Proposed Interim Hearing Date and Time November 19, 2012 at 2:00 p.m.
Proposed Objection Deadline: November 19, 2012 at 10:00 a.m.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

---x		Chapter 11
	:	
In re	:	Case No. 12-22052 (RDD)
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Hostess Brands, Inc., *et al.*,[1]	:	(Jointly Administered)
	:	
Debtors.	:	
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EMERGENCY MOTION OF DEBTORS AND DEBTORS IN POSSESSION FOR INTERIM AND FINAL ORDERS, PURSUANT TO SECTIONS 105, 363, 365 AND 503(c) OF THE BANKRUPTCY CODE: (A) APPROVING (I) A PLAN TO WIND DOWN THE DEBTORS' BUSINESSES, (II) THE SALE OF CERTAIN ASSETS, (III) GOING-OUT-OF-BUSINESS SALES AT THE DEBTORS' RETAIL STORES, (IV) THE DEBTORS' NON-CONSENSUAL USE OF CASH COLLATERAL AND MODIFICATIONS TO FINAL DIP ORDER, (V) AN EMPLOYEE RETENTION PLAN, (VI) A MANAGEMENT INCENTIVE PLAN, (VII) PROTECTIONS FOR CERTAIN EMPLOYEES IMPLEMENTING THE WINDDOWN OF THE DEBTORS' BUSINESSES, (VIII) THE USE OF CERTAIN THIRD PARTY CONTRACTORS AND (IX) PROCEDURES FOR THE EXPEDITED REJECTION OF CONTRACTS AND LEASES; AND (B) AUTHORIZING THE DEBTORS TO TAKE ANY AND ALL ACTIONS NECESSARY TO IMPLEMENT THE WINDDOWN

[1] The Debtors are the following six entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Hostess Brands, Inc. (0322), IBC Sales Corporation (3634), IBC Services, LLC (3639), IBC Trucking, LLC (8328), Interstate Brands Corporation (6705) and MCF Legacy, Inc. (0599).

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<u>STATUTES</u>

TO THE HONORABLE
UNITED STATES BANKRUPTCY JUDGE:

Hostess Brands, Inc. and its five domestic direct and indirect subsidiaries, as debtors and debtors in possession (collectively, "Hostess" or the "Debtors"), respectfully represent as follows:

BACKGROUND

1. On January 11, 2012 (the "Petition Date"), the Debtors commenced their reorganization cases by filing voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors' chapter 11 cases have been consolidated and are being administered jointly for procedural purposes only. The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. On January 18, 2012, the United States Trustee for the Southern District of New York (the "U.S. Trustee") appointed an official committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code (the "Creditors' Committee"). The U.S. Trustee subsequently amended such appointments to the Creditors' Committee on January 30, 2012.

3. On February 3, 2012, the Court entered the Final Order (I) Authorizing Debtors to (A) Obtain Post-Petition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362 and 364 and (B) Utilize Cash Collateral Pursuant to 11 U.S.C. § 363, and (II) Granting Adequate Protection to Pre-Petition Secured Parties (Docket No. 254) (as amended, the "Final DIP Order") approving, on a final basis, the Debtors' entry into that certain Debtor-in-Possession Credit, Guaranty and Security Agreement (as amended, the "DIP Credit Agreement").

4. Founded in 1930, Hostess is one of the largest wholesale bakers and distributors of bread and snack cakes in the United States. Traditionally, Hostess has produced

and sold an array of popular products under new and iconic brands such as Butternut®, Ding Dongs®, Dolly Madison®, Drake's®, Home Pride®, Ho Hos®, Hostess®, Merita®, Nature's Pride®, Twinkies® and Wonder®. As of the Petition Date, the Debtors operated 36 bakeries, 565 distribution centers, approximately 5,500 delivery routes and 570 bakery outlet stores throughout the United States.

