section 363 of the Bankruptcy Code) may be a preferred alternative because such a sale approved by a federal bankruptcy judge can largely protect against many or all of these risks in a particular transaction.
- iii. For instance, a sale of the debtor's assets approved by a bankruptcy judge will almost universally be considered a sale for reasonably equivalent value, making a fraudulent transfer claim impossible.
- iv. Such a sale process, however, comes with certain costs. First, a sale process under Section 363 is almost always an auction



where the proposed buyer may be outbid. Conversely, a distressed acquisition outside of bankruptcy is almost always a private sale without an auction. A potential buyer therefore will be exposed to the risk of being outbid in a 363 sale where that risk would not be the case in a non-bankruptcy sale.

- v. Second, the costs of a Chapter 11 case in bankruptcy are often significant. These transaction costs have to be funded and affect available distributions and other issues in the bankruptcy.
- vi. A potential buyer can consider a debtor-in-possession loan (a so-called DIP Loan) to a Chapter 11 debtor to provide cash availability to the debtor. There are many reasons to consider such a loan although often times the existing secured creditor would be the primary entity making such a loan.

b. Stalking Horse Bid and Bidding Protections

- i. In a 363 sale process it is common to have a so-called “stalking horse buyer” as the lead bidder for the auction. This buyer signs an asset purchase agreement with the debtor/seller that becomes the form APA for other bidders at the auction to use when making their bids.

- ii. A “stalking horse bidder” invests substantial time and energy in formulating its bid including due diligence and the other costs referenced earlier in these materials. Accordingly, it has become common for the bankruptcy court to approve a “break-up fee” (often in the range of 3%) to compensate the stalking horse should it get outbid at the auction. This break-up fee also serves as “funny money” to the stalking horse bidder at the auction because competing bidders have to satisfy this break-up fee as part of outbidding the stalking horse while the stalking horse bidder does not.
- iii. A stalking horse bidder often has the inside track on an acquisition, but 363 auctions can also become hotly contested and vigorous auctions where the price increases substantially.

c. Sample forms

- i. Attached hereto are the following sample documents related to a 363 sale:
  - 1. A bid procedure order (Exhibit B); and
  - 2. A 363 sale approval (Exhibit C).

X. SOMETIMES THE BEST DEAL IS THE DEAL NOT CONSUMMATED

- a. Almost every distressed deal brings surprises or things not anticipated at the outset. That is not always a bad thing, but a buyer cannot afford to permit itself to get so invested in a deal opportunity that it loses the ability to assess objectively these inevitable surprises. It is critical that a buyer and its professionals retain the objectivity to assess accurately any “new circumstances” quickly and determine whether “walking away” from the deal makes sense (or not). In considering this option, it is also worth understanding that deals have a way sometimes of coming back in different forms and with different pricing in a way that validates, after the fact, a decision to put on the brakes.
- b. As stated above, distressed deals usually move quickly or not at all. Accordingly a buyer must know going in that surprises will present themselves with little advance warning and that they will have to react quickly to these surprises usually with imperfect information. If a buyer is not able to do so, often for good and sufficient reasons, a distressed deal environment may simply not be a practical place for such a buyer. This is especially the case since pursuing a distressed opportunity is time intensive and costly and for some companies, simply not the best place to deploy its resources. For other companies, however, who are able and willing to react swiftly and professionally

to distressed opportunities, the upside can be hugely significant and valuable.



# Exhibit A

## **Due Diligence Request List**

In connection with the potential acquisition of [NAME OF TARGET] (together with all of its subsidiaries and any predecessors, collectively, the "**Company**"), please provide us with the following materials. If certain materials have already been provided or are unavailable or inapplicable, please indicate so in your response to this request. Please note that our due diligence investigation is ongoing and we will submit supplemental due diligence requests as necessary.

Unless otherwise indicated, documents should be made available for all periods subsequent to [DATE] and should include all amendments, supplements and other ancillary documents. Unless otherwise indicated, the word "material" means an item involving payments (to or from the Company) or liabilities in excess of \$[DOLLAR AMOUNT]. Please do not hesitate to contact us at [CONTACT INFORMATION] with any questions or concerns regarding this request.

1. Corporate Records.

(a) Organizational documents of the Company and each of its subsidiaries (e.g. certificates of incorporation, by-laws, certificates of partnership, partnership agreements, certificates of formation, limited liability company agreements).

(b) Minute books of the Company and each of its subsidiaries, including minutes of meetings and actions by written consent of the board of directors (or its equivalent) of the Company and any of its committees and minutes of meetings and actions by written consent of the stockholders of the Company.

(c) Communications with stockholders, including annual reports, proxy statements and correspondence.

(d) Summary of the corporate history of the Company and any predecessors, including any mergers, acquisitions, changes in control and divestitures.

(e) Organizational structure chart of the Company and its subsidiaries identifying the legal name, type of entity, ownership and jurisdiction of organization.

(f) List of all corporations, partnerships, joint ventures and other entities that are not subsidiaries of the Company, but in which the Company owns an interest. Include the number of authorized shares or interests, the number of shares or interests owned by the Company, and the percentage of voting securities or interests (and economic interests, if different) owned by the Company. Provide any agreements to which the Company is a party relating to these investments.

(g) List of special purpose entities in which the Company, any of its current or former executive officers or directors have a significant interest (on an individual or an aggregate basis) or that have purchased assets or assumed liabilities from the Company or that have significant obligations to the Company (each a "SPE"). Include a brief description of each SPE's primary purpose or activities. Any agreements or documents setting forth any arrangements (or if not memorialized, a description of any such arrangement) between or among the Company and any SPE.

(h) List of places where the Company is qualified to do business.

(i) List of places where the Company operates its business or maintains inventory, owns or leases property or has employees, agents or independent contractors. Include the number of employees and a description of operations or services performed at each location.

(j) List and description of all transactions between the Company and any stockholder, director, officer, employee or affiliate of the Company (or any entity or person formerly having the status thereof), including amounts and names of parties involved, during the past [NUMBER] years.

## 2. Stockholder Information.

(a) Stock certificate books and stock transfer ledgers or other records that show all issuances, grants and cancellations of Company stock, options, SARs (stock appreciation rights), restricted stock units, profits interests, warrants and other actual, derivative or phantom equity interests, including names and addresses of record and beneficial holders, dates of issuance, payment information, grant or cancellation, and number of securities. For options and warrants include the date of grant, the fair market value of the underlying stock on the grant date, exercise price, number of shares subject to the option, SAR or warrant and vesting terms and identifying by jurisdiction grants made to persons located outside the US.

(b) List of any oral or written agreements to grant or issue stock, options, SARs (stock appreciation rights), restricted stock units, profits interests, warrants or any other form of actual, derivative or phantom equity interest in the Company.

(c) Stockholders agreements, put or call agreements, voting agreements, stock transfer agreements or other arrangements among the stockholders of the Company.

(d) All documents known to the Company relating to outstanding proxies, powers of attorney (with respect to any stock of the Company), voting trusts, or other assignment of rights attaching to any securities of the Company.

(e) All outstanding agreements or other instruments that may in any way limit the Company's ability to declare and pay dividends.

3. Securities Issuances.

(a) Documents generated in connection with all equity financings of the Company, including stock purchase agreements and related documentation, such as offering circulars, private placement memoranda and prospectuses relating to the offer or sale of equity securities.

(b) Documents generated in connection with any convertible debt financings of the Company.

(c) Samples of common stock certificates, warrants, options, debentures and any other outstanding securities.

(d) Stock option and purchase plans and equity incentive plans of any type, including forms of option and purchase agreements which have been or may be used for these plans, and any options or warrants not under an equity plan.

(e) Agreements and other documentation relating to repurchases, redemptions, exchanges, conversions or similar transactions involving the Company's securities and schedule of any dividends paid or declared.

(f) Agreements relating to registration rights.

(g) Agreements relating to preemptive rights, rights of first refusal or co-sale rights.

(h) Forms D or any other forms filed to qualify for an exemption under the Securities Act.

(i) Governmental permits, notices of exemption and consents for issuance or transfer of the Company's securities and evidence of qualification or exemption under applicable blue sky laws.

4. Financing Documents.

(a) Summary of currently outstanding short-term debt, long-term debt, inter-company debt, contingent obligations and capital lease obligations of the Company, including amounts, maturities and prepayment terms.

(b) Summary of currently outstanding interest rate or foreign currency swaps, caps, options, forwards or other derivative instruments or arrangements to which the Company is a party.



(c) Copies of any currently outstanding commitment letters or other correspondence relating to proposed financings or borrowings which may involve amounts in excess of \$[DOLLAR AMOUNT] of indebtedness of the Company.

(d) All correspondence and documents relating to contingent liabilities exceeding \$[DOLLAR AMOUNT].

(e) All documents purporting to create liens, mortgages, security agreements, pledges, charges or other encumbrances on the stock of the Company, on any real or personal property of the Company or in favor of the Company. Copies of all Uniform Commercial Code financing statements filed with respect to the above.

(f) Agreements evidencing borrowings by the Company, whether secured or unsecured, documented or undocumented, including loan and credit agreements, mortgages, deeds of trust, letters of credit, indentures, promissory notes and other evidences of indebtedness, and any amendments, renewals, notices or waivers.

(g) Documents and agreements evidencing other material financing arrangements, including capital leases, synthetic leases, sale and leaseback arrangements, installment purchases, or similar agreements.

(h) All agreements pursuant to which the Company is or will be subject to any obligation to provide funds to or to make investments in any other person (in the form of a loan, capital contribution or otherwise).

(i) Documents and agreements relating to any guarantees by the Company or releases of guarantees.

(j) Bank letters or agreements confirming lines of credit, including any amendments, renewal letters, notices, waivers, etc.

(k) Copies of notes payable to or notes receivable from any employee, director, affiliate, agent or stockholder of the Company outstanding at any time during the past year. Copies of all other financing agreements relating, directly or indirectly, to the Company or any person who is, or is proposed to become, an officer, director, key employee, or significant stockholder (including affiliates) of the Company (including loans, leases, purchases and sales of property).

5. Other Material Contracts.

(a) Any partnership, joint venture, distributorship, franchise, licensing, management, research and development, or similar agreements or contracts to which the Company is a party.

(b) Contracts with customers or suppliers.

(c) List of the Company's [NUMBER] largest customers for the last [NUMBER] years, indicating amounts and nature of services provided.

(d) List of the Company's suppliers (other than suppliers of goods and services generally required by all businesses, e.g. office supplies, utilities, etc., unless in excess of \$[DOLLAR AMOUNT] from an individual supplier during any 12-month period) including for each supplier, indicating the amount and nature of products supplied.

(e) Material agreements relating to the sale or lease of the Company's personal property (including equipment) and any related financing arrangements.

(f) All material warranty and service agreements.

(g) Installment sales agreements.

(h) Any agreement which prohibits or restricts the Company's ability to compete in any business anywhere in any geographic area, or the customers with which the Company may do business or the prices the Company may charge for its services.

(i) Any inter-company agreements between the Company and its subsidiaries.

(j) Any agreements between the Company and its affiliates (if not already provided pursuant to clause (i) above).

(k) Any material purchase agreements and other significant documents relating to any reorganization, any going private transactions, mergers, consolidations, spin-offs or reincorporation in the past [NUMBER] years or currently proposed.

(l) Any material purchase agreements and other significant documents relating to any acquisitions or dispositions by the Company in the past [NUMBER] years or currently proposed.

(m) Any indemnification agreements.

(n) Any other material agreements or drafts of proposed material agreements of the Company.

(o) Details of any material negotiations currently in progress.

6. Management/Employees.

(a) All corporate policy and employee manuals covering hiring, employee benefits, regulatory compliance and internal controls.

(b) Organizational charts of management by department and by legal entity.

- (c) Number of employees by department and by functional area.
- (d) Copies of offer letters, employment contracts, bonus guarantees, severance agreements, change-of-control agreements, independent contractor agreements, nondisclosure and confidentiality agreements, non-competition agreements, management and consulting contracts.
- (e) Union contracts, collective bargaining agreements and a summary of any ongoing negotiations with unions.
- (f) Documents relating to all profit sharing and savings plans, pension or retirement plans, supplemental retirement plans, retiree medical arrangements, deferred compensation plans, severance, medical, flexible spending, dental or other health and welfare plans and any bonus, incentive, performance or other employee compensation/benefit plans or arrangements and related agreements (that provide benefits to current or former directors, officers or employees and their respective beneficiaries); materials describing any of the foregoing or contemplated amendments; and the applicable trust accounting, IRS determination letter(s), Form 5500 filing, plan audit reports, actuarial reports and other applicable financial statements for the three most recent years. Summary plan descriptions for each of the foregoing, to the extent available.
- (g) Copies of all filings and correspondence with the IRS, the DOL and the PBGC (not covered in the preceding paragraph) made during the three most recently completed plan years.
- (h) Copies of complaints and other material pleadings and court filings in connection with any pending lawsuit involving any employee benefit plan or benefits thereunder, or any such lawsuit filed within the past three years.
- (i) Any notices or other communications issued within the past three years relating to blackout periods under any defined contribution plan or regarding any future reductions in medical, pension or other employee benefit or regarding the termination of any employee benefit arrangements.
- (j) Cost/benefit information for each current plan for the most recent plan year, including (i) administrative costs, (ii) employer contributions, (iii) employee contributions, and (iv) benefit distributions.
- (k) Copies of any Section 280G calculations performed with respect to potential parachute payments.
- (l) Description of any threatened or pending labor disputes, work stoppages, work slowdowns, walkouts, lockouts or union organizing activities. Copies of any National Labor Review Board or US Department of Labor filings.

(m) Any indemnification agreements with any directors, officers, employees or agents.

(n) Schedule of all compensation paid during the last fiscal year to officers, directors and key employees, showing separately salaries, bonuses and non-cash compensation, including bonuses paid or accrued, direct or indirect benefits or perquisites, and all benefits paid or accrued under all employee benefit plans.

(o) Description of commissions paid to managers, agents or other employees of the Company.

(p) Copies of all agreements relating to "rabbi trusts" or other arrangements securing in any way the payment of deferred compensation, severance or other payments to employees or directors.

(q) A listing of all outstanding loans to employees in excess of \$[DOLLAR AMOUNT] (including loans granted under any 401(k) plan) including the amount of the loan, its rate of interest and whether or not it is secured.

(r) Absenteeism, disciplinary actions, accident records and turnover rates of the Company and its Subsidiaries.

(s) Copies of any special compensation/retention arrangements in connection with the proposed transaction.

## 7. Financial Information.

(a) Historical financial statements for the last [NUMBER] years. Include summary of significant accounting policies used by the Company.

(b) Interim financial statements prepared since the end of the most recent fiscal year.

(c) Most recent projected financial statements (by month for current year and projections for next [NUMBER] years) including supporting assumptions.

(d) Management letters or special reports by auditors and any responses.

(e) Description of and reasons for any change in accounting methods or principles.

(f) Detailed aging schedule for accounts receivable and accounts payable at end of each fiscal quarter of last five years.

(g) Detailed description of critical accounting policies, and explanation of revenue and cost recognition methods.

- (h) Information on planned acquisitions and dispositions.
- (i) Information on bad debt reserves and unusual charges to operations for the past [NUMBER] fiscal years.
- (j) If applicable, inventory schedule and valuation assumptions and inventory valuation, turnover and obsolescence review.
- (k) List of fixed assets (fixed and unfixed).
- (l) Detailed description of any off-balance sheet arrangements, liabilities or obligations of any nature (fixed or contingent, matured or unmatured) that are not shown or otherwise provided for in the Company's current financial statements. Please include: the nature and purpose of any such off-balance sheet arrangements; the importance to the Company of such arrangements; the amounts of revenue, expenses and cash flows arising from such arrangements; and any known event, demand, commitment, trend or uncertainty that is reasonably likely to result in the termination (or reduction in availability to the Company) if any such arrangement and the course of action the Company has taken or proposes to take in response to such circumstances.
- (m) Description of any non-GAAP financial measures, accompanied by the most directly comparable GAAP financial measure and a reconciliation to GAAP, along with the reasons for use of non-GAAP measures.
- (n) Any reports on internal accounting controls.
- (o) Detailed explanation of any change in or disagreement with auditors on accounting and financial matters in the last [NUMBER] fiscal years.
- (p) Copies of all business plans, including a summary of any ongoing or proposed plans for capital expenditures in excess of \$[DOLLAR AMOUNT].
- (q) Written investment policies of the Company.

8. Sales and Marketing.

- (a) List of third party developers showing total and type of project for each developer during the last and current fiscal years and forms of agreements entered into with third party developers.
- (b) List of the Company's competitors.
- (c) Pertinent market research or marketing studies (including any studies or reports relied on or commissioned or prepared by the Company).

- (d) Any recent analyses of the Company prepared by investment bankers, engineers, management consultants, auditors or others.
- (e) Recent presentations to industry, trade or investment groups.
- (f) Marketing and sales literature and forms, including price lists, catalogs, purchase orders, technical manuals, user manuals, etc.
- (g) Marketing agreements and material agency and advertising contracts.
- (h) All agreements or proposed agreements with distributors, dealers and sales representatives.
- (i) Describe warranty and return policies and procedures. Include any related written materials and any documents creating any express or implied warranties with respect to products manufactured or distributed by the Company.
- (j) Distribution agreements.

9. Real Property.

- (a) List of real property owned by the Company, including size, location and use of each parcel. Provide documents of title, title insurance, mortgages, deeds of trust, leases and security agreements for these properties.
- (b) Any appraisals or surveys of the Company's real property obtained within the past [NUMBER] years.
- (c) Outstanding leases for real property to which the Company is either a lessor or lessee, including ground leases and subleases, estoppel certificates and related subordination or non-disturbance agreements.
- (d) Any option or development agreements involving real property to which the Company is a party.
- (e) Certificates of occupancy relating to any real property owned or leased by the Company.
- (f) List of all material encroachments, liens, easements or other encumbrances on any real property owned or leased by the Company.