JURISDICTION

5. This Court has subject matter jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

RELIEF REQUESTED

6. The Debtors hereby move the Court for the entry of interim and final orders, pursuant to sections 105(a), 363, 365 and 503(c) of the Bankruptcy Code: (a) approving (i) the Debtors' current plan (the "Winddown Plan") for the (A) orderly winddown of the Debtors' various business operations and sale of assets and (B) maintenance, security and preservation of the Debtors' assets for eventual sale (collectively, the "Winddown"); (ii) the sale and/or abandonment and disposal of finished goods, certain excess ingredients and packaging; (iii) a retention plan for certain of the Debtors' non-senior management employees that the Debtors must retain to implement and effect the Winddown Plan; (iv) an incentive plan for certain of the Debtors' senior management employees; (v) the Debtors' use of certain third party contractors as necessary to implement the Winddown Plan; (vi) certain protections for directors and officers that developed and approved and/or will implement and/or oversee the Winddown Plan (collectively, the "Protected Persons"); and (vii) procedures for the expedited rejection in the future of executory contracts and unexpired leases; (b) authorizing the non-consensual use of the cash collateral of certain of the Debtors' lenders and approving certain modifications to the Final DIP

Order and the DIP Credit Agreement; and (c) authorizing the Debtors to take any and all actions that are necessary in the exercise of their business judgment to implement the Winddown Plan.

7. The current version of the Winddown Plan — setting forth, among other things, (a) the operational actions to be taken by the Debtors in connection with the Winddown, (b) the Debtors' contemplated timetables for such actions (and the Winddown generally) and (c) certain of the key assumptions upon which the Winddown Plan was developed — is attached hereto as Exhibit A and incorporated herein by reference. In support of the relief requested herein, the Debtors submit the Declaration of Charles Carroll (the "Carroll Declaration") attached hereto as Exhibit B, the Declaration and Expert Report of Dewey Imhoff (the "Imhoff Declaration") attached hereto as Exhibit C, the Declaration of David Rush (the "Rush Declaration") attached hereto as Exhibit D and the Declaration of Gregory F. Rayburn (the "Rayburn Declaration") attached hereto as Exhibit E.

SPECIFIC BACKGROUND

8. From the outset of these chapter 11 cases until only recently, the Debtors focused on, and pursued, the reorganization of their businesses as economically viable and competitive going concerns. As the Debtors set forth in the Initial 1113/1114 Motion (as such term is defined below), the threshold obstacle to such a reorganization was

> an inflated cost structure that has put them at a profound competitive disadvantage. And that is so because the biggest component of the Debtors' costs — their obligations under collective bargaining agreements that cover nearly 15,000 active union employees — has never been meaningfully addressed. Nor have there been any significant modifications to union pension plan obligations or to the provisions in the collective bargaining agreements that limit the Debtors' opportunities to grow revenues. Hostess simply cannot emerge as a viable competitor unless they are relieved of significant financial commitments and arcane work rules imposed by their collective bargaining agreements.

Initial 1113/1114 Motion, at ¶¶ 9-10. As was made clear by the third-party investor process conducted by the Debtors earlier this year, achieving modifications to the Debtors' collective bargaining agreements ("CBAs") and multi-employer pension benefit obligations was a *sine qua non* for the Debtors' ability to attract investors willing to provide capital to the reorganized Debtors in connection with a chapter 11 plan.

9. On January 25, 2012, the Debtors filed their Motion of Debtors and Debtors in Possession to (A) Reject Certain Collective Bargaining Agreements and (B) Modify Certain Retiree Benefit Obligations, Pursuant to Sections 1113(c) and 1114(g) of the Bankruptcy Code (Docket No. 174) (the "Initial 1113/1114 Motion"), seeking authority to reject their CBAs with (a) the 141 local affiliates of the International Brotherhood of Teamsters (the international union, together with its local affiliates, the "IBT") and (b) the 35 local affiliates of the Bakery, Confectionery, Tobacco and Grain Workers International Union (the international union, together with its local affiliates, the "BCT" and collectively with the IBT, the "Unions"). On April 23, 2012, the Debtors also filed a motion (the "Other Unions 1113 Motion") seeking to reject 67 different CBAs in place with 57 local affiliates of 10 separate unions (other than the IBT and the BCT) (the "Other Unions"). Under the Initial 1113/1114 Motion and the Other Unions 1113 Motion, the Debtors proposed to replace the rejected CBAs with agreements that modified those agreements in a number of ways and limited the Debtors' obligations with respect to the multiemployer pension plans, all in accordance with the Debtors' last, best and final offer made on April 14, 2012.