10. Intellectual Property.

- (a) List of all US and foreign patents and patent applications owned or held for use by the Company, indicating in each case, as applicable, the record owner, the

dates of invention, application, issue, reexamination and reissue, the patent number or application serial number, and copies of all related prosecution files.

(b) List of all US and foreign copyright (and mask work) registrations and applications owned or held for use by the Company and material unregistered copyrights, indicating in each case, as applicable, the record owner, the dates of authorship, publication, application, registration and renewal, registration number, and copies of all related documents and files.

(c) List of all US and foreign trademark, service mark and trade name registrations and applications and unregistered trademarks, service marks and tradenames owned or held for use by the Company, indicating in each case, as applicable, the record owner, the date of first use, application, registration and renewal, registration number or application serial number, and copies of all related prosecution files.

(d) List of all domain names owned or held for use by the Company, indicating in each case, the record owner, the registrar, registration and renewal date.

(e) List describing all proprietary technology and computer software owned, held for use by or being developed by or for the Company.

(f) List describing all:

(i) material third-party computer software used by the Company or incorporated into any software or product of the Company; and

(ii) open source, freeware or other software having similar licensing or distribution models used by the Company or incorporated into any software or product of the Company.

(g) List describing all [material] trade secrets and other proprietary know-how or processes owned or held for use by the Company.

(h) Copies of all [material] agreements, proposed agreements or arrangements pursuant to which any third-party intellectual is assigned or licensed to the Company by any third party.

(i) Copies of all [material] agreements and proposed agreements pursuant to which any intellectual property is assigned, sold or otherwise transferred, or licensed by the Company to any party or subject to a covenant not to sue.

(j) Copies of all research and development, joint venture or other agreements relating to product, process or technical research, development and testing to which the Company is a party.

(k) Copies of all current and historical documents, policies and procedures relating to the development and protection of the Company's intellectual property, including, without limitation, form invention and proprietary rights agreements.

(l) Copies of all nondisclosure agreements, settlement agreements, administrative or judicial decisions or orders, consent orders, releases, covenants not to sue, security agreements and other agreements or decisions restricting or encumbering the intellectual property of the Company.

(m) Copies of all freedom-of-use advice, validity or infringement analyses, and legal opinions of counsel regarding the intellectual property of the Company.

(n) Copies of all correspondence from third parties regarding alleged or potential infringement or other violation by the Company of intellectual property rights of others.

(o) Descriptions of, and copies of all communications relating to, all:

(i) pending or threatened claims, judicial or administrative proceedings, or litigation brought against the Company alleging the infringement or other violation of any third party's intellectual property or challenging the ownership, validity or enforceability of the Company's intellectual property or any intellectual property exclusively licensed to the Company; or

(ii) past disputes of such nature active in the last [NUMBER] years.

(p) Descriptions of, and copies of all communications relating to, all:

(i) potential, pending or threatened claims, judicial or administrative proceedings, or litigation brought or contemplated by the Company alleging the infringement or other violation of intellectual property of the Company or any intellectual property exclusively licensed to the Company by a third party or challenging the ownership, validity or enforceability of a third party's intellectual property; or

(ii) past disputes of such nature active in the last [NUMBER] years.

#### 11. IT Systems and Networks.

(a) Copies of all agreements relating to the provision of IT, data or internet-related products or services to or by the Company.

(b) A description of all computer systems, software packages, networks and service bureaus ("**Computer Systems**") in use by the Company, by location.



- (c) Copies of the most recent strategic plans for the Company's Computer Systems.
- (d) A description of any back-up and disaster recovery arrangements, facilities management and ongoing support arrangements, including details of service levels and charges.
- (e) A description of and copies of documents relating to whether the Company has access, or rights of access, to the source code of material licensed software in order to ensure adequate maintenance and updating of that software.
- (f) A description of any Company procedures to monitor compliance with the terms of software licenses, including whether these procedures monitor the use of software by the Company to ensure that multiple copies of any software are not used in breach of the relevant license terms.
- (g) A description of and copies of the Company's website and web services security policies and procedures.
- (h) Confirm whether the Company owns all intellectual property in the design and content of its websites.
- (i) A description of any insurance coverage for business losses related to the Company's Computer Systems.
- (j) A Description of any [material] interruptions of the Company's Computer Systems in the past [NUMBER] years.

12. Privacy and Data Security.

- (a) Copies of all current and historical privacy and data security policies and practice manuals of the Company, including, without limitation, all privacy policies and procedures for the Company's use and disclosure of customer or personal information.
- (b) Copies of all policies, procedures and written information security programs for compliance with data protection and privacy legislation.
- (c) Copies of all reports or audits (internal or external, including any SAS 70 and SSAE 16 audits) that have been performed on the Company's information security program(s) or any other reports prepared by or for the Company concerning the implementation of information security program(s).
- (d) Copies of any other documentation and information regarding the Company's collection, use, storage or disposal of customer or personal information (whether the Company's or a third party's).

(e) Copies of all agreements that the Company has with any third parties that act as the Company's agents or contractors and receive customer or personal information subject to any statutory or regulatory data privacy or security requirements from or on behalf of the Company. Please provide copies any reports or audits (internal or external, and including any SAS 70 and SSAE 16 audits) that have been performed on the information security program(s) of such third parties.

(f) Details of any actual or potential data and information security breaches, unauthorized use or access of the Company's Computer Systems or data, or data and information security issues impacting the Company that have been identified in the past [NUMBER] years.

13. Environmental.

(a) Description of any toxic chemicals used in production and manner of storage and disposition.

(b) Description of any Environmental Protection Act, Toxic Substances Control Act or other investigation or claim.

(c) Environmental surveys, site assessments or reports (including copies of any Phase I and Phase II reports) concerning any real property currently or formerly owned or leased by the Company.

(d) Environmental, health and safety compliance verification reports (e.g. compliance audits) and quality assurance documents.

(e) Copies of any internal reports or memoranda prepared by the Company or third parties relating to hazardous materials, health and safety or other environmental matters.

(f) Correspondence, memoranda, notes or notices of violation from foreign, federal, state or local environmental, health and safety authorities.

(g) Any "potentially responsible party" letters or other similar notices or requests for information from any governmental or regulatory authority.

14. Governmental Regulations and Filing.

(a) Summary of material inquiries by any foreign, federal, state or local governmental agency.

(b) Copies of all contracts between the Company and any foreign or domestic government (including regulatory bodies and other agencies with governmental authority).

(c) Status of foreign and domestic government contracts subject to renegotiation.

(d) Material foreign and domestic governmental permits, licenses and certificates which the Company holds and current status.

(e) List and description of all permits necessary for the Company to operate its business in the ordinary course.

(f) Material filings made and significant correspondence by the Company with any state, federal or foreign governmental or regulatory agencies since the Company's inception.

(g) Any franchise filings and all material correspondence relating to the filings.

15. Litigation and Audits.

(a) List of all litigation for past [NUMBER] years.

(b) Letters from counsel sent to auditors for year end for the past [NUMBER] years and current interim audits.

(c) Current list of all litigation, administrative or regulatory proceedings, investigations or governmental actions involving the Company or its business with a brief description of the claim for each matter. Include name of court or agency in which the litigation proceeding is pending, date instituted, docket number and principal parties to the action.

(d) Description of currently threatened litigation, legal claims, regulatory actions or other actions or proceedings, including any correspondence relating to any threatened governmental investigation or alleged violation of law or regulation.

(e) Any currently effective consent decrees, judgments, other decrees or orders, settlement agreements and other similar agreements to which the Company is a party or by which the Company or any of its assets is bound (or to which any stockholder of the Company is a party or by which any such stockholder or any of its assets is bound and which relates, directly or indirectly, to the Company).

(f) Correspondence, memoranda or notes concerning inquiries from governmental tax authorities, occupational safety, health and hazard officials, environmental officials or authorities regarding equal opportunities violations, antitrust violations, or violations of any other law, rule or regulation.

(g) Description of any warranty claims that have been made against the Company, any subsidiary, or any partnership or joint venture and the resolution of such claim.

16. Insurance.

(a) A schedule of all policies or binders of insurance or self-insurance arrangements, including medical, workers compensation, disability, automobile, general liability, fire and casualty, products liability, professional liability, business interruption, officers' and directors' liability and key-man life insurance, with deductibles, coverage limits, and other significant terms. Please indicate the name and address of all insurance agents, brokers and companies.

(b) A schedule of insurance claims in excess of \$[DOLLAR AMOUNT] over the last [NUMBER] years, and summary of loss history for such period.

(c) Analysis of premium payments for the past [NUMBER] years and details regarding any cancellations or denials of insurance during this period.

(d) Summary of self-insurance programs or other risk retention.

(e) A schedule of threatened or potential claims.

17. Taxes.

(a) Federal, state, local and foreign tax returns for all open tax years, including sales, property, franchise, payroll, excise, withholding and capital tax returns and consolidated returns of the Company. Copies of tax elections, consents, agreements or waivers (other than as attached to tax returns).

(b) Information with respect to any foreign, Internal Revenue Service, state or local tax examination or audit of the Company's or any of its subsidiaries' or their respective predecessor's returns and the results of each audit.

(c) Copies of all documents relating to pending tax litigation or any appeals process or hearing.

(d) Correspondence between the Company and the Internal Revenue Service or any foreign or state or local tax authority.

(e) Description of any undertakings given by the Company to tax authorities or any special tax rulings or agreements arranged with tax authorities.

(f) Copies of any and all tax sharing, tax allocation or inter-company agreements relating, in whole or in part, to the Company.

(g) Description of any preferred tax status or tax benefit which may be adversely affected by the proposed acquisition and any related transactions, including a summary of any available tax attribute carry-forwards.

(h) Information to analyze tax positions taken in connection with acquisitions, dispositions, restructurings, reorganizations, or the like and any tax strategies in connection with any transactions currently proposed including any ongoing tax indemnities.

(i) Any notices, elections, or other correspondence with foreign, federal, state and local tax authorities regarding the reorganization of the Company and its predecessors to the extent material.

(j) Copies of correspondence from outside tax advisors and accountants for the past three years.

(k) Copies of any tax provision work papers and memos supporting calculations and risks.



# Exhibit B

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

In re:

Chapter 11

COSMOLEDO, LLC, *et al.*<sup>1</sup>

Case No. 20-12117 (MEW)

Jointly Administered

Debtors.

**ORDER (a) APPROVING BID PROTECTIONS, (b) APPROVING BIDDING PROCEDURES FOR THE CONDUCT OF AN AUCTION, AND (c) FIXING MANNER AND NOTICE OF AUCTION, SALE HEARING AND CURE CLAIMS BAR DATE**

*Upon the Motion of the Debtors for Orders (I) Scheduling Hearing to Consider (a) Sale of Substantially All of the Debtors' Assets, Free And Clear of All Liens, Claims and Encumbrances, Subject to Higher and Better Offers and (b) Assumption and Assignment of Leases and Executory Contracts; (II) Scheduling Hearing to Consider Approval of Stalking Horse Agreement, Related Bid Protections, and Bidding Procedures for the Conduct of an Auction; (III) Fixing a Cure Claims Bar Date with respect to the Assumption and Assignment of Leases and Executory Contracts; (IV) Fixing Manner and Notice of Sale Hearing; (V) Authorizing The Debtors to Sell Assets, Free and Clear of All Liens, Claims And Encumbrances, Subject to Higher and Better Offers; (VI) Authorizing Assumption and Assignment of Leases And Executory Contracts; and (VII) Granting Related Relief, dated September 10, 2020 including all exhibits thereto (the*

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Cosmoledo, LLC (6787); Breadroll, LLC, (3279); 688 Bronx Commissary, LLC (6515); 95 Broad Commissary, LLC (2335); 178 Bruckner Commissary, LLC (2581); 8 West Bakery, LLC (6421); NYC 1294 Third Ave Bakery, LLC (2001); 921 Broadway Bakery, LLC (2352); 1800 Broadway Bakery, LLC (8939); 1535 Third Avenue Bakery, LLC (1011); 2161 Broadway Bakery, LLC (2767); 210 Joralemon Bakery, LLC (4779); 1377 Sixth Avenue Bakery, LLC (9717); 400 Fifth Avenue Bakery, LLC (6378); 1400 Broadway Bakery, LLC (8529); 575 Lexington Avenue Bakery, LLC (9884); 685 Third Avenue Bakery, LLC (9613); 370 Lexington Avenue Bakery, LLC (0672); 787 Seventh Avenue Bakery, LLC (6846); 339 Seventh Avenue Bakery, LLC (1406); and 55 Hudson Yards Bakery, LLC (7583).

“Motion”)<sup>2</sup> filed by Cosmoledo LLC, the debtors and debtors in possession herein (the “Debtors”), seeking, *inter alia*, entry of an order (this “Bidding Procedures Order”) approving (a) the Bidding Procedures which are attached hereto as Appendix A and made a part hereof (“Bidding Procedures”), (b) approving the Break-Up Fee and Expense Reimbursement, (c) establishing a deadline for the assertion of cure claims by counterparties to the Debtors’ executory contracts and unexpired leases, and (d) approving the manner and form of notices of the cure claim bar date and the hearing on the balance of the relief sought in the Motion, including approval of the Sale; and objections having been filed to the relief sought herein by (a) the Office of the United States Trustee [ECF No.: 56]; (b) the Official Committee of Unsecured Creditors (the “Creditors’ Committee”) [ECF No.: 74]; (c) Maison Kayser Medatlantique Ltd. [ECF No.:73] and (d) One Hudson Yards Owner, LLC [ECF No.: 75] (the “Objections”); and upon the record of these cases and the record of the hearing held to consider approval of the Bidding Procedures and the form and manner of notice of the Bidding Procedures, the Auction, the Sale Hearing and the Assumption and Assignment Procedures held on September 30, 2020 (the “Bidding Procedures Hearing”); after due deliberation and sufficient cause appearing therefore; it is hereby

**FOUND AND DETERMINED THAT:**

- A. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.
- B. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A).
- C. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.
- D. The statutory and legal predicates for the relief requested in the Motion, Sections 105, 363, 365, 503, and 507 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006, and 9014 have been satisfied.

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<sup>2</sup> Unless otherwise expressly defined herein, any capitalized term shall have the meaning ascribed to such term in the Motion or the Sale Agreement, as defined below, as applicable.



E. Good and sufficient notice of the Motion, and the Bidding Procedures as sought in the Motion has been given under the circumstances, and no other or further notice is required except as set forth herein and in the Bidding Procedures. A reasonable opportunity to object or be heard regarding the Bidding Procedures has been afforded to parties in interest.

F. The Bidding Procedures are fair, reasonable and appropriate and represent the best method for maximizing the return for the Assets.

G. The Bidding Procedures and the Sale Agreement have been negotiated in good faith and at arm's length.

H. The Debtors have articulated good and sufficient business reasons for approving (i) the Bidding Procedures, (ii) the Assumption and Assignment Procedures, (iii) the Bid Protections, and (iv) the form and manner of notice of the Auction and the Sale Hearing.

I. The Assumption and Assignment Procedures are fair, reasonable, and appropriate, and comply with the provisions of section 365 of the Bankruptcy Code and Bankruptcy Rule 6006.

J. The Assumption and Assignment Procedures have been tailored to provide adequate opportunity for all non-Debtor Counterparties to the Transferred Contracts and other Proposed Assumed Contracts to raise any objections to the proposed assumption and assignment or to the Cure Costs.

K. MK USA, LLC (the "Stalking Horse Bidder") shall act as the stalking horse bidder pursuant to the Sale Agreement annexed to the Motion, and the Offer embodied therein shall be subject to higher and better offers in connection with the Bidding Procedures.

L. The Stalking Horse Bidder is not an "insider" or "affiliate" of any of the Debtors, as those terms are defined in section 101 of the Bankruptcy Code, and no common identity of incorporators, directors, or controlling stockholders exists between the Stalking Horse Bidder and

the Debtors. The Stalking Horse Bidder and its counsel and advisors have acted in “good faith” within the meaning of section 363(m) of the Bankruptcy Code in connection with the Stalking Horse Bidder’s negotiation of the Bid Protections and the Bidding Procedures and the Stalking Horse Bidder’s negotiation and entry into the Sale Agreement.

M. As set forth in the Supplemental Affidavits, the Sale Notice is appropriate and reasonably calculated to provide all interested parties with timely and proper notice of the Bidding Procedures, the Assumption and Assignment Procedures, the Auction, the Sale Hearing, and the sale of the Purchased Assets as set forth under the Sale Agreement free and clear of any liens, claims, encumbrances, or interests pursuant to section 363(f) of the Bankruptcy Code) (with such liens, claims, encumbrances, or interests attaching to the proceeds of any such sale), and any and all objection deadlines related thereto, and no other or further notice shall be required for the Motion, the Sale, or the assumption and assignment of the Assumed Contracts except as expressly required herein.

N. The notice of Potential Assumption and Assignment of Executory Contracts and Unexpired Leases and Establishment of Cure Claims Bar Date for Non-Debtor Counterparties to Executory Contracts and Unexpired Leases (the “Cure Notice”), is appropriate and reasonably calculated to provide all interested parties with timely and proper notice of the amount asserted by the Debtors’ as necessary to cure executory contracts and unexpired leases to be assumed by the Debtors and assigned to a Successful Bidder at the Sale Hearing and provide adequate assurance of future performance under Sections 365(b) and 365(f) of the Bankruptcy Code;

O. Good and sufficient cause has been shown to waive the stay of effectiveness of this Order under Bankruptcy Rules 6004(h), 6006(d), 7062, or 9014, or any applicable provisions of the Bankruptcy Rules or the Local Rule.

**AND IT IS HEREBY ORDERED THAT:**

1. The Motion is granted to the extent set forth herein.
2. All objections, including the Objections, to the relief granted herein that have not been withdrawn with prejudice, waived, or settled, and all reservations of rights included in such objections, hereby are overruled and denied on the merits with prejudice.

**Approval of the Bidding Procedures and Bid Protections**

3. The Bidding Procedures as attached are hereby approved and shall govern the bids and proceedings related to the sale of the Purchased Assets and the Auction. The failure to specifically include or reference any particular provision of the Bidding Procedures in the Motion or this Order shall not diminish or otherwise impair the effectiveness of such procedures, it being the Court's intent that the Bidding Procedures are approved in their entirety, as if fully set forth in this Order. The Debtors are authorized to take all actions necessary or appropriate to implement the Bidding Procedures.

4. Subject to the right of parties-in-interest to object and the Court's entry of an order approving the sale, the Debtors are authorized to enter into the Sale Agreement, and the Stalking Horse Bid shall be subject to higher or better Qualified Bids, in accordance with the terms and procedures of the Bidding Procedures.

5. The Bid Protections are approved in their entirety, including, without limitation, payment by the Debtors of the Break-Up Fee and Expense Reimbursement to the Stalking Horse Bidder on the terms and conditions contained in the Bidding Procedures and Sale Agreement, provided however, that to the extent that the Court reduces the portion of the Stalking Horse Bidder's Credit Bid attributable to Cash Collateral to less than \$3,400,000, the amount of the Break-Up Fee shall be reduced by 2.5% of such reduction. For example, if the Court determines

that the Stalking Horse Bidder is only entitled to include in its Credit Bid, Cash Collateral in the amount of \$2,400,000, not \$3,400,000, the amount of the Break-Up Fee shall be reduced by \$25,000 (2.5% of a \$1,000,000 reduction).. Except as expressly provided for herein, no other termination payments or fees of any kind are authorized or permitted under this Order.

6. The Break-Up Fee and Expense Reimbursement shall be accorded treatment as a superpriority administrative expense claim in the chapter 11 cases, senior to all other administrative claims at any time allowed in the chapter 11 cases.

7. The Bidding Procedures shall apply with respect to any bids for, and the auction and sale of, any or all of the Purchased Assets. The Debtors are authorized to take all actions necessary or appropriate to implement the Bidding Procedures. Notwithstanding anything contained in the Sale Agreement to the contrary, immediately upon entry of this Order the Debtors are authorized to market and solicit higher and better offers from prospective purchasers for their assets being offered for sale.

8. The deadline for submitting Qualified Bids for some or all of the Purchased Assets is **October 20, 2020 at 5:00 p.m.** (Eastern Time)(the “Bid Deadline”); provided that the Debtors shall have the right, to extend the Bid Deadline for any reason whatsoever, in their reasonable business judgment and in consultation with the Creditors’ Committee, for all or certain Prospective Bidders, without further order of the Court, subject to providing notice to the Stalking Horse Bidder, and all other Prospective Bidders. Any party that does not submit a Qualified Bid by the Bid Deadline in accordance with the Bidding Procedures will not be allowed to (a) submit any offer after such deadline for the applicable assets, or (b) participate in the Auction for the applicable assets; provided that the foregoing shall not preclude the Debtors after the applicable Bid Deadline from marketing to any person, or auctioning, or any parties from bidding on, any

assets whether included in the Auction or not.

9. The Stalking Horse Bidder is hereby deemed a Qualified Bidder, and the Offer, as reflected in the Sale Agreement, is a Qualified Bid for all purposes and requirements pursuant to the Bidding Procedures. If no other Qualified Bid in respect of the Purchased Assets are received on or before Bid Deadline, the Debtors shall not conduct an Auction for the Purchased Assets, and the Stalking Horse Bidder will be named the Successful Bidder. The Stalking Horse Bidder shall provide the Debtors with a final list of Contracts or Lease of which it seeks assumption and assignment by no later than two (2) days prior to the Bid Deadline. Such list shall constitute the final Schedule 2.6(a) under the Sale Agreement. The Debtors will file the final Schedule 2.6(a) on the docket and serve such schedule on all interested parties on the day of receipt.

10. Nothing in this Order or the Bidding Procedures shall be construed as approving the Sale Agreement or any transaction contemplated therein prior to approval by this Court at the Sale Hearing and all such transactions remain subject to such approval.

11. Notwithstanding anything to the contrary in this Order, the Creditors' Committee shall be entitled, but is not directed, to conduct an expedited investigation of the Stalking Horse Bidder's secured claim and all alleged liens and security interests of the Stalking Horse Bidder. The Creditors' Committee shall have until **October 14, 2020** to file an objection to the Stalking Horse Bidder's right to, or amount of, any credit bid. If the Creditors' Committee does not file an objection by such time, the maximum amount of the Stalking Horse Bidder's Approved Credit Bid shall be \$5,400,000.

12. In the event the Creditors' Committee timely files an objection to the Stalking Horse Bidder's right to credit bid, the Debtors shall request a hearing to be held by no later than one day prior to the Bid Deadline to determine of the proper amount of the Stalking Horse Bidder's

credit bid. If any such hearing is held, the Debtors are directed to modify the timeline set forth herein, and in the Bidding Procedures, to postpone the Bid Deadline and related dates, as necessary until the date that is no later than two (2) days after the Court makes a determination on the amount of the Stalking Horse Bidder's credit bid.

13. Nothing herein shall be construed as limiting any parties' rights to file a response to any objection by the Creditors' Committee.

14. Notwithstanding anything contained in the Sale Agreement, in the event the Court determines that the Stalking Horse Bidder does not have the right to Credit Bid and the Stalking Horse Bidder elects not to proceed with the sale under the Sale Agreement, to the extent such termination is permitted under the Sale Agreement, the Stalking Horse Bidder's entitlement to a Break Up Fee or Expense Reimbursement shall be subject to further order of this Court and all parties' rights to seek approval of or object to the payment of any Break Up Fee or Expense Reimbursement are hereby preserved.

15. Subject to the terms of this Order and the terms of any subsequent Order of this Court regarding the sufficiency or amount of any credit bid, nothing contained herein shall otherwise prejudice or impair the right of the Stalking Horse Bidder to credit bid, as set forth in the Bidding Procedures on such assets that are subject to their respective liens in their respective priorities.

#### **Conduct of the Auction**

16. If the Debtors receive at least one Qualified Bid in respect of the Purchased Assets by the Bid Deadline, the Debtors shall conduct the Auction of the Purchased Assets in accordance with the Bidding Procedures.

17. The Auction shall be held on **October 23, 2020 at 10:00 a.m.** (Eastern Time) at the

offices of Mintz & Gold LLP, 600 Third Ave., 25<sup>th</sup> Floor, New York, New York 10016, or by videoconference. The Debtors, in consultation with the Creditors' Committee, have the right to extend, postpone or cancel the Auction at any time, for any reason.

18. The Auction shall be conducted openly, and all creditors and other parties in interest shall be permitted to attend; provided that the Debtors may, in their reasonable business judgment, and in consultation with the Creditors' Committee, establish a reasonable limit on the number of representatives and/or professional advisors that may appear on behalf of or accompany a Qualified Bidder, or other parties in interest at the Auction. The proceedings of the Auction shall be transcribed.

19. Subject to the rights of the Stalking Horse Bidder and this Order, the Debtors, in consultation with the Creditors' Committee, shall have the right, as they may reasonably determine to be in the best interests of their estates, to carry out the Bidding Procedures, including, without limitation, to: (a) determine which parties are Prospective Bidders, (b) determine which Prospective Bidders are Qualified Bidders; (c) determine which bids are Qualified Bids; (d) determine which bid or bids are the Successful Bid and Back-Up Bid (as such terms are defined in the Bidding Procedures), each as it relates to the Auction; (e) adjourn or cancel the Auctions and/or the Sale Hearings in open court without further notice; (f) modify the Bidding Procedures consistent with their fiduciary duties and bankruptcy law; and (g) withdraw the Motion at any time with or without prejudice.

20. The Debtors shall have the right, in their reasonable business judgment, in a manner consistent with their fiduciary duties and applicable law, and in consultation with the Creditors' Committee, to modify the Bidding Procedures, including (a) waive terms and conditions with respect to any Prospective Bidder; (b) extend the deadlines set forth in the Bidding Procedures; (c)

announce at the Auction modified or additional procedures for conducting the Auction; and (d) provide reasonable accommodations to the any Qualified Bidder with respect to such terms, conditions, and deadlines of the bidding and Auction process to promote further bids by such bidders on any Assets in each case, to the extent not materially inconsistent with the Bidding Procedures and this Order. Except as provided in the Sale Agreement, nothing in this Order or the Bidding Procedures shall obligate the Debtors to consummate or pursue any transaction with respect to any Asset with a Qualified Bidder.

### **Sale Hearing and Service of Notice**

21. The Sale Hearing shall be held on **October 29, 2020, 2020 at 10:00 a.m.** (Eastern Time) before the Honorable Michael E. Wiles United States Bankruptcy Judge, at the United States Bankruptcy Court, 1 Bowling Green, New York, New York 10004, by videoconference or teleconference, to consider (a) approval of the Sale Agreement and the sale of the Assets, pursuant to §§ 105(a), 363(b), (f), (m) and (n) of the Bankruptcy Code and Bankruptcy Rules 2002, 6004 and 9014, free and clear of all liens, claims and encumbrances, subject to higher or better offers; and (b) approval of the assumption and assignment of executory contracts and unexpired leases of the Debtor, pursuant to § 365 of the Bankruptcy Code and Bankruptcy Rule 6006. Notwithstanding the foregoing, the Debtors may, after consultation with the Creditors' Committee, seek an adjournment of the Sale Hearing, as the Debtors deem appropriate in the exercise of their reasonable business judgment.

22. On or before the date that is one (1) day following entry of this Order, (the "Service Deadline"), the Debtors shall serve, by regular mail and by email, where possible, a copy of this Order, together with appendices thereto, upon: (a) Katten Muchin Rosenman LLP, 575 Madison Avenue New York, New York 10022, Attn: Jerry L. Hall, Esq., jerry.hall@katten.com, counsel to



the Debtors' senior secured lender and Stalking Horse Bidder; (b) Hahn & Hessen LLP, 488 Madison Avenue, New York, NY 10022, Attn: Mark Indelicato, Esq., mindelicato@hahnhausen.com, proposed counsel for the Creditors' Committee; (c) all entities known to assert a lien, claim, interest or encumbrance in the Debtors' assets; (d) all parties that have previously notified the Debtors of their interest in acquiring all or a portion of the Debtors' assets; (e) the Office of the United States Trustee, 201 Varick Street, Room 1006, New York, New York 10014 Attn: Brian Masumoto, Esq., Brian.Masumoto@usdoj.gov; (f) all counterparties to Assumed Contracts and Leases; (g) all relevant taxing authorities; (h) all parties that have filed a notice of appearance in this case as of the date of this Order; (i) the Small Business Administration; and (j) the United States Attorney's Office for the Southern District of New York.

23. The form of notice of the proposed Sale, the Auction and the Sale Hearing (the "Sale Notice"), annexed as Appendix C hereto, is approved, and the Debtors are directed to serve a copy of the Sale Notice upon (a) all known creditors of the Debtors, and (b) all federal, state and local taxing authorities in jurisdictions in which the Debtors operates their business, by regular mail on or before the Service Deadline to the extent any such parties are not to receive a copy of this Order pursuant to the preceding decretal paragraph.

24. Responses or objections, if any, to the relief sought at the Sale Hearing, other than in connection with a Cure Claim (as defined below) and the auction process and selection of the Successful Bidder, must: (a) be made in writing; (b) state with particularity the grounds therefor; (c) conform to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Southern District of New York; (d) be filed with the United States Bankruptcy Court for the Southern District of New York; and (e) served upon (i) Mintz & Gold LLP 600 Third Ave., 25th Fl., New York, New York 10016, Attn: Andrew Gottesman, Esq., gottesman@mintzandgold.com,

proposed counsel for the Debtors; (ii) Office of the United States Trustee for the Southern District of New York 201 Varick Street, Room 1006, New York, NY 10014, Attn: Brian Masumoto, Esq., Brian.Masumoto@usdoj.gov; (iii) Willkie Farr and Gallagher, 787 Seventh Avenue New York, New York 10019, Attn: Paul V. Shalhoub, Esq., pshalhoub@willkie.com, counsel to the holder of Cosmoledo's equity interests; (iv) Katten Muchin Rosenman LLP, 575 Madison Avenue New York, New York 10022, Attn: Jerry L. Hall, Esq., jerry.hall@katten.com, counsel to the Debtors' senior secured lender and Stalking Horse Bidder; (v) Hahn & Hessen LLP, 488 Madison Avenue, New York, NY 10022, Attn: Mark Indelicato, Esq., mindelicato@hahnhausen.com, proposed counsel to the Creditors' Committee; and (iv) all other parties who have requested notice under Bankruptcy Rule 2002, so as to be received no later than **October 21, 2020 at 5:00 p.m.** (Eastern Time).

#### **Assumption and Assignment Procedures**

25. The form of notice of Potential Assumption and Assignment of Executory Contracts and Unexpired Leases and Establishment of Cure Claims Bar Date for Non-Debtor Counterparties to Executory Contracts and Unexpired Leases (the "Cure Notice"), annexed as Appendix D hereto, is approved.

26. The following procedures (the "Assumption and Assignment Procedures") shall be used in connection with any executory contracts and unexpired leases proposed to be assumed and assigned to the Successful Bidder:

- a. The Debtors are directed to serve a copy of the Cure Notice upon all non-debtor counterparties to the executory contracts and unexpired leases set forth on the parties annexed thereto, by electronic mail or overnight delivery on or before **October 21, 2020** at 4:00 p.m. (Eastern Time).
- b. To the extent of any dispute in connection with: (i) the cure amounts listed on the Cure Notice, and/or (ii) the form and manner of adequate assurance of future performance proposed by the Successful Bidder, all non-debtor counterparties to the executory contracts and unexpired leases listed thereon

are directed to electronically file an objection with the Clerk of the Bankruptcy Court, setting forth the basis for such objection (the “Cure Claim”), and serve a copy of such Cure Claim upon (i) Mintz & Gold LLP, 600 Third Ave., 25th Floor, New York, New York 10016, Attn: Andrew Gottesman, Esq., gottesman@mintzandgold.com, proposed counsel to the Debtors, (ii) Katten Muchin Rosenman LLP, 575 Madison Avenue New York, New York 10022, Attn: Jerry L. Hall, Esq., jerry.hall@katten.com, counsel to the Debtors’ senior secured lender and Stalking Horse Bidder; and (iii) Hahn & Hessen LLP, 488 Madison Avenue, New York, NY 10022, Attn: Mark Indelicato, Esq., mindelicato@hahnhausen.com, proposed counsel to the Creditors’ Committee, so as to be received on or before **October 27, 2020 at 12:00 p.m.** (Eastern Time) (the “Cure Claim Deadline”). A non-debtor party that agrees with the amount shown on the attached Appendix B is not required to file a Cure Claim.

- c. Any party that fails to file a Cure Claim by the Cure Claim Deadline shall be forever barred from asserting a Cure Claim against the Debtors, their estate and/or any purchaser of the Assets under such executory contract or lease;
- d. The Debtors shall make good faith and reasonable efforts to resolve any disputed Cure Claims with the non-debtor counterparty to such contract or lease in advance of the Sale Hearing;
- e. Any unresolved Cure Claims shall be scheduled for resolution at the Sale Hearing;
- f. Cure Claims (if any) under any executory contracts and unexpired leases to be assumed and assigned to the Successful Bidder shall be paid, as follows:
  - i. If there is no dispute as to the amount of the Cure Claim, such Cure Claim shall be paid by the Successful Bidder at the time of the closing of the transaction;
  - ii. If there is a dispute as to the amount of the Cure Claim but the Successful Bidder desires to proceed with the assumption and assignment of the applicable contract, (x) the undisputed portion of the Cure Claim shall be paid by the Successful Bidder at the time of the closing of the transaction, and (y) the Successful Bidder, shall make provision for the payment of the disputed portion of the Cure Claim in form and substance reasonably satisfactory to the Debtors, the Successful Bidder and the counterparty to such contract or lease, or (if no agreement can be reached) pursuant to order of this Court. Upon the entry of a final order determining the amount of the Cure Claim, the balance of the Cure Claim, if any, shall be paid by the Successful Bidder to the counterparty; and
  - iii. If there is a Cure Claim and the Successful Bidder elects to defer a

decision on assumption and assignment until final adjudication of the amount of the Cure Claim, then (x) such contract or lease will not be assumed or assigned at the time of closing of the transaction, (y) the Cure Claim will be adjudicated by the Court, and (z) within two (2) business days following the entry of a final order determining the amount of the Cure Claim, the Successful Bidder shall notify the Debtors and the counterparty that the Successful Bidder either (A) desires to have the applicable contract or lease assumed and assigned (in which case the Successful Bidder shall pay the allowed Cure Claim), or (B) has determined not to have the applicable contract or lease assumed and assigned.

**Other Related Relief**

27. All persons and entities (whether or not selected as a Qualified Bidder) that submit a bid for any of the Debtors' Assets during the sale process, including at the Auctions, shall be deemed to have knowingly and voluntarily (a) submitted to the exclusive jurisdiction of this Court with respect to all matters related to the terms and conditions of the transfer of Assets, the Auction; (b) consented to the entry of a final order by the Court in connection with the Motion or this Order (including any disputes relating to the bidding and Auction process, the Auction, and/or any Sale) to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution; and (c) waived any right to jury trial in connection with any disputes relating to the any of the foregoing matters.

28. Notwithstanding the possible applicability of Bankruptcy Rules 6004(h), 6006(d), 7062, or 9014, or any applicable provisions of the Bankruptcy Rules or the Local Rules or otherwise stating the contrary, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry, and any applicable stay of the effectiveness and enforceability of this Order is hereby waived.