10. After the filing of the Initial 1113/1114 Motion, the Debtors sought to engage the IBT and BCT in continued negotiations. The BCT ultimately refused to continue to negotiate with the Debtors and indicated that it would not contest the relief sought in the Initial 1113/1114 Motion. Accordingly, on May 4, 2012, May 24, 2012 and May 31, 2012, the Court

entered orders (Docket Nos. 848, 1016 and 1058) (the "BCT Rejection Orders") granting the Initial 1113/1114 Motion solely with respect to the BCT and authorizing, but not directing, the Debtors to (a) reject all CBAs with the BCT still in effect as of the date of the BCT Rejection Orders, (b) implement, and perform under, certain "Section 1113/1114 Proposals" attached as an exhibit to the first BCT Rejection Order (the "BCT Proposals") and (c) modify, in accordance with the BCT Proposals, any "retiree benefit" obligation the Debtors had to retirees formerly represented by the BCT. While prolonged and extensive negotiations with the IBT continued after the filing of the Initial 1113/1114 Motion, the Debtors and the IBT were unable to reach agreement. Thus, the Debtors proceeded with the prosecution of the Initial 1113/1114 Motion with respect to the IBT.

11. After the trial on the Initial 1113/1114 Motion with respect to the IBT, on May 14, 2012, the Court issued an oral ruling on the Initial 1113/1114 Motion indicating that, while it would deny the rejection of the Debtors' CBAs with the IBT (and related section 1114 relief sought), the Court was inclined to grant a motion brought by the Debtors (including approval of the Debtors' exit from certain multi-employer pension plans) so long as the Debtors made certain changes to the relief requested. The Court's ruling made clear that the Court believed that the Debtors' exit from the multi-employer pension plans would very likely be necessary for the Debtors to successfully emerge from bankruptcy. In accordance with the above, on May 22, 2012, the Court entered an order (Docket No. 993) denying the Initial 1113/1114 Motion with respect to the IBT.

12. Following the Court's ruling with respect to the Initial 1113/1114 Motion, the Debtors held discussions on an expedited basis with the IBT, certain of their key lenders and the only potential outside equity investor that had made a viable proposal. During these discussions, the IBT indicated that, notwithstanding the Court's May 14, 2012 ruling, its

participation in any reorganization plan was conditioned upon Hostess remaining in all of the IBT multi-employer pension plans. In response, Hostess' only viable outside investor indicated that it was no longer willing to invest in the Debtors' businesses.

13. As a result, it became and remains clear that no outside investors are interested in funding the Debtors' reorganization. Nonetheless, Hostess and certain of its key lenders contacted the IBT and the BCT to see if it would be possible to reach an alternative comprehensive plan that would allow the Debtors to emerge from bankruptcy as a going concern.

14. The IBT agreed to reconvene negotiations immediately. The BCT, on the other hand, declined to do so and stated that it would not negotiate until the Debtors' negotiations with the IBT had concluded. On August 11, 2012, following three additional months of negotiations, the IBT agreed to submit the Debtors' revised last, best, final proposal (the "IBT LBFO") to its members for ratification. On September 14, 2012, the IBT members ratified the IBT LBFO.

15. After completing negotiations with the IBT, Hostess presented the BCT with a proposal to modify the BCT CBAs. The terms of the proposal to the BCT mirrored those of the IBT LBFO, with a few exceptions to account for, among other things, differences between the terms of the IBT CBAs and BCT CBAs. On August 14, 2012, representatives of Hostess, including Hostess' CEO and Vice President of Human Resources and Labor Relations, and certain of its secured lenders met with the BCT to discuss Hostess' proposal. After further negotiations, on August 29, 2012, Hostess made its last, best final offer to the BCT (the "BCT LBFO"), which incorporated several modifications proposed by the BCT. Later that day, the BCT notified Hostess that it would submit the BCT LBFO to its local affiliates for a membership vote. As of September 14, 2012, all but three BCT locals voted to reject the BCT LBFO.

16. After the "no" vote from the BCT, in a last ditch effort to preserve their reorganization prospects and over 18,000 jobs, the Debtors filed a motion (Docket No. 1483) (the "New BCT Motion") seeking to have the Court order the implementation of the BCT LBFO notwithstanding the BCT's rejection of such terms. Testimony at a hearing in support of the New BCT Motion established that there was, in fact, no viable purchaser waiting in the wings to purchase the Debtors' businesses as a whole. On October 4, 2012, the Court entered an order (Docket No. 1563) authorizing the Debtors to reject their CBAs with the local affiliates of the BCT that voted against ratification of the BCT LBFO and to implement the terms thereof, with the exception of 18 CBAs with the local affiliates of the BCT that had terminated (the "Terminated BCT CBAs"). With respect to the Terminated BCT CBAs, the Court's order authorized the Debtors to implement the terms of the BCT LBFO until such time as the Debtors and the authorized representatives for each such Terminated BCT CBA bargained to impasse within the meaning of the National Labor Relations Act.