29. The Debtors are authorized to take all action necessary to effectuate the relief granted in this Order.

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

Dated: October 2, 2020  
New York, New York

/s/ Michael E. Wiles  
Hon. Michael E. Wiles  
United States Bankruptcy Judge

**Appendix A**

**Bidding Procedures**

**Bidding Procedures**

Cosmoledo LLC and its affiliated debtors and debtors in possession (collectively, the “Debtors”) are debtors in possession in chapter 11 cases being jointly administered under Case No. 20-12117 in the United States Bankruptcy Court for the Southern District of New York. On September 30, 2020 the Bankruptcy Court entered an order (the “Bidding Procedures Order”) authorizing the Debtors to, among other things, market substantially all of their assets (the “Assets”) through the Bidding Procedures described herein (the “Bidding Procedures”), and schedule an auction of the assets (the “Auction”) and a sale hearing (the “Sale Hearing”) to consider the sale of the assets to the successful bidder (a “Sale”). These Bidding Procedures are designed to provide interested parties with the opportunity to qualify as bidders and participate in the Auction on the terms set forth in the “stalking horse” sale agreement attached hereto as Schedule 1 (as may be amended up to five (5) days before the Bid Deadline, the “Sale Agreement”) and to facilitate a full and fair auction and sale process.

The key dates and procedures are as follows:<sup>3</sup>

<b>Date</b>	<b>Event</b>
October 20, 2020 at 5:00 p.m.	Bid Deadline
October 21, 2020 at 5:00 p.m.	Cure Notice Deadline (including adequate assurance information)
October 21, 2020 at 5:00 p.m.	Sale Objection Deadline (other than Cure Objection)
October 23, 2020 at 10:00 a.m.	Auction
October 24, 2020 at 5:00 p.m.	Deadline to file and serve Notice of Auction Results
October 27, 2020 at 12:00 p.m.	Cure Objection Deadline
October 29, 2020 at 10:00 a.m.	Sale Hearing

**Auction:** The Auction, if necessary, will be held at the offices of proposed counsel to the Debtors, Mintz & Gold LLP, 600 Third Ave., 25<sup>th</sup> Fl., New York, New York 10016; by video conference or audio conference. All auction proceedings will be transcribed and recorded. The Debtors have the right to extend, postpone or cancel the Auction at any time, for any reason.

**Sale Hearing:** The Sale Hearing will be held at the United States Bankruptcy Court, 1 Bowling Green, New York, New York 10004, before the Honorable Michael E. Wiles, United States

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<sup>3</sup> All times are Eastern Time.

Bankruptcy Judge for the Southern District of New York, by videoconference or audioconference.

**Bid Deadline:** All bids must be submitted to (i) the Debtors' proposed counsel, Mintz & Gold LLP, 600 Third Ave., 25<sup>th</sup> Fl., New York, New York 10016, Attn: Andrew Gottesman, Esq., gottesman@mintzandgold.com, (ii) Hahn & Hessen LLP, 488 Madison Avenue, New York, NY 10022, Attn: Mark Indelicato, Esq., mindelicato@hahnhausen.com, proposed counsel to the Official Committee of Unsecured Creditors, appointed in these cases (the "Creditors' Committee"); and (iii) Katten Muchin Rosenman LLP, 575 Madison Avenue New York, New York 10022, Attn: Jerry L. Hall, Esq., jerry.hall@katten.com, counsel to the Debtors' senior secured lender and Stalking Horse Bidder, by no later than the Bid Deadline.

- a. **Due Diligence.** To the extent any party wishes to undertake any due diligence with respect to the Assets in connection with a potential bid (a "Prospective Bidder"), such Prospective Bidder must (i) execute a non-disclosure agreement (to the extent such an agreement has not been previously executed and delivered by such proposed bidder) in form and substance acceptable to the Debtors, and (ii) provide sufficient information, as reasonably determined by the Debtors and the Creditors' Committee, to allow the Debtors and the Creditors' Committee to reasonably determine that such Prospective Bidder has, or can obtain, the financial wherewithal and any required internal corporate, legal, or other authorizations to close a Sale, including, but not limited to, current audited financial statements of the interested party (or such other form of financial disclosure reasonably acceptable to the Debtors in their discretion) prior to undertaking any such due diligence and all such due diligence must be undertaken and completed prior to the Bid Deadline. An interested party shall be deemed a "Prospective Bidder" if the Debtors determine in their reasonable discretion and in consultation with the Creditors' Committee, that an interested party has satisfied the above requirements.
  - i. Until the Bid Deadline (as defined below), the Debtors will provide Prospective Bidders with reasonable access to a data room and any other additional information that the Debtors believe to be reasonable and appropriate under the circumstances. The Debtors will work to accommodate all reasonable requests for additional information and due diligence access from Prospective Bidders. All requests for information should be directed to John Sordillo (john.sordillo@CBIZ.com) of the Debtors' proposed financial advisors, CBIZ Accounting, Tax and Advisory of New York, LLC ("CBIZ").
  - ii. Neither the Debtors nor any of their representatives shall be obligated to furnish any information of any kind whatsoever relating to the Locations to any person or entity who is not a Prospective Bidder or a Consultation Party or who does not comply with the participation requirements set forth above.
  - iii. Once an interested party is deemed a Prospective Bidder, its identity may, in the Debtors' discretion, be disclosed to the Stalking Horse Bidder.
  - iv. Unless otherwise determined by the Debtors, the availability of additional due diligence to a Prospective Bidder will cease if (i) the Prospective Bidder does not become a Qualified Bidder or (ii) these Bidding Procedures are terminated.



- v. Prospective Bidders shall be entitled to bid on some or any part of the Purchased Assets and Assumed Liabilities under the Sale Agreement, or any assets which are not specially made part of the Sale Agreement.
  - vi. The Debtors shall determine, after consultation with the Committee, in its reasonable business judgment, if a bid is a Qualified Bid, including consideration of the financial qualifications of the bidder. No bid shall be a Qualified Bid if such bid is subject to a due diligence, financing, or other contingency. After taking account of reasonable non-monetary considerations (e.g., without limitation, execution risk), to the extent that the aggregate amount of qualified bids exceeds the Initial Overbid amount, (provided that bids may be aggregated only to the extent they are for separate, non-overlapping assets), the Debtors shall conduct an auction.
- b. Qualified Bid. A bid that meets the following qualifications will be considered a “Qualified Bid”:
- i. The bid must be received in accordance herewith by the Bid Deadline.
  - ii. The bid must:
    - a. Be in writing;
    - b. State that it is irrevocable and acknowledge that such bid may be designated a back-up bid;
    - c. Be accompanied by a duly executed sale agreement, marked to reflect variations to the Sale Agreement;
    - d. Be accompanied by a deposit in immediately available funds of not less than twenty (20%) percent of the full amount of any proposed purchase price (including the value of any credit bid or other non-monetary consideration, but not including the amount of any potential Cure Costs or the amount of any other Assumed Liabilities) (the “Deposit”). The Deposit will be subject to forfeiture upon a breach by the bidder and non-refundable if the bidder is selected as a Successful Bidder (as defined below) and fails to consummate the purchase (other than as a result of a breach by the Debtors). The Deposit will be refundable by the earlier of thirty (30) days after the Auction (ii) the consummation of the transaction with the Successful Bidder, and (iii) the release of such bid by the Debtors (such date, the “Back-Up Termination Date”) if the bidder is not selected as the Successful Bidder;
    - e. State explicitly that it is not subject to any further due diligence, financing or other contingency; and
    - f. State specifically to which of the Purchased Assets the bid applies, it being understood that any bid may be for all or any portion of the Purchased Assets under the Sale Agreement; *provided, however*, that no bid may seek

assignment of Debtors' PPP Loan and any bid that proposes to take assignment of Debtors' PPP Loan shall not be a Qualified Bid.

- iii. Any secured party, including the Stalking Horse Bidder, in connection with the Sale of all or a portion of the Purchased Assets, may seek to credit bid all or a portion of their secured claims for their respective collateral (each such bid, a "Credit Bid") pursuant to section 363(k) of the Bankruptcy Code; *provided that* any such Credit Bid shall include cash consideration (i) sufficient to pay in full all claims for which there are valid, perfected, and unavoidable liens or PACA/PASA trust claims on any Assets included in such Credit Bid that are senior in priority to those of the party seeking to Credit Bid (unless such senior lien holder consents to alternative treatment), or deemed not to be part of the Debtors' estates, and (ii) pay the cash payments approved under the Bid Protections and otherwise complies with any orders of the Bankruptcy Court approving debtor-in-possession financing or use of cash collateral.
- iv. The proposed purchase price for a Qualified Bid shall not be less than \$9,135,400.00 (the "Initial Overbid").<sup>4</sup>
- v. Without limiting the generality of the foregoing, any Qualified Bid shall be for some or any part of the Purchased Assets and Assumed Liabilities under the Sale Agreement, or any assets which are not specially made part of the Sale Agreement, on an as-is, where-is basis and shall not include any due diligence, financing or other contingency. A bid must fully describe all Assumed Liabilities that are part of such bid, including the assumption of any leases and/or executory contracts that such bidder seeks to assume and related cure costs assume and the amount of the related cure costs that such bidder is agreeing to assume as part of its bid.
- vi. The bid must be expressly made subject to the Debtors' obligations to pay the Break-Up Fee and Expense Reimbursement pursuant to the terms of the Sale Agreement, as modified by the Bid Procedures Order.
- vii. Each bid must include a copy of an asset purchase agreement reflecting the terms and conditions of the Bid, which agreement must be marked to show any proposed amendments and modifications to Sale Agreement (the "Proposed APA").
- viii. Simultaneously with the delivery of a Proposed APA, a Prospective Bidder

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<sup>4</sup> The Initial Overbid is equal to the sum of (A) the cash portion of the Purchase Price as defined in the Sale Agreement of not less than \$3,000,000, (B) the maximum credit bid amount (subject to the Creditors' Committee's right to challenge) of \$5,400,000 (the "Credit Bid"), (C) the Break-Up Fee of \$160,400 (2.5% of \$6,416,000, representing the cash portion of the Purchase Price, plus the amount of Cash Collateral included in the Credit Bid), (D) \$500,000, the maximum amount of the Expense Reimbursement, and (E) \$75,000, the incremental initial overbid amount.

shall deliver financial information evidencing that (a) such party has the financial wherewithal to consummate the proposed transaction on the terms proposed and (b) such party can provide adequate assurance of the future performance of all Contracts and Leases of which it seeks an assignment under Sections 365(b)(1)(C) and 365 (f)(2)(b) of the Bankruptcy Code. Such financial information may include current audited or verified financial statements and/or a letter from a depository institution indicating the ability to close on a proposed transaction. In the event the financial information pertains to the parent or other equity holder of an acquisition affiliate, the bid of the affiliate shall be guaranteed by the parent or other equity holder.

- ix. Only those Prospective Bidders having submitted Qualified Bids (a “Qualified Bidder”) will be permitted to participate in the Auction. The Debtors’ counsel, upon consultation with the Committee, will promptly notify each Prospective Bidder after the Bid Deadline whether it is a Qualified Bidder. The Stalking Horse Bidder shall be deemed a Qualified Bidder at any Auction.
- x. Except as provided with respect to the Stalking Horse Bidder, a Qualified Bid must include a statement that the bid does not entitle such bidder to any break-up fee, termination fee, expense reimbursement, or similar type of payment or reimbursement and a waiver of any substantial contribution administrative expense claim under section 503(b) of the Bankruptcy Code related to bidding for the Assets.
- xi. The bid must include the contact information of the specific person(s) whom the Debtors or their advisors should contact in the event that the Debtors have any questions or wish to discuss the bid.
- xii. A copy of a board resolution or similar document demonstrating the authority to make a binding and irrevocable bid on the terms proposed and to consummate the contemplated transaction.
- xiii. The entity submitting a bid shall also provide evidence or affirm under oath that all necessary approvals have been obtained authorizing the submission of the bid by such entity.
- xiv. There must be no communications between and amongst Prospective or Qualified Bidders regarding the Debtors unless the Debtors have previously authorized such communication in writing. The Debtors reserve the right, in their reasonable business judgment and in consultation with the Creditors’ Committee, to disqualify any Prospective Bidder(s) or Qualified Bidder(s) that have communications between and amongst themselves.

c. Auction Procedures and Bidding Increments.

- i. In the event one or more Qualified Bids (in addition to the Stalking Horse Bid) are received by the Debtors prior to the Bid Deadline, the Debtors will conduct

the Auction. No later than one (1) business day prior to the Auction, the Debtors shall circulate to each Qualified Bidder copies of the Qualified Bid determined to be the highest or best Qualified Bid submitted as of the Bid Deadline, and that will constitute the opening bid at the Auction.

- ii. The Debtors, in consultation with the Creditors' Committee, have the right to determine, in their sole discretion, the highest or best Qualified Bid (or collection of Qualified Bids) to serve as the starting point at the Auction.
- iii. Between the date the Debtors notify a Prospective Bidder that it is a Qualified Bidder and the Auction, the Debtors may discuss, negotiate or seek clarification of any Qualified Bid from a Qualified Bidder. Without the written consent of the Debtors, a Qualified Bidder may not modify, amend or withdraw its Qualified Bid, except for proposed amendments to increase the purchase price or otherwise improve the terms of its Qualified Bid, during the period that such Qualified Bid remains binding as specified herein; provided that any Qualified Bid may be improved at the Auction as set forth herein.
- iv. At the Auction (A) all bids shall be made and received in one room, or on video conference, on an open basis, and all other bidders shall be entitled to be present for all bidding with the understanding that the true identity of each bidder shall be fully disclosed to all other bidders and that all material terms of each bid will be fully disclosed to all other bidders throughout the entire Auction; (B) the opening bid at the Auction shall not be less than the Initial Overbid; (C) all offers subsequent to the opening bid at the Auction must exceed the prior offer by not less than \$50,000 ("the Subsequent Incremental Bid Amount"); (E) with respect to any such further overbid submitted by the Stalking Horse Bidder, the consideration offered by the Stalking Horse Bidder shall be deemed to include the full amount of the Break-Up Fee and Expense Reimbursement potentially payable to the Stalking Horse Bidder; and (E) bidding at the Auction will continue until such time as no further bids are made within the time limit announced by Debtors' counsel, upon consultation with the Creditors' Committee (if any), and the Debtors shall have the option to continue the Auction.
- v. The Debtors reserve the right to and may, after consultation with the their professionals and the Creditors' Committee, reject at any time before entry of the relevant Sale Order any bid that, in the Debtors' judgment, is (i) inadequate or insufficient; (ii) not in conformity with the requirements of the Bankruptcy Code, these Bidding Procedures, or the terms and conditions of the Sale; or (iii) contrary to the best interests of the Debtors and their estates, except that if the Stalking Horse Bid is the only Qualified Bid the foregoing provisions of this sentence will be inoperative. The Debtors may consider any factors, including the factors set forth above, regarding the form and content of Qualified Bids and the Debtors' review of bids. No attempt by the Debtors to reject a bid under this paragraph will modify any rights of the Debtors or the Stalking Horse Bidder under applicable Stalking Horse Agreement (as may be consensually

modified at any Auction).

- vi. Upon conclusion of the Auction, the Debtors, upon consultation with its professionals and the Creditors' Committee, shall determine the highest or otherwise best bid (the "Successful Bidder"), and such bid shall be submitted for approval to the Bankruptcy Court. Subject to the Court's calendar, the Sale Hearing will occur no later than three (3) business days after the conclusion of the Auction.
- vii. The Successful Bidder shall have the burden of establishing by competent evidence that it qualifies for section 363(m) protections, and that it is capable of providing adequate assurance of future performance with respect to any executory contract or unexpired lease it wishes to have assumed and assigned pursuant to section 365, and it is entitled to credit bid pursuant to section 363(k) and otherwise complies with its obligations under the Bankruptcy Code.
- viii. If the Debtors do not receive any Qualified Bids, the Debtors will report the same to the Bankruptcy Court and the Creditors' Committee and proceed with the Sale Hearing and no Auction shall be held.
- ix. Debtors' counsel reserves the right to establish such other reasonable rules and procedures for the conduct of the Auction as may be necessary, provided that such rules and procedures are publicly announced at the Auction.

THE SUCCESSFUL BID AND THE BACK-UP BID SUBMITTED AT THE AUCTION SHALL CONSTITUTE IRREVOCABLE OFFERS AND BE BINDING ON THE SUCCESSFUL BIDDER AND THE BACK-UP BIDDER FROM THE TIME THE BIDS ARE SUBMITTED UNTIL THE LATER OF THE ENTRY OF THE SALE ORDER AND THE BACK-UP TERMINATION DATE. IN THE EVENT THAT THE SUCCESSFUL BIDDER IS REQUIRED TO AND DOES NOT CLOSE ON THE SALE AS CONTEMPLATED IN THE SALE AGREEMENT, THE DEBTORS SHALL HAVE THE RIGHT TO RETAIN SUCH BIDDER'S DEPOSIT AND CLOSE THE SALE WITH THE BACK-UP BIDDER (WITH SUCH BACK-UP BIDDER BECOMING THE SUCCESSFUL BIDDER ON THE TERMS OF ITS LAST BID).

ANY QUALIFIED BID THAT IS NOT THE SUCCESSFUL BID OR THE BACK-UP BID SHALL BE DEEMED WITHDRAWN AND TERMINATED AT THE CONCLUSION OF THE SALE HEARING, AND SUCH BIDDER'S DEPOSIT SHALL BE PROMPTLY RETURNED.

- d. Bid Protections. The Break-Up Fee and Expense Reimbursement shall be payable to the Stalking Horse Bidder only under the following terms and conditions:
  - i. If a person other than the Stalking Horse Bidder is determined to be the Successful Bidder for the Assets and the Debtors close a transaction with such other Successful Bidder, the Stalking Horse Bidder shall receive the Break-Up Fee and Expense Reimbursement, payable at closing from the proceeds of such transaction; and

- ii. The Break-Up Fee and the Expense Reimbursement shall be accorded treatment as a superpriority administrative expense claim in these Chapter 11 cases.

Reservation of Rights

The Debtors reserve the right to modify these Bidding Procedures at or prior to the Auction, in consultation with the Creditors' Committee, without the need of further order of the Bankruptcy Court, including to (1) extend any of the deadlines set forth in the Bidding Procedures, and (2) adjourn the Auction and /or the Sale Hearing (the latter subject to the Bankruptcy Court's calendar).

**Schedule 1**

**Stalking Horse Sale Agreement**

*(Revised Version to be Filed)*

**Appendix B**

**List of Executory Contracts and Unexpired Leases and Cure Amounts**

\*\*Subject to further revision if additional contracts come to light at a later date

\*\*Agreement descriptions and dates are for informationally purposes only

<b>Debtor Entity</b>	<b>Counterparty</b>	<b>Agreement Description</b>	<b>Original Date</b>	<b>Estimated Cure Amounts as of 8/31/20</b>
Cosmoledo, LLC	Maison Eric Kayser Medatlantique Limited (as successor-in-interest to Idexar Investments Limited)	Know-How Agreement (as amended as of September 10, 2015)	7/14/11	\$623,988.99
Cosmoledo, LLC	Maison Eric Kayser Medatlantique Limited (as successor-in-interest to Idexar Investments Limited)	Trademark Agreement (as amended as of September 10, 2015, as further amended as of September 14, 2017, as further amended as of March 20, 2018)	7/14/11	\$0
178 Bruckner Commissary, LLC	HUB Truck Rental Corp.	Truck Lease and Service Agreement (the "Truck Agreement")	9/26/18	\$0
178 Bruckner Commissary, LLC	HUB Truck Rental Corp.	Schedule A to Truck Agreement, relating to lease of 2019 Isuzu	9/26/18	\$106,870.00
178 Bruckner Commissary, LLC	HUB Truck Rental Corp.	Schedule A to Truck Agreement, relating to lease of 2019 Isuzu	1/16/19	\$107,828.00
178 Bruckner Commissary, LLC	HUB Truck Rental Corp.	Schedule A to Truck Agreement, relating to lease of 2019 Isuzu	3/21/19	\$107,828.00
1800 Broadway Bakery, LLC	Central Park South Associates LLC	Lease	4/1/13	\$453,071.85
8 West Bakery LLC	AB 40th Street LLC	Lease, as amended by the First Amendment, dated 8/28/14	4/5/12	\$318,235.26
1535 Third Avenue Bakery, LLC	200 East 87th Street Associates, L.P. [3rd and 87th LP]	Lease	3/13/14	\$305,501.48
575 Lexington Avenue Bakery, LLC	575 Lex Property Owner, LLC	Lease, as amended by First Amendment, dated	1/17/17	\$288,824.57



Debtor Entity	Counterparty	Agreement Description	Original Date	Estimated Cure Amounts as of 8/31/20
		May 2017		
400 Fifth Avenue Bakery LLC	Pacific Fifth Avenue Corporation d/b/a Langham Place, New York	Lease	11/23/16	\$288,198.50
921 Broadway Bakery, LLC	149 Fifth Ave. Corp d/b/a William Colavito, Inc.	Lease	8/15/12	\$268,697.55
1377 Sixth Avenue Bakery, LLC	The Claridge's Company LLC	Lease	6/29/16	\$263,530.95
NYC 1294 Third Avenue Bakery, LLC	175 East 74th Corporation d/b/a Douglas Elliman Property Management	Lease	2/19/12	\$260,635.00
2161 Broadway Bakery, LLC	Colorado Associates, LLC	Lease	5/30/14	\$256,296.42
Cosmoledo, LLC	373-381 PAS Associates, LLC	Lease	5/3/16	\$225,914.31
1400 Broadway Bakery, LLC	ESRT 1400 Broadway, L.P.	Lease	11/28/16	\$219,117.75
787 Seventh Avenue Bakery, LLC	FSP 787 Seventh, LLC	Lease	10/31/17	\$201,419.13
370 Lexington Avenue Bakery, LLC	Unizo Real Estate NY Three, LLC [BSD 370 Lexington, LLC]	Lease; Limited Personal Guaranty of Cosmoledo, LLC	6/7/17	\$195,500.59
55 Hudson Yards Bakery, LLC	One Hudson Yards Owner, LLC	Lease	9/25/17	\$193,391.33
685 Third Avenue Bakery, LLC	T-C 685 Third Avenue Owner LLC	Lease	7/26/17	\$178,559.69
210 Joralemon Bakery, LLC	210 Muni LLC	Lease	6/5/15	\$148,592.00
178 Bruckner Commissary, LLC	Hoffman Investors Corp.	Lease	7/22/13	\$118,618.21
339 Seventh Avenue Bakery, LLC	333 Seventh, LLC	Lease	9/25/17	\$70,346.31
95 Broad Commissary, LLC	95 Broad Street Realty, LLC	Lease	8/1/17	\$0 (exited the premises)
95 Broad Commissary, LLC	Café Pushkin Factory, LLC	Sublease, as amended	7/1/13	\$0 (exited the premises)
178 Bruckner	Artistic Desk Pad &	Lease	8/1/15	\$0 (exited the

<b>Debtor Entity</b>	<b>Counterparty</b>	<b>Agreement Description</b>	<b>Original Date</b>	<b>Estimated Cure Amounts as of 8/31/20 (premises)</b>
Commissary, LLC	Novelty Co., Inc.			
178 Bruckner Commissary, LLC	Annette Lorenz	Agreement for Garbage Container Space	6/15/20	\$1,060.72
Cosmoledo, LLC	Baltz & Company	Service Agreement for Public Relations Firm	8/25/17	\$0
Cosmoledo, LLC d/b/a Maison Kayser LLC	The Chefs Warehouse	Cost Plus Program and Rebate Incentive Program	5/22/18	\$0
Cosmoledo, LLC d/b/a Maison Kayser LLC	DoorDash, Inc.	Doordash Drive Fulfillment Agreement	10/1/18	\$59,917.62
Breadroll, LLC	CrunchTime Information Systems, Inc.	Master License Agreement	No date specified	\$35,190.39
Cosmoledo, LLC d/b/a Maison Kayser LLC	Grubhub Holdings Inc.	Enterprise Restaurant Agreement	6/29/20	\$0
Cosmoledo, LLC d/b/a Maison Kayser LLC	Ceridian HCM, Inc.	Service Agreement, as amended	11/30/15	\$25,434.18
Cosmoledo, LLC	Carey Carrington	Consulting Agreement	2/1/19	\$0
Cosmoledo, LLC d/b/a Maison Kayser LLC	Elliot Associates	Staffing Agreement	10/3/18	193.09
Breadroll, LLC	LevelUp (SCVNGR, Inc.)	Services Agreement (Mobile Marketing Strategy)	7/15/19	\$0
Breadroll, LLC	Yann Ledoux	Severance Agreement	10/31/19	\$71,154.87
Cosmoledo, LLC d/b/a Maison Kayser LLC	TDn2K, LLC	Mutual Non-disclosure Agreement	6/26/19	\$0
Breadroll, LLC	Swede Farms, Inc.	Supply Agreement	12/18/19	\$49,497.64
8 West Bakery, LLC	Auto-Chlor System	Dishwashing Machine Agreement	10/10/14	\$9,560.98
Cosmoledo, LLC d/b/a Maison Kayser LLC	A&F Fire Protection Co., Inc.	Fire Sprinkler Inspection Contract	9/27/19	\$0
Cosmoledo, LLC d/b/a Maison Kayser LLC	Arista Air Conditioning Corp.	HVAC Maintenance Agreement	5/6/16	\$50,088.39
2161 Broadway Bakery, LLC	Auto-Chlor System	Dishwashing Machine Agreement	10/10/14	\$9,560.98
Breadroll, LLC	City of Saints	Coffee Order Form	5/7/18	\$7,280
Cosmoledo, LLC	Nicholas Chevrieux	Severance Agreement	3/31/20	\$69,230.75

<b>Debtor Entity</b>	<b>Counterparty</b>	<b>Agreement Description</b>	<b>Original Date</b>	<b>Estimated Cure Amounts as of 8/31/20</b>
178 Bruckner Commissary, LLC	Gabrielli Truck Leasing LLC	Truck Leasing Agreement	10/19/16	\$16,323.73
Cosmoledo, LLC d/b/a Maison Kayser LLC	El Media Group	Master Music Service Agreement	10/5/16	\$4,720.00
Cosmoledo, LLC d/b/a Maison Kayser LLC	First Universal Cleaning Co.	Cleaning Services	3/14/17	\$0
Cosmoledo, LLC d/b/a Maison Kayser LLC	Konica Minolta	Copier/Printer Agreement		\$7,692.59
Cosmoledo, LLC d/b/a Maison Kayser LLC	Megamax Voice & Data Inc.	Fire Alarm System Maintenance and Monitoring Agreement		\$1,306.50
178 Bruckner Commissary, LLC	Milea Leasing Corporation	Truck Leasing and Service Agreement	11/11/14	\$10,360.56
Cosmoledo, LLC	Jose Alcalay	Incentive Bonus Agreement		\$0
Cosmoledo, LLC d/b/a Maison Kayser LLC	Konica Minolta Premier Finance	Copier/Printer Agreement #25569825	8/19/19	\$6,222.56
95 Broad Commissary, LLC	Konica Minolta Premier Finance	Copier/Printer Agreement #500-50033591	1/13/20	\$0
Cosmoledo, LLC d/b/a Maison Kayser LLC	Konica Minolta Premier Finance	Copier/Printer Agreement #25477986	11/2/17	\$0
Cosmoledo, LLC d/b/a Maison Kayser LLC	Modern Woodcrafts, LLC	Storage Fees	3/1/19	\$7,976.25
Cosmoledo, LLC d/b/a Maison Kayser LLC	Multivac	Premium Preventive Maintenance Service Agreement	4/24/2019	\$4,222.35
Cosmoledo, LLC d/b/a Maison Kayser LLC	Tenant Sales and Service Company	Tenant Sales and Service Company Gold Service Agreement	1/30/17	\$2,289.54
210 Joralemon Bakery, LLC	Santec	Dishwashing Machine Rental Agreement	12/1/11	\$475.20
8 West 40th Street Bakery, LLC	NCR Local Tri-State	NCR Purchase Agreement #23082	6/28/13	\$0
1800 Broadway Bakery, LLC	NCR Local Tri-State	NCR Purchase Agreement #23081	6/28/13	\$0

Debtor Entity	Counterparty	Agreement Description	Original Date	Estimated Cure Amounts as of 8/31/20
921 Broadway Bakery, LLC	NCR Local Tri-State	NCR Purchase Agreement #23079	6/28/13	\$0
2161 Broadway Bakery, LLC	NCR Corporation – Radiant Systems, Inc.	NCR Purchase Agreement #31748	9/30/14	\$28,872.54
178 Bruckner Commissary, LLC	Michelle Kuo Corp (AIA Document A101 - 2020)	Standard Form of Agreement between Owner and Contractor	4/27/20	\$124,293.50
178 Bruckner Commissary, LLC	Burnham Nationwide, Inc	Invoice #200563 - Kayser Bakery Commissary 178 Bruckner Blvd	1/31/20	\$866.20
921 Broadway Bakery, LLC	Burnham Nationwide, Inc	Invoice #200564 - Kayser Bakery 921 Broadway	1/31/20	\$1,952.70
1535 Third Avenue Bakery, LLC	Burnham Nationwide, Inc	Invoice #200568 - Kayser Bakery 1535 3 <sup>rd</sup> Avenue	1/31/20	\$4,598.60
1535 Third Avenue Bakery, LLC	Burnham Nationwide, Inc	Invoice #201297 - Kayser Bakery 1535 3 <sup>rd</sup> Avenue	3/11/20	\$400
178 Bruckner Commissary, LLC	Burnham Nationwide, Inc	Invoice #201383 – Kayser Bakery Commissary 178 Bruckner Blvd	3/18/20	\$7,037
Cosmoledo, LLC d/b/a Maison Kayser LLC	Burnham Nationwide, Inc	Invoice #202121 - Kayser Bakery 1535 3 <sup>rd</sup> Avenue	4/30/20	\$2,500
1535 Third Avenue Bakery LLC	Angelika Adams Design LLC	178 Bruckner remaining items – Preliminary Punchlist	8/12/20	\$2,500
NYC 1294 Third Avenue Bakery, LLC	Radiant Systems (NCR)	Hosted Solutions Sales Orders	7/10/12	\$0
Cosmoledo, LLC	Bailey Glasser	Service Agreement	4/2/20	\$2,880
Cosmoledo, LLC d/b/a Maison Kayser LLC	Imperial Bag & Paper Co. LLC	Credit Application	2/3/15	\$161,987.86
95 Broad Commissary, LLC	Fresherly LLC	Credit Application	3/19/19	\$1,423.60
Cosmoledo, LLC d/b/a Maison Kayser	First Universal Cleaning Co.	Engaged Annual Contract	3/14/17	\$8,249.44

<b>Debtor Entity</b>	<b>Counterparty</b>	<b>Agreement Description</b>	<b>Original Date</b>	<b>Estimated Cure Amounts as of 8/31/20</b>
Cosmoledo, LLC d/b/a Maison Kayser LLC	T.W. Smith Corp.	Sales Agreement	6/1/18	\$765.81
Cosmoledo, LLC d/b/a Maison Kayser LLC	ServiceChannel	Master Services Agreement	4/1/16	\$9,994.11
Cosmoledo, LLC d/b/a Maison Kayser LLC	Baldor Specialty Foods, Inc	Credit Application		\$151,277.26
Cosmoledo, LLC d/b/a Maison Kayser LLC	Dairyland USA Corp.	Credit Application		\$145,945.84
Cosmoledo, LLC d/b/a Maison Kayser LLC	D`artagnan, LLC	Credit Application		\$23,336.94
Cosmoledo, LLC d/b/a Maison Kayser LLC	Fodera Foods	Credit Application		\$50,255.75
Cosmoledo, LLC d/b/a Maison Kayser LLC	JuliusSilvert, Inc.	Credit Application		\$34,521.65
Cosmoledo, LLC d/b/a Maison Kayser LLC	M. Tucker a division of Singer NY, LLC	Credit Application		\$8,824.85
178 Bruckner Commissary, LLC	Paris Gourmet	Credit Application		\$89,673.73
Cosmoledo, LLC d/b/a Maison Kayser LLC	ClearPath Solutions	Service Agreement	2/2/20	\$0
Cosmoledo, LLC d/b/a Maison Kayser LLC	Mazars USA LLP	Service Agreement	4/6/20	\$61,317.99
Cosmoledo, LLC	John Cahill	Consulting Agreement	3/15/19	

**Appendix C**

**Form of Sale Notice**

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

In re:

COSMOLEDO, LLC, *et al.*<sup>5</sup>

Chapter 11

Case No. 20-12117 (MEW)

Debtors.

Jointly Administered

**NOTICE OF AUCTION SALE AND HEARING ON APPROVAL OF SALE OF  
DEBTORS' ASSETS, FREE AND CLEAR OF ALL LIENS, CLAIMS AND  
ENCUMBRANCES, SUBJECT TO HIGHER OR BETTER OFFERS PURSUANT  
TO SECTION 363(b) OF THE BANKRUPTCY CODE**

**TO ALL CREDITORS OF THE DEBTOR AND OTHER NOTICE PARTIES:**

**PLEASE TAKE NOTICE** that on September 10, 2020 (the "Petition Date"), Cosmoledo LLC, and its affiliated debtors and debtors in possession herein (the "Debtors"), filed voluntary petitions under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York.

**PLEASE TAKE FURTHER NOTICE** that the Debtors have filed a motion (the "Motion")<sup>6</sup> seeking approval of a certain asset purchase agreement and related transaction documents (collectively, the "Sale Agreement") by and between the Debtors, as seller, and MK USA, LLC ("Purchaser"), pursuant to which, among other things, the Debtors propose to sell substantially all of its assets (the "Assets") to the Purchaser, free and clear of all liens, claims and encumbrances, and subject to higher or better offers (the "Sale").

**PLEASE TAKE FURTHER NOTICE** that at a hearing held on September 30, 2020, the Bankruptcy Court entered an order approving the Bidding Procedures and the Bid Protections (the "Bidding Procedures Order").

**PLEASE TAKE FURTHER NOTICE** that an Auction (as defined in the Bidding

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<sup>5</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Cosmoledo, LLC (6787); Breadroll, LLC, (3279); 688 Bronx Commissary, LLC (6515); 95 Broad Commissary, LLC (2335); 178 Bruckner Commissary, LLC (2581); 8 West Bakery, LLC (6421); NYC 1294 Third Ave Bakery, LLC (2001); 921 Broadway Bakery, LLC (2352); 1800 Broadway Bakery, LLC (8939); 1535 Third Avenue Bakery, LLC (1011); 2161 Broadway Bakery, LLC (2767); 210 Joralemon Bakery, LLC (4779); 1377 Sixth Avenue Bakery, LLC (9717); 400 Fifth Avenue Bakery, LLC (6378); 1400 Broadway Bakery, LLC (8529); 575 Lexington Avenue Bakery, LLC (9884); 685 Third Avenue Bakery, LLC (9613); 370 Lexington Avenue Bakery, LLC (0672); 787 Seventh Avenue Bakery, LLC (6846); 339 Seventh Avenue Bakery, LLC (1406); and 55 Hudson Yards Bakery, LLC (7583).

<sup>6</sup> Capitalized terms not otherwise defined herein have the respective meanings ascribed to such terms in the Motion.

Procedures) will be held on **October 23, 2020 at 10:00 a.m.** (Eastern time) at the offices of Mintz & Gold LLP, proposed attorneys for the Debtors, 600 Third Ave., 25<sup>th</sup> Fl., New York, New York 10016, or by videoconference, to consider any higher and better offers in accordance with the Bidding Procedures.

**PLEASE TAKE FURTHER NOTICE** that a hearing will be held on **October 29, 2020, 2020 at 10:00 a.m.** (Eastern time) before the Honorable Michael E. Wiles United States Bankruptcy Judge, at the United States Bankruptcy Court, 1 Bowling Green, New York, New York 10004, to consider approval of the Sale Agreement or any higher and better offer(s) by the Successful Bidder(s) (the “Sale Hearing”).

**PLEASE TAKE FURTHER NOTICE** that the Motion seeks approval of the assumption and assignment of certain executory contracts and unexpired leases to be identified by the Purchaser or other Successful Bidder pursuant to section 365 of the Bankruptcy Code and Bankruptcy Rule 6006. Appendix B to the Bidding Procedures Order sets forth a list of all of the Debtors’ executory contracts and unexpired leases, together with a statement of the Cure Costs (if any) associated with each such contract and lease, calculated in accordance with the Debtors’ books and records. In connection with the potential assumption and assignment of the executory contracts and unexpired leases, the Bankruptcy Court, pursuant to the Bidding Procedures Order, has directed that all non-debtor parties to any executory contract or unexpired lease electronically file with the Clerk of the Bankruptcy Court a cure claim, setting forth all claims and arrearages against the Debtors due under such contract or lease (the “Cure Claims”), and serve a copy of the Cure Claim upon (i) Mintz & Gold LLP, proposed attorneys for the Debtor, 600 Third Ave., 25<sup>th</sup> Fl., New York, New York 10016, Attn: Andrew Gottesman, Esq., gottesman@mintzandgold.com; (ii) Katten Muchin Rosenman LLP, 575 Madison Avenue New York, New York 10022, Attn: Jerry L. Hall, Esq., jerry.hall@katten.com, counsel to the Purchaser; and (iii) Hahn & Hessen LLP, 488 Madison Avenue, New York, NY 10022, Attn: Mark Indelicato, Esq. mindelicato@hahn Hessen.com, counsel to the Official Committee of Unsecured Creditors, so as to be received on or before **October 27, 2020 at 12:00 p.m.** (Eastern time), provided, however, that any party that is required to file a Cure Claim, but fails to do so, shall be bound by the cure amount as set forth on Appendix B to the Bidding Procedures Order, and shall be forever barred from asserting any other Cure Claim against the Debtor, its estate, the Purchaser, or its designee, and/or any Successful Bidder arising under such executory contract or unexpired lease.

**PLEASE TAKE FURTHER NOTICE** that the following is a general explanation of the salient terms of the Sale Agreement.<sup>7</sup>

Purchased Assets. The Sale Agreement contemplates the Debtors will sell, convey, assign and transfer to the Purchaser all of the Assets (other than the Excluded Assets) on the terms and subject to the conditions set forth in the Sale Agreement. The Assets include, among other things, (i) the equity of the entity in 688 Bronx Commissary, LLC, (ii) all furniture, fixtures and equipment, (iii) any and all acquired claims of the estate against go-forward vendors, parents,

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<sup>7</sup> The following is merely a summary of the Sale Agreement and is qualified in its entirety by the actual, express terms of the Sale Agreement. To the extent there is any discrepancy between this summary and the terms of the Sale Agreement, the terms of the Sale Agreement shall control.



affiliates and shareholders), (iv) Debtors' Intellectual Property, to the extent transferrable, and (v) the assumption of those of the Debtors' real property leases and executory contracts identified as of two days before the Bid Deadline.

Purchase Price. The purchase price for the Assets is (a) cash on the Closing Date in the amount of \$3,000,000, plus (i) Cure Costs relating to any Assigned Contracts and Leases, (ii) other Assumed Liabilities under the Sale Agreement, and (iii) a credit bid of \$5,400,000, subject to contest by the Creditors' Committee prior to the Sale Hearing (collectively, the "Purchase Price").

Assumed Liabilities. The Purchaser is not assuming any liabilities of the Debtors other than (a) liabilities arising from and after the Closing under any Assumed Contracts, and (b) such other liabilities as may be specifically identified in the Sale Agreement.

Assigned Contracts and Leases. The Sale Agreement contemplates that certain executory Contracts and Leases will be assumed and assigned to the Purchaser at Closing (the "Assumed Contracts"). The Purchaser shall be responsible for the payment of any Cure Claims associated with Assumed Contracts.

Excluded Assets. The Debtors are not selling to the Purchaser, and the Assets do not include, any asset specifically identified as being an Excluded Asset set forth in Section 2.2 of the Sale Agreement. Among other things, cash (including cash representing the PPP Loan), accounts receivable and certain claims and causes of action are not being sold.

Conditions to Closing. The Sale Agreement provides that the conditions to closing include, among other things, (a) entry of a final non-appealable order by the Bankruptcy Court authorizing the sale of the Assets to the Purchaser, pursuant to the terms of the Sale Agreement; (b) representations and warranties are true and correct; and (c) no breach of the Sale Agreement.

**PLEASE TAKE FURTHER NOTICE**, that any of the hearings scheduled by the Bankruptcy Court may be adjourned from time to time without prior notice to creditors or other parties in interest, other than by announcement in Bankruptcy Court of such adjournment on the date of the hearing.

**PLEASE TAKE FURTHER NOTICE**, that copies of the entire sale package, including the operative Bidding Procedures, the Bidding Procedures Order, the Motion, the Amended and Restated Sale Agreement and the Proposed Sale Order are available for inspection at the website of the Debtors proposed Claims and Noticing Agent and may be viewed at [www.donlinrecano.com/maisonkayserusa](http://www.donlinrecano.com/maisonkayserusa) Bankruptcy Court's website ([www.nysb.uscourts.gov](http://www.nysb.uscourts.gov)); or during regular business hours at the office of the Clerk of the United States Bankruptcy Court, 1 Bowling Green, New York, New York 10004; and you may request a copy by contacting Mintz

& Gold LLP, 600 Third Ave., 25<sup>th</sup> Fl., New York, New York 10016, Attn: CeCe Cole, Esq., cole@mintzandgold.com or telephone number (212) 696-4848.

**PLEASE TAKE FURTHER NOTICE**, that objections, if any, to the Sale (other than objections with respect to Cure Claims or the auction process and selection of the Successful Bidder), must be (i) filed electronically with the Clerk of the Bankruptcy Court (with a copy to chambers), (ii) state with specificity the basis for such objection, (iii) conform to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Southern District of New York and (iv) served upon served upon (a) Mintz & Gold LLP 600 Third Ave., 25<sup>th</sup> Fl., New York, New York 10016, Attn: Andrew Gottesman, Esq., gottesman@mintzandgold.com, proposed counsel for the Debtors; (b) Office of the United States Trustee for the Southern District of New York 201 Varick Street, Room 1006, New York, NY 10014 Attn: Brian Masumoto, Esq., Brian.Masumoto@usdoj.gov; (c) Willkie Farr and Gallagher, 787 Seventh Avenue New York, New York 10019, Attn: Paul V. Shalhoub, Esq., pshalhoub@willkie.com, counsel to the holder of Cosmoledo's equity interests; (d) Katten Muchin Rosenman LLP, 575 Madison Avenue New York, New York 10022, Attn: Jerry L. Hall, Esq., jerry.hall@katten.com, counsel to the Debtors' senior secured lender and Stalking Horse Bidder; (e) Hahn & Hessen LLP, 488 Madison Avenue, New York, NY 10022, Attn: Mark Indelicato, Esq., mindelicato@hahn Hessen.com, proposed counsel to the Official Committee of Unsecured Creditors; and (f) all other parties who have requested notice under Bankruptcy Rule 2002 so as to be received no later than **October 21, 2020 at 5:00 p.m.** (Eastern Time).

Dated: October 1, 2020  
New York, New York

MINTZ & GOLD LLP

by: /s/ Andrew R. Gottesman  
Andrew R. Gottesman  
Maria E. Garcia  
Gabriel Altman  
600 Third Avenue, 25<sup>th</sup> Floor  
New York, New York 10016  
Telephone (212) 696-4848  
Facsimile (212) 696-1231  
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[garcia@mintzandgold.com](mailto:garcia@mintzandgold.com)  
[altman@mintzandgold.com](mailto:altman@mintzandgold.com)

*Proposed Attorneys to the Debtors*

**Appendix D**

**Form of Cure Notice**

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

Chapter 11

Case No. 20-12117 (MEW)

In re:

(Jointly Administered)

COSMOLEDO, LLC, *et al.*<sup>8</sup>

Debtors.

**NOTICE OF POTENTIAL ASSUMPTION AND ASSIGNMENT OF EXECUTORY  
CONTRACTS AND UNEXPIRED LEASES AND ESTABLISHMENT OF CURE  
CLAIMS BAR DATE FOR NON-DEBTOR COUNTERPARTIES TO SUCH  
EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

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

**PLEASE TAKE NOTICE**, that on September 10, 2020 (the “Petition Date”), Cosmoledo LLC, and its affiliated debtors and debtors in possession herein (the “Debtors”), filed voluntary petitions under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Southern District of New York.

**PLEASE TAKE FURTHER NOTICE**, that the Debtors have filed a motion (the “Motion”)<sup>9</sup> seeking approval of a certain asset purchase agreement and related transaction documents (collectively, the “Sale Agreement”) by and between the Debtors, as seller, and MK USA, LLC (“Purchaser”), pursuant to which, among other things, the Debtors propose to sell

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<sup>8</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: Cosmoledo, LLC (6787); Breadroll, LLC, (3279); 688 Bronx Commissary, LLC (6515); 95 Broad Commissary, LLC (2335); 178 Bruckner Commissary, LLC (2581); 8 West Bakery, LLC (6421); NYC 1294 Third Ave Bakery, LLC (2001); 921 Broadway Bakery, LLC (2352); 1800 Broadway Bakery, LLC (8939); 1535 Third Avenue Bakery, LLC (1011); 2161 Broadway Bakery, LLC (2767); 210 Joralemon Bakery, LLC (4779); 1377 Sixth Avenue Bakery, LLC (9717); 400 Fifth Avenue Bakery, LLC (6378); 1400 Broadway Bakery, LLC (8529); 575 Lexington Avenue Bakery, LLC (9884); 685 Third Avenue Bakery, LLC (9613); 370 Lexington Avenue Bakery, LLC (0672); 787 Seventh Avenue Bakery, LLC (6846); 339 Seventh Avenue Bakery, LLC (1406); and 55 Hudson Yards Bakery, LLC (7583).

<sup>9</sup> Capitalized terms not otherwise defined herein have the respective meanings ascribed to such terms in the Motion.

substantially all of its assets (the “Assets”) to the Purchaser, free and clear of all liens, claims and encumbrances, and subject to higher or better offers (the “Sale”). [ECF No.:18]

**PLEASE TAKE FURTHER NOTICE**, that in connection with the Sale, the Debtors have filed a schedule of all of the Debtors’ executory contracts and unexpired leases that are to be assumed and assigned to the Purchaser in accordance with the Sale Agreement, or such other party as may be the Successful Bidder at an Auction conducted in connection with the Sale (the “Cure Claims List”) and that schedule states (among other things) the Cure Costs associated with each executory contract and unexpired lease on the Cure Claims List, calculated in accordance with the Debtors’ books and records. The Cure Claims List is attached hereto as Appendix A.

**PLEASE TAKE FURTHER NOTICE**, that attached hereto as Appendix B is information the Debtors believe to be sufficient to provide adequate assurance of the future performance of any potential Successful Bidder under the contracts or leases listed on Appendix A, as required under Section 365(f) of the Bankruptcy Code.

**PLEASE TAKE FURTHER NOTICE**, that the Debtors will file and serve notice of the Successful Bidder in any Auction within one (1) day following the conclusion of any Auction.

**PLEASE TAKE FURTHER NOTICE**, that the Bankruptcy Court has established **October 27, 2020 at 12:00 p.m.** (Eastern time) (the “Cure Claims Bar Date”) as the date by which all non-debtor counterparties to the executory contracts and unexpired leases must electronically file with the Clerk of the Bankruptcy Court a cure claim, setting forth all claims and arrearages due and payable by the Debtor under such executory contract or unexpired lease or any objection to the form or manner of adequate assurance provided by the Successful Bidder (the “Cure Claims”), and serve a copy of the Cure Claims upon (i) Mintz & Gold LLP, proposed attorneys for the Debtors, 600 Third Ave., 25<sup>th</sup> Fl., New York, New York 10016, Attn: Andrew Gottesman, Esq.,

gottesman@mintzandgold.com; (ii) Katten Muchin Rosenman LLP, 575 Madison Avenue New York, New York 10022, Attn: Jerry L. Hall, Esq., jerry.hall@katten.com, counsel to the Debtors' senior secured lender and Stalking Horse Bidder; and (iii) Hahn & Hessen LLP, 488 Madison Avenue, New York, NY 10022, Attn: Mark Indelicato, Esq., mindelicato@hahn Hessen.com, proposed counsel to the Official Committee of Unsecured Creditors.

**PLEASE TAKE FURTHER NOTICE**, that any party required to file a Cure Claim, that fails to do so, shall be bound by the cure amount as set forth on the Cure Claims List, and shall be forever barred from asserting any other Cure Claim against the Debtor, its estate, the Purchaser, or its designee, and/or any Successful Bidder arising under such executory contract.

**PLEASE TAKE FURTHER NOTICE**, that the Court has also set **October 21, 2020 at 5:00 p.m.** (Eastern time) as the deadline to object (other than with respect to Cure Claims, the auction process or the selection of the Successful Bidder) to the other relief sought at the Sale Hearing being held to consider final approval of the Sale to the Stalking Horse Bidder or other Successful Bidder at the Auction. Cure Claims may be combined with objections to other relief sought at the Sale Hearing.

Dated: October 1, 2020  
New York, New York

MINTZ & GOLD LLP

by: /s/ Andrew R. Gottesman  
Andrew R. Gottesman  
Maria E. Garcia  
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*Proposed Attorneys for the Debtors*

**Appendix A**  
**Cure Claims List**



**Appendix B**  
**Adequate Assurance Information**



# Exhibit C

**UNITED STATES BANKRUPTCY COURT** Chapter 11  
**SOUTHERN DISTRICT OF NEW YORK**

In re:

COSMOLEDO, LLC, *et al.*<sup>1</sup>

Case No. 20-12117 (MEW)

(Jointly Administered)

Debtors.

**ORDER (A) APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE  
DEBTORS' ASSETS, FREE AND CLEAR OF ALL LIENS, CLAIMS AND  
ENCUMBRANCES, (B) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT  
OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND  
(C) GRANTING RELATED RELIEF**

This matter having come before the Court on the Debtors' Motion For Orders (I) Scheduling Hearing To Consider (a) Sale of Substantially All of the Debtors' Assets, Free and Clear of All Liens, Claims and Encumbrances, Subject to Higher and Better Offers; and (b) Assumption and Assignment of Leases and Executory Contracts; (II) Scheduling Hearing to Consider Approval of Stalking Horse Agreement, Related Bid Protections, and Bidding Procedures for the Conduct of an Auction; (III) Fixing a Cure Claims Bar Date With Respect to the Assumption and Assignment of Leases and Executory Contracts; (IV) Fixing Manner and Notice of Sale Hearing; (V) Authorizing the Debtor to Sell Assets, Free and Clear of All Liens, Claims and Encumbrances, Subject to Higher and Better Offers; (VI) Authorizing Assumption and Assignment of Leases and Executory Contracts; and (VII) Granting Related Relief [Docket No.18]

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Cosmoledo, LLC (6787); Breadroll, LLC, (3279); 688 Bronx Commissary, LLC (6515); 95 Broad Commissary, LLC (2335); 178 Bruckner Commissary, LLC (2581); 8 West Bakery, LLC (6421); NYC 1294 Third Ave Bakery, LLC (2001); 921 Broadway Bakery, LLC (2352); 1800 Broadway Bakery, LLC (8939); 1535 Third Avenue Bakery, LLC (1011); 2161 Broadway Bakery, LLC (2767); 210 Joralemon Bakery, LLC (4779); 1377 Sixth Avenue Bakery, LLC (9717); 400 Fifth Avenue Bakery, LLC (6378); 1400 Broadway Bakery, LLC (8529); 575 Lexington Avenue Bakery, LLC (9884); 685 Third Avenue Bakery, LLC (9613); 370 Lexington Avenue Bakery, LLC (0672); 787 Seventh Avenue Bakery, LLC (6846); 339 Seventh Avenue Bakery, LLC (1406); and 55 Hudson Yards Bakery, LLC (7583).

(the “Sale Motion”)<sup>2</sup>, seeking, *inter alia*, entry of an order (i) approving a certain Asset Purchase Agreement, dated September 10, 2020, by and between the Debtors and MK USA, LLC (the “Purchaser”) (the “Sale Agreement”) and all ancillary documents referenced therein or contemplated thereby (such documents, collectively and including the Sale Agreement, the “Transaction Documents,” copies of which are annexed hereto as Appendix A), (ii) authorizing the sale of substantially all of the Debtors’ assets (including, without limitation, (y) the equity ownership interests in 688 Bronx Commissary, LLC, a New York limited-liability company (“688 Bronx”) collectively, all such assets, the “Assets”) pursuant to section 363(b) of title 11 of the United States Code, as amended (the “Bankruptcy Code”), and Rule 6004 of the Federal Rules of Bankruptcy Procedure, as amended (the “Bankruptcy Rules”), free and clear of all claims, liens and other encumbrances, and (iii) approving the assumption and assignment of certain executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code and Bankruptcy Rule 6006; and this Court having entered the *Order (A) Approving Stalking Horse Agreement and Bid Protections, (B) Approving Bidding Procedures For The Conduct Of An Auction, And (C) Fixing Manner And Notice Of Auction, Sale Hearing And Cure Claims Bar Date* on October 2, 2020 (the “Bidding Procedures Order”) [ECF No. 88]; and the Debtors having filed a *Notice of Cancellation of Auction and Designation of Stalking Horse Bidder as the Successful Bidder* on October 22, 2020. [ECF No. 140].; and the Purchaser under the Sale Agreement having been identified as the Successful Bidder (as defined in the Bidding Procedures Order); and due, proper, timely, adequate and sufficient notice of the Sale Motion and hearing (the “Sale Hearing”) to approve the sale of the Assets to Purchaser (including, without limitation, the assumption and assignment of the Assumed Contracts) having been given; and the Sale Hearing having been held

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<sup>2</sup> Terms not defined herein shall have the meanings ascribed to them in the Motion.

on October 29, 2020; and the Court having reviewed and considered the Sale Motion and the objections thereto; and all objections to the relief requested in the Sale Motion having been resolved by the terms of this order (the “Sale Order”) or having been otherwise overruled or withdrawn; and on the arguments of counsel made, and the evidence adduced, at the Sale Hearing; and it appearing that the relief set forth herein is in the best interests of the Debtors, their estates, their creditors, and all other parties in interest; and upon the record of the Sale Hearing and this chapter 11 case; and after due deliberation thereon; and good cause appearing therefor; it is

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

A. On September 10, 2020 (the “Petition Date”), the Debtors filed voluntary petitions under chapter 11 of the Bankruptcy Code and have continued in the management and operation of their business and property as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

B. On September 18, 2020, the Official Committee of Unsecured Creditors of Cosmoledo, LLC (the “Creditors’ Committee) was appointed. No trustee has been appointed in this case.

C. This Court has jurisdiction over the Sale Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* signed by Chief Judge Loretta A. Preska dated January 31, 2012. Venue is proper before this Court pursuant to 28 U.S.C. § 1409. Consideration of the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b).

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<sup>3</sup> The findings and conclusions set forth herein constitute the Court’s findings of fact and conclusions of law. To the extent any of the following findings of fact constitute conclusions of law, they are adopted, and shall be construed and deemed, conclusions of law. To the extent any of the following conclusions of law constitute findings of fact, they are adopted, and shall be construed and deemed, as findings of fact.

D. The statutory predicates for the relief sought herein are sections 105(a), 363(b), (f), (m) and (n) and 365 of the Bankruptcy Code, and Bankruptcy Rules 2002, 6004, 6006 and 9014. The Asset Sale constitutes a sale of property of the Debtors' estate outside the ordinary course of business within the meaning of section 363(b) of the Bankruptcy Code.

E. Due, proper, timely, adequate and sufficient notice of the Sale Motion, the Sale Hearing, and the Asset Sale (including, without limitation, the assumption and assignment of the Assumed Contracts to Purchaser) has been provided in accordance with sections 105(a), 363(b), (f), (m) and (n) and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006 and 9014. Such notice is good, sufficient and appropriate, and no other or further notice of the Sale Motion, the Sale Hearing or the Asset Sale is or shall be required, and a reasonable opportunity to object and be heard with respect to the Sale Motion and the relief requested therein was afforded to all interested parties.

F. Upon entry of this Sale Order the Debtors shall have all necessary power and authority to convey all their right, title and interest in and to the Assets.

G. Upon entry of this Sale Order, the Debtors have (i) full power and authority to execute the Sale Agreement and all other Transaction Documents, and the sale of the Assets has been duly and validly authorized by all necessary company action of the Debtors, as applicable, (ii) the necessary power and authority to consummate the Asset Sale of the Assets to Purchaser and (iii) taken all company action necessary to authorize and approve the Sale Agreement and the other Transaction Documents, and consummate the Asset Sale of the Assets to Purchaser. No consents or approvals, other than those expressly provided for in the Sale Agreement, are required for the Debtors to close the transaction in accordance with the terms and conditions of the Sale Agreement.

H. Sound business reasons exist for the Asset Sale and the Debtors have shown good and sufficient business justification under sections 363(b) of the Bankruptcy Code for the sale of the Assets to Purchaser.

I. Entry into the Sale Agreement and the other Transaction Documents, and consummation of the Asset Sale in accordance with the terms and conditions thereof, constitute the Debtors' exercise of sound business judgment and such acts are in the best interests of the Debtors, their estate, creditors and all parties in interest, in that, without exclusion:

- (i) the Sale Agreement was negotiated, proposed and entered into in good faith, from arm's-length bargaining positions as between the Debtors and Purchaser;
- (ii) the Debtors were free to deal with any other party interested in acquiring the Assets;
- (iii) the Debtors have provided for adequate notice and an opportunity to be heard in connection with the Asset Sale in their chapter 11 case; and
- (iv) Purchaser is a third party unrelated to the Debtors and is not a mere continuation of the Debtors' business.

J. The Purchase Price provided by Purchaser for the Assets is the highest and best offer received by the Debtors, is fair and reasonable, and constitutes reasonably equivalent value and fair consideration for the Assets under the Bankruptcy Code and other applicable law.

K. There has been no showing that any of the Debtors or Purchaser (i) has entered into the Sale Agreement or proposes to consummate the Asset Sale for the purpose of hindering, delaying or defrauding the Debtors' present or future creditors or (ii) is entering into the Sale Agreement or proposing to consummate the Asset Sale fraudulently, for the purpose of statutory or common law fraudulent conveyance and fraudulent transfer claims, whether under the Bankruptcy Code or under the laws of the United States, any state, territory, possession thereof or

the District of Columbia or any other applicable jurisdiction with laws substantially similar to the foregoing.

L. Purchaser has agreed to buy assets and shall not constitute a mere continuation of the Debtors or a successor to the Debtors solely by virtue of the consummation of the Asset Sale contemplated by the Sale Agreement.

M. The Debtors may sell the Assets free and clear of all liens, claims and encumbrances (“Encumbrances”) to the fullest extent permitted by section 363(f) of the Bankruptcy Code, as contemplated by the Sale Agreement because, with respect to each creditor asserting any Encumbrance, one or more of the standards set forth in section 363(f)(1)-(5) of the Bankruptcy Code has been satisfied. There were no objections by any holders of Encumbrances that have not been resolved by the terms of this Sale Order, or otherwise overruled or withdrawn, and all such objections are barred to the extent they were not asserted.

N. Purchaser would not have entered into the Sale Agreement and would not consummate the sale of all Assets, thus adversely affecting the Debtors, their estates, creditors, employees and other parties in interest, if the sale of the Assets was not free and clear of all Encumbrances or if Purchaser would be liable for any Encumbrances.

O. A sale of the Assets other than one free and clear of all Encumbrances would adversely impact the Debtors’ estates and would yield substantially less value for the Debtors’ estates, with less certainty than the Asset Sale. Therefore, the Asset Sale contemplated by the Sale Agreement is in the best interests of the Debtors, their estates, creditors and all other parties in interest.

P. The Sale Agreement and other Transaction Documents were negotiated, and have been and are being undertaken, by the Debtors and Purchaser at arm’s-length without collusion or



fraud, and in good faith within the meaning of section 363(m) of the Bankruptcy Code. As a result of the foregoing, Purchaser is a good faith purchaser within the meaning of section 363(m) of the Bankruptcy Code and the court decisions thereunder, and is therefore entitled to the full protection of that provision with respect to all aspects of the transactions contemplated by the Sale Agreement, including the acquisition of the Assets, and otherwise has proceeded in good faith in all respects in connection with this proceeding. Moreover, there is no evidence before the Court suggesting that the Debtors or the Purchaser engaged in any conduct that would cause or permit the Sale Agreement, the other Transaction Documents, the consummation of the Asset Sale, or the assumption and assignment of the Assumed Contracts, to be avoided, or costs or damages to be imposed, under section 363(n) of the Bankruptcy Code. None of Purchaser or its respective affiliates, present or contemplated members, officers, directors, partners, shareholders or any of their respective heirs, successors and assigns is an “insider” of any of the Debtors, as that term is defined in section 101(31) of the Bankruptcy Code.

Q. As of Closing (as defined in the Sale Agreement), Purchaser will not be an “insider” or “affiliate” of the Debtors, as those terms are defined in the Bankruptcy Code, and no common identity of incorporators, directors or stockholders will exist between Purchaser and the Debtors.

R. The sale of the Assets to Purchaser will be a legal, valid, and effective transfer of the Assets, and will vest Purchaser with all right, title, and interest of the Debtors in and to the Assets free and clear of all Encumbrances, including, but not limited to, all claims arising under any theory of successor liability, in each case to the fullest extent permitted by section 363(f) of the Bankruptcy Code.

S. The Debtors have demonstrated that it is an exercise of its sound business judgment to assume and assign and sell the Assumed Contracts to Purchaser in connection with the Asset

Sale. Additionally, assumption, assignment and sale of the Assumed Contracts to Purchaser is in the best interests of the Debtors, their estates, their creditors, and all parties in interest. The Assumed Contracts being assumed, assigned and sold to Purchaser are an integral part of the Assets being purchased by Purchaser, and accordingly, such assumption, assignment, and sale is reasonable, and will enhance the value of the Debtors' estates.

T. Subject to the Closing and payment and satisfaction of any Cure Claims by Purchaser in accordance with the Sale Agreement and this Sale Order, the Debtors and Purchaser have, to the extent necessary, satisfied the requirements of the Bankruptcy Code, including, without limitation, sections 365(b)(1)(A) and (B) and 365(f) of the Bankruptcy Code, in connection with the sale and the assumption and assignment of the Assumed Contracts to Purchaser. Purchaser has demonstrated adequate assurance of future performance with respect to the Assumed Contracts pursuant to section 365(b)(1)(C) of the Bankruptcy Code. The assumption and assignment of the Assumed Contracts pursuant to the terms of this Sale Order is integral to the Sale Agreement and is in the best interests of the Debtors, their estates, their creditors and other parties in interest, and represents the exercise of sound and prudent business judgment by the Debtors.

U. The Debtors have established that strong business reasons exist for selling the Assets outside the ordinary course of business and outside a plan of reorganization. The Asset Sale does not constitute a sub rosa chapter 11 plan for which approval has been sought without the protections that a disclosure statement would afford. The Asset Sale neither impermissibly restructures the rights of Debtors' creditors nor impermissibly dictates a liquidating plan of reorganization for the Debtors. Nothing in the Sale Agreement creates any third-party beneficiary rights in any person or entity not a party to the Sale Agreement.

V. Entry of an order approving the Sale Agreement and all the provisions thereof is a necessary condition precedent to Purchaser's consummation of the Asset Sale.

W. Time is of the essence in consummating the Asset Sale. Accordingly, to maximize the value of the Debtors' assets, it is essential that the sale of the Assets occur within the time constraints set forth in the Sale Agreement. Accordingly, there is cause to waive the stays contemplated by Bankruptcy Rules 6004(h) and 6006(d).

X. Approval of the Sale Agreement and the other Transaction Documents, and consummation of the Asset Sale (including, without limitation, assumption and assignment of the Assumed Contracts to Purchaser) in accordance with the terms and conditions thereof at this time, are in the best interests of the Debtors, their creditors, their estates, and all parties in interest.

**NOW, THEREFORE, BASED UPON ALL OF THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:**

1. The relief requested in the Sale Motion is granted in the manner and to the extent provided herein, and on the record of the Sale Hearing, and the Asset Sale and all other transactions contemplated under the Sale Agreement and the other Transaction Documents are hereby approved.

2. All objections concerning the Sale Motion and Asset Sale are resolved in accordance with the terms of this Sale Order, and as set forth in the record of the Sale Hearing, and to the extent any such objection was not otherwise withdrawn, waived, or settled, it is hereby overruled and denied (including all reservations of rights or relief requested therein).

3. Findings of fact and conclusions of law in the Bidding Procedures Order, including the record of the Bidding Procedures hearing held on September 30, 2020, are incorporated herein by reference.

**APPROVAL OF THE SALE AGREEMENT, THE OTHER  
TRANSACTION DOCUMENTS, AND ASSET SALE TO PURCHASER**

4. The Sale Agreement and the sale to Purchaser of the Assets (including, without limitation, assumption and assignment of the Assumed Contracts to Purchaser), are hereby approved and authorized in all respects pursuant to sections 105(a), 363(b), 363(f), 363(m) and 365 of the Bankruptcy Code.

5. The Debtors are authorized and directed to take any and all actions necessary or appropriate to (a) consummate the Asset Sale (including, without limitation, to convey to Purchaser any and all of the Assets) and the Closing, and (b) execute, perform, consummate, implement and close fully the Sale Agreement, the other Transaction Documents and all additional or ancillary documents or instruments that may be reasonably necessary or desirable to implement the Sale Agreement (including any and all amendments thereto), all in accordance with the Sale Motion, the Sale Agreement and this Sale Order. Notwithstanding anything herein to the contrary, Sellers and Purchaser shall have no obligation to proceed with the Closing of the Sale Agreement until all conditions precedent to their respective obligations to do so as set forth in the Sale Agreement have been satisfied or waived in accordance therewith.

6. The consideration provided by Purchaser for the Assets under the Sale Agreement is fair and reasonable and shall be deemed for all purposes to constitute reasonably equivalent value and fair consideration under the Bankruptcy Code and any other applicable law.

7. Purchaser is a purchaser in good faith as that term is used in section 363(m) of the Bankruptcy Code, and Purchaser is entitled to all the protections afforded by section 363(m) of the Bankruptcy Code. Accordingly, the reversal or modification on appeal of the authorization provided herein to consummate the Asset Sale shall not affect the validity of the Asset Sale

(including the assumption and assignment of any of the Assumed Contracts to Purchaser), unless such authorization is duly stayed pending such appeal.

8. All persons and entities are prohibited and enjoined from taking any action that would adversely affect or interfere with, or which would be inconsistent with, the ability of the Debtors to transfer the Assets to Purchaser in accordance with the Sale Agreement and this Sale Order. All amounts, if any, to be paid by the Debtors to Purchaser pursuant to the Sale Agreement, including any allowed claims for breach thereof, shall (i) constitute allowed administrative expenses of the estates pursuant to sections 503(b) and 507(a)(2) of the Bankruptcy Code, (ii) be protected as provided in the Sale Agreement and the Bidding Procedures Order, (iii) not be altered, amended, discharged or affected by any plan proposed or confirmed in the Cases without the prior written consent of Purchaser and (iv) be due and payable if and when any of the Debtors' obligations arise under the Sale Agreement without further order of the Court.

9. Nothing contained in (a) any chapter 11 plan confirmed in these Cases, (b) any order confirming any such chapter 11 plan, or (c) any order of any type or kind in these Cases, any subsequent chapter 7 cases in which these Cases may be converted or any related proceedings subsequent to the entry of this Sale Order shall conflict with or derogate from the provisions of the Sale Agreement (or any agreement contemplated thereby) or this Sale Order, and to the extent of any conflict or derogation between this Sale Order or the Sale Agreement (or any agreement contemplated thereby) and such future plan or order, the terms of this Sale Order and the Sale Agreement (or any agreement contemplated thereby) shall control.

#### **TRANSFER OF THE ASSETS**

10. Pursuant to sections 363(b) and 363(f) of the Bankruptcy Code, upon the Closing, the Assets shall be sold, transferred, conveyed and assigned to the Purchaser, and the Purchaser

shall take title to and possession of the Assets, free and clear of (a) all Encumbrances, (b) any restriction on the use, voting, transfer, receipt of income or other exercise of any attributes of ownership of the Assets, and (c) any claim (as that term is defined in section 101(5) of the Bankruptcy Code), whether arising prior to or subsequent to the commencement of the Debtors' chapter 11 cases, including any claim arising under any theory of successor liability, in each case to the fullest extent permitted by section 363(f) of the Bankruptcy Code, and upon Closing of the Asset Sale, all creditors, employees and equity holders of the Debtors are permanently and forever barred, restrained and enjoined from asserting any claims or enforcing remedies, or commencing or continuing in any manner any action or other proceeding of any kind, against Purchaser or the Assets on account of any of such Encumbrances. Encumbrances, if any, on any Assets shall attach to the Purchase Price in the same order of priority as existed on the Petition Date and shall be and hereby are released, terminated and discharged as to Purchaser and the Assets.

11. Except as expressly provided in the Sale Agreement and this Sale Order, Purchaser is not assuming, nor shall it or any affiliate of Purchaser be in any way liable or responsible, as a successor or otherwise, for, any liabilities, debts, or obligations of the Debtors in any way whatsoever relating to or arising from the Debtors' ownership, possession or use of the Assets prior to the consummation of the transactions contemplated by the Sale Agreement, or any liabilities calculable by reference to the Debtors or any of their operations or the Assets, or relating to continuing or other conditions existing on or prior to the Closing Date, which liabilities, debts, and obligations are hereby extinguished insofar as they may give rise to liability, successor liability or otherwise, against Purchaser or any affiliate of Purchaser. Notwithstanding anything herein to the contrary, Purchaser shall not be liable for any Excluded Liabilities.

12. From and after the Closing Date, Purchaser shall assume and agrees to pay, perform and otherwise discharge, the Assumed Liabilities, in accordance with the terms and conditions of the Sale Agreement, with such assumption of liabilities constituting a portion of the Purchase Price paid by Purchaser for the Assets, and the Debtors shall be relieved of all such Assumed Liabilities and have no further liability for such Assumed Liabilities.

13. Purchaser is hereby authorized in connection with the consummation of the Asset Sale to allocate the Assets and the Assumed Contracts among its affiliates, designees, assignees, and/or successors in a manner as it, in its sole discretion, deems appropriate and to assign, sublease, sublicense, transfer or otherwise dispose of any of the Assets or the rights under any of the Assumed Contracts to such affiliates, designees, assignees, and/or successors with all of the rights and protections accorded under this Sale Order and the Sale Agreement.

**ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS**

14. The Debtors are hereby authorized and directed, pursuant to sections 365 of the Bankruptcy Code, to (i) assume and assign the Assumed Contracts to Purchaser at the time of and effective upon the Closing, free and clear of any and all Encumbrances, and (ii) execute and deliver to Purchaser such documents or other instruments as may be necessary to transfer, convey, sell and assign to Purchaser, and cause Purchaser to assume, such Assumed Contracts, all in accordance with the Sale Agreement and this Sale Order. Notwithstanding anything herein to the contrary, no contract or lease that constitutes an Excluded Asset or has otherwise been rejected in accordance with the Sale Agreement's procedures shall be assumed, assigned, transferred, conveyed or sold to Purchaser pursuant to this Sale Order.

15. Notwithstanding anything contained to the contrary in the Purchase Agreement, the Debtors are not authorized to sell, transfer or assign to Purchaser any intellectual property that was

licensed, or is determined by a court of competent jurisdiction to have been licensed, to Cosmoledo by Maison Eric Kayser Medatlantique Limited (“MEKM”), including without limitation trademarks, recipes and know-how. The Debtors shall retain, and not transfer to Purchaser, possession of any written, printed or electronic versions of trademarks, recipes, know-how or any of the contents thereof that was provided to Cosmoledo by MEKM, unless and until the Debtors and MEKM separately agree otherwise or a court of competent jurisdiction subsequently approves such a transfer. To the extent that any recipe, know-how or other material is in the public domain, such material is not owned by the Debtor or MEKM.

16. The Assumed Contracts shall be transferred to, and shall remain in full force and effect for the benefit of, Purchaser in accordance with their respective terms, notwithstanding any provision in any such Assumed Contract (including any of the type described in section 365(f) of the Bankruptcy Code) that prohibits, restricts, or conditions such assignment or transfer. Upon the Closing, in accordance with sections 363 and 365 of the Bankruptcy Code, Purchaser shall be fully and irrevocably vested with all right, title, privilege and interest of the Debtors in, to and under the Assumed Contracts.

17. Consistent with the requirements of sections 365(b) and 365(f) of the Bankruptcy Code, upon the Closing and payment and satisfaction by Purchaser of the Cure Claims in respect of the Assumed Contracts in accordance with the terms and conditions of the Sale Agreement:

- A. all defaults of the Debtors under such Assumed Contracts existing as and through the date of Closing (without giving effect to any acceleration clauses or any default provisions of the kind specified in section 365(b)(2) of the Bankruptcy Code) shall be deemed in all respects cured, and Purchaser shall have no further liability or obligation in respect of any such defaults (including, without limitation, any liability to compensate any counterparty for any actual pecuniary loss to such counterparty resulting from such defaults), except as may otherwise be expressly agreed between Purchaser and the applicable counterparty;



- B. each counterparty to such Assumed Contract shall be forever barred, estopped, and permanently enjoined from asserting against the Debtors, Purchaser, or the property of any of them, any default or claim of breach arising under such Assumed Contract and existing as of the Closing Date, or, against Purchaser, any counterclaim, defense, setoff, recoupment or any other claim asserted or assertible against the Debtors or their estates; and
- C. Purchaser shall be deemed to be substituted for the Debtors as a party to each of the Assumed Contracts, and the Debtors and their estates shall be relieved from any liability for breach of any such Assumed Contracts occurring after the Closing Date.

18. Purchaser has provided adequate assurance of its future performance under the Assumed Contracts within the meaning of sections 365(b)(1)(C) and 365(f)(2)(B) of the Bankruptcy Code.

19. Notwithstanding anything herein to the contrary, the failure of the Debtors or Purchaser to enforce at any time one or more terms or conditions of any Assumed Contract shall not be a waiver of such terms or conditions, or of the rights of the Debtors or Purchaser, as the case may be, to enforce every term and condition of such Assumed Contract. There shall be no rent accelerations, assignment fees, increases or any other fees charged or chargeable to Purchaser as a result of the assumption and assignment of the Assumed Contracts. Any provision in any Assumed Contract that prohibits or conditions the assignment of such contract or lease, or allows the counterparty to such contract to terminate, recapture, impose any penalty, condition renewal or extension, or modify any term or condition upon the assignment of such contract or lease, constitutes an unenforceable anti-assignment provision, and is void and of no force and effect. The validity of the assumption and assignment of the Assumed Contracts to Purchaser shall not be affected by any existing dispute between the Debtors and any non-Debtor counterparty. Any party that may have had the right to consent to the assignment of any of the Assumed Contracts is

deemed and determined to have consented for the purposes of section 365(e)(2)(A)(ii) of the Bankruptcy Code.

20. Pending resolution of an objection timely asserted by a counterparty to an Assumed Contract (a “Cure Objection”), only the rights of a counterparty to an Assumed Contract that has timely filed a Cure Objection that has not been withdrawn, waived, resolved or settled, which rights have been expressly re-asserted to the Court at the Sale Hearing, or by stipulation or statement filed with the Court before entry of this Sale Order, shall be preserved with respect to the issue of cure raised in its Cure Objection, including, without limitation, any right to object to the provision of adequate assurance of future performance. Nothing herein shall modify or impair the Debtors’ obligations under section 365(d)(3) of the Bankruptcy Code, or enlarge or extend the period set forth in section 364(d)(4)(A) of the Bankruptcy Code within which the Debtors are permitted to assume or reject unexpired leases of property, any which enlargement or extension, if any, shall be subject to entry of a separate Order of this Court on a motion filed and served by the Debtors pursuant to section 364(d)(4)(B) of the Bankruptcy Code.

#### **MISCELLANEOUS**

21. Baldor Specialty Foods, Inc. (“Baldor”) is hereby deemed to hold a valid, allowed claim in the amount of \$171,195.38 (the “Baldor PACA Claim”) which is entitled to priority under the trust provisions of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499a, et seq. (“PACA”). Debtors are hereby authorized and directed, and the Purchaser is hereby authorized, to pay to Baldor or its counsel the full amount of the Baldor PACA Claim on or before the Closing. Notwithstanding any other provision of this Order, in the event Baldor does not receive full payment on account of the Baldor PACA Claim on or before the Closing, Baldor will be deemed to have a valid and continuing PACA trust interest, in the amount of the Baldor PACA Claim, in

and to the Cash Consideration (as that term is defined in the Asset Purchase Agreement) and Baldor shall be entitled to recover from the Debtors and the estates the full amount of the Baldor PACA Claim, including additional accrued interest and attorneys' fees, under all remedies available to Baldor at law or in equity.

22. No bulk sales law or any similar law of any state or other jurisdiction shall apply in any way to the Asset Sale. No brokers were involved in consummating the Asset Sale, and no brokers' commissions are due to any person or entity in connection with the Asset Sale.

23. On the Closing Date and pursuant to the terms of the Sale Agreement, this Sale Order shall be construed and shall constitute for any and all purposes a full and complete general assignment, conveyance and transfer of all of the Assets or a bill of sale transferring good and marketable title in such Assets to Purchaser.

24. This Sale Order is and shall be binding upon and govern the acts of all entities, including, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies or units, governmental departments or units, secretaries of state, federal, state and local officials and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to any of the Assets conveyed to Purchaser. All such entities described above in this paragraph are authorized and specifically directed to strike all recorded Encumbrances against the Assets from their records, official and otherwise.

25. Each and every federal, state and governmental agency or department, and any other person or entity, is hereby authorized to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the Sale Agreement.

26. Any and all Assets in the possession or control of any person or entity, including, without limitation, any vendor, supplier, professional, contractor or employee of the Debtors shall be transferred to Purchaser free and clear of all Encumbrances. All such vendors, suppliers, professional, contractors or employees are hereby directed to turn over to Purchaser any such Assets in their possession or control as of the Closing Date.

#### **FURTHER ASSURANCES**

27. The Debtors are hereby authorized to take all such actions and execute and deliver to the Purchaser such other and further agreements and documents as shall be necessary to consummate and give effect to the Sale Agreement and the transactions contemplated thereby without further order of the Court.

#### **ADDITIONAL PROVISIONS**

28. Effective upon the Closing, the Debtors, on behalf of themselves and their respective past, present and future subsidiaries, parents, divisions, affiliates, agents, representatives, insurers, attorneys, successors and assigns (collectively, the “Debtor Releasing Parties”), hereby release, remise, acquit and forever discharge Purchaser and its past, present and future subsidiaries, parents, divisions, affiliates, agents, representatives, insurers, attorneys, successors and assigns, and each of its and their respective directors, managers, officers, employees, shareholders, members, agents, representatives, attorneys, contractors, subcontractors, independent contractors, owners, insurance companies and partners (except, in each case, the Debtor Releasing Parties) (collectively, in their capacities as parties being released pursuant to this paragraph, the “Purchaser Released Parties”), from any and all claims, contracts, demands, causes of action, disputes, controversies, suits, cross-claims, torts, losses, attorneys’ fees and expenses, obligations, agreements, covenants, damages, liabilities, costs and expenses, whether known or

unknown, whether anticipated or unanticipated, whether claimed or suspected, whether fixed or contingent, whether yet accrued or not, whether damage has resulted or not, whether at law or in equity, whether arising out of agreement or imposed by statute or common law of any kind, nature, or description, including, without limitation as to any of the foregoing, any claim by way of indemnity or contribution, which any Debtor Releasing Party has, may have had or may hereafter assert against any Purchaser Released Party arising from or related in any way, either directly or indirectly, to the negotiation, documentation, performance or consummation of the Sale Agreement, any Transaction Documents, or any other agreements entered into in connection with the transactions contemplated thereby; *provided, however*, that the foregoing release shall not apply to the Debtors' rights or Purchaser's obligations under this Order or the Sale Agreement, any Transaction Documents, or any other agreements entered into in connection with the transactions contemplated hereby or thereby.

29. This Sale Order and the Sale Agreement shall be binding in all respects upon all administrative expense claimants, creditors and equity security holders of the Debtors, all counterparties to the Assumed Contracts, all successors and assigns of the Debtors and their affiliates and subsidiaries, and any trustees, examiners, "responsible persons" or other fiduciaries appointed in the Debtors' chapter 11 cases or upon a conversion to chapter 7 under the Bankruptcy Code, and none of the Sale Agreement, the Asset Sale nor any transactions contemplated thereby shall be subject to rejection or avoidance under any circumstances.

30. The Sale Agreement and the other Transaction Documents may be modified, amended, or supplemented by the parties thereto, in a writing signed by the Debtors and Purchaser, and in accordance with the terms thereof, without further order of the Court, provided that (i) in the reasonable view of the Debtors that, in consultation with the Committee (if any), any such

modification, amendment or supplement has no material adverse effect on the Debtors' estate or its creditors, and (ii) with respect to material modifications, amendments or supplements, notice is provided to those persons who have requested notice pursuant to Bankruptcy Rule 2002 and filed of record with the Court.

31. Nothing contained in any order entered in the Debtors' chapter 11 cases subsequent to entry of this Sale Order, nor in any chapter 11 plan confirmed in the Debtors' chapter 11 case, shall conflict with or derogate from the provisions of the Sale Agreement or the terms of this Sale Order.

32. This Sale Order shall be effective immediately upon entry, and any stay of orders provided for in Bankruptcy Rules 6004(h) and 6006(d), and any other provision of the Bankruptcy Code, Bankruptcy Rules or Local Rules (if any), shall not apply, is expressly lifted, and this Sale Order is immediately effective and enforceable.

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

34. The failure specifically to include or make reference to any particular provision of the Sale Agreement or the other Transaction Documents in this Sale Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court that the Sale Agreement and the other Transaction Documents are authorized and approved in their entirety.

35. To the extent applicable, the automatic stay pursuant to section 362 of the Bankruptcy Code is hereby lifted with respect to the Debtors to the extent necessary, without further order of the Court (a) to allow Purchaser to give the Debtors any notice provided for or contemplated in the Sale Agreement, and (b) to allow Purchaser to take any and all actions contemplated or permitted by the Sale Agreement.

36. Each and every federal, state and local governmental agency or department is hereby authorized to accept any and all documents and instruments necessary and appropriate to consummate the Asset Sale, including all agreements entered into in connection therewith, and this Sale Order.

37. To the extent available under applicable law and the Sale Agreement, Purchaser shall be authorized, as of the Closing Date, to operate under any license, permit, registration and any other governmental authorization or approval of the Debtors with respect to the Assets and the executory contracts and unexpired leases, and all such licenses, permits, registrations and governmental authorizations and approvals are deemed to have been, and hereby are transferred to Purchaser as of the Closing Date.

38. To the extent permitted by section 525 of the Bankruptcy Code, no governmental unit may revoke or suspend any permit relating to the operation of the Assets sold, transferred or conveyed to Purchaser on account of the filing or pendency of the Debtors' chapter 11 case or the consummation of the Asset Sale.

39. In the event of any inconsistency between this Sale Order, on the one hand, and the Sale Agreement or other Transaction Documents thereto, on the other hand, the terms of this Sale Order shall control.

40. The Court retains jurisdiction to: (a) interpret, implement and enforce the terms and provisions of this Sale Order (including any injunctive relief provided in this Sale Order) and the terms of the Sale Agreement, all amendments, modification or supplements thereto, and any waivers and consents thereunder; (b) protect Purchaser, or any of the Assets, from and against any of the Encumbrances or purported enforcement thereof; (c) compel delivery of all Assets to Purchaser; and (d) resolve any disputes arising under or related to the Sale Agreement, the Asset

Sale or the transactions contemplated thereunder or thereby, or Purchaser's peaceful possession, use and enjoyment of the Assets.

41. Purchaser has standing to seek to enforce the terms of this Sale Order.

42. Notwithstanding the foregoing, nothing contained in the Sale Agreement, the other Transaction Documents or this Sale Order shall in any way affect the rights of the Debtors' estates to object to or otherwise contest or challenge the validity or enforceability of any claims asserted against the Debtors' estates by any person, or the perfection of any security interest relating to any such claim.

Dated: New York, New York  
November 2, 2020

/s/ Michael E. Wiles  
Hon. Michael E. Wiles  
United States Bankruptcy Judge





# Speaker Bios



## William S. Fish, Jr.

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Bill's practice spans across a number of legal disciplines including business services, complex commercial litigation, bankruptcy and creditors' rights, and the First Amendment. He has tried numerous complex matters in state and federal court and regularly represents clients in complex bankruptcy proceedings, acquisitions, real estate transactions, loan transactions, and other business matters throughout the country. Bill has represented clients in cross-border and other international transactions. He has acted as general counsel to a broad range of clients, providing legal advice on a variety of business topics. Bill also counsels clients on how best to structure joint ventures and other related matters.

### PRACTICE AREAS

Corporate & Business  
Senior Living  
Real Estate  
Mergers & Acquisitions  
Litigation  
Bankruptcy, Creditors' Rights & Workouts  
Opportunity Zones  
Municipal Restructuring  
International  
Health Care

### BAR MEMBERSHIPS

Connecticut, 1983  
U.S. Court of Appeals for the Second Circuit, 2006  
U.S. District Court for the District of Connecticut, 1984  
U.S. Tax Court, 2010

### WORK EXPERIENCE

Hinckley Allen  
» Partner (2008-Present)  
Tyler Cooper & Alcorn, LLP  
» Managing Partner (2003-2008)  
» Partner (1990-2003)  
» Associate (1983-1990)

### EDUCATION

University of Virginia School of Law  
(J.D., 1983)  
State University of New York at Buffalo  
(B.A., 1980, Phi Beta Kappa)

### SPECIAL HONORS

Best Lawyers in America® (2007-2022)  
» Lawyer of the Year (2011, 2015-2019, 2021)  
» Recognized for Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, Bet-the-Company Litigation, First Amendment Law, and Litigation-Bankruptcy  
Super Lawyers, Connecticut (2006-2021)  
Hartford Magazine, Greater Hartford's Top Attorneys, Bankruptcy and Creditor's Rights category (2011)  
Appointed by Governor Rell to Task Force on Open Access to the Courts  
Martindale-Hubbell® AV Peer Review Rating, Recipient



## Jennifer V. Doran

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Jennifer focuses her practice on business law, with an emphasis on closely held and family owned businesses, commercial transactions, and creditors' rights. She specializes in advising closely held business on intergenerational issues, succession planning, and growth strategies, including mergers and acquisitions, ESOPs, and intra-company transactions. Jennifer also counsels clients on formation issues, joint ventures, contract preparation, security issues, equipment leasing, distribution rights, licensing, and other commercial matters. She has particular expertise in the construction and distribution industries. Jennifer also represents creditors in insolvency and bankruptcy matters including workouts, preference and fraudulent transfer actions, the assumption of real estate leases, single purpose entity structures, the acquisition of assets from bankruptcy, and other issues facing both secured and unsecured creditors. She also counsels clients with respect to the structure of securitized loan transactions and represents indenture trustees on a variety of matters, including default issues.

### PRACTICE AREAS

Corporate & Business  
Bankruptcy, Creditors' Rights & Workouts  
Municipal Restructuring  
Corporate Trust  
Retail  
Family Business  
Construction & Public Contracts

### BAR MEMBERSHIPS

Rhode Island, 2002  
Massachusetts, 2002  
U.S. District Court for the District of Massachusetts, 2002  
U.S. District Court for the District of Rhode Island, 2010

### WORK EXPERIENCE

Hinckley Allen  
» Executive Committee Member  
» Chair, Bankruptcy, Creditors' Rights & Workout  
» Partner (2009-Present)  
» Associate (2001-2008)  
» Summer Associate (2000)  
Health Law Advocates, Inc.  
» Research Assistant (1999)

### EDUCATION

Boston University School of Law (J.D., 2001, Dean's Scholar)  
Johns Hopkins University (B.A., 1998, with honors)

### SPECIAL HONORS

Best Lawyers in America® (2018-2022)  
Recognized for Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law  
Super Lawyers Rising Stars, Massachusetts (2005-2016)  
Boston Bar Association, Law Day Honoree, Public Interest Leadership Program (2009)

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