17. In August 2012, during the same period the Debtors resumed negotiations with the BCT, they also resumed negotiations with their Other Unions. Three of the Other Unions — the Glass, Molders, Pottery, Plastics & Allied Workers International Union (the "GMP"), the United Brotherhood of Carpenters and Joiners of America (the "UBCJA") and the International Brotherhood of Firemen & Oilers (the "IBFO") — did not participate in those negotiations but agreed not to contest the Other Unions 1113 Motion. The remaining seven Other Unions agreed to submit the Debtors' last, best final offers (the "Other Union LBFOs") to their membership for a ratification vote. As of October 3, 2012, the United Steelworkers (the "USW") and the United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW") had ratified their respective Other Union LBFO; the International Association of Machinists and Aerospace Workers (the "IAM") and the International Union of Operating

Engineers & Service Employees (the "IUOE") failed to ratify their respective Other Union LBFO; and the Office & Professional Employees International Union (the "OPEIU"), the Retail, Wholesale and Department Store Union (the "RWDSU") and the United Food and Commercial Workers Union (the "UFCW") were still in the process of voting on whether to ratify their respective Other Union LBFO.

18. A trial on the Other Unions 1113 Motion was held on September 25, 2012 and October 3, 2012. On October 4, 2012, the Court entered an order authorizing the Debtors to reject all of their Other Union CBAs with the IAM, the IUOE, the GMP, the UBCJA and the IBFO. The Court postponed its ruling until October 11, 2012 with respect to the RWDSU and the UFCW to allow those Other Unions to complete their voting processes. On October 5, 2012, the OPEIU ratified its agreement. On October 10, 2012, the GMP ratified its agreement. Also, on or around October 10, 2012, the Debtors were informed that (a) the RWDSU had completed its voting process and employees covered by five of the eight RWDSU CBAs voted to ratify their respective agreements while employees covered by three of the eight RWDSU CBAs failed to ratify their respective agreements and (b) the UFCW had completed its voting process and all of the UFCW's applicable local unions voted to ratify their respective agreements. On October 11, 2012, the Debtors sought an order from the Court granting the Other Unions 1113 Motion with respect to the three RWDSU bargaining units that failed to ratify their respective agreements. On October 12, 2012, the Court entered that order (Docket No. 1610). After the entry of this order, the three non-ratifying RWDSU locals re-voted on their respective agreements and, this time, voted to ratify the agreements.

19. Accordingly, the Debtors have either obtained a consensual agreement or an order of the Court regarding modifications to CBAs for each of their 12 unions. Beginning on October 21, 2012, the Debtors began implementing the modifications to the CBAs. On

November 7, 2012, the Debtors began to receive strike notices from various local unions affiliated with the BCT. On November 8, 2012, the Debtors received a strike notice from the IUOE. Between November 9 and November 13, 2012, various local unions affiliated with the BCT commenced strikes at 12 of the Debtors' bakeries. At another 12 bakeries, picket lines were set up by striking BCT workers, and certain BCT and other unionized workers at those bakeries chose to honor the picket lines by not reporting for work. As a result, production was significantly disrupted at the 24 bakeries impacted by the Strikes; however, many of the impacted bakeries remained operational to varying degrees due to management filling in for production workers and, in some plants, high numbers of employees crossing picket lines.[1]

20. Since the strikes (the "Strikes") were commenced, the Debtors have urged striking employees to return to work. Unfortunately, at this time, thousands of the Debtors' employees continue to participate in or honor the Strikes. As a result, a sufficient number of the Debtors' baking facilities have become inoperable, and the Debtors are no longer able to fulfill customer orders or sell product at their retail stores. Because of the material impairment of the Debtors' business operations, the Debtors will soon lose access to the funding necessary to operate their businesses, and the Debtors will have triggered certain remedial provisions of the Final DIP Order. As a result, the Debtors are beginning to take steps to wind down their business operations, including the relief requested in this Motion.

21. While the IBT and BCT votes were in process, the Debtors and their investment bankers undertook numerous efforts in the marketplace to gauge interest for certain of their brands, which complemented the substantial prior efforts made by the Debtors early this

[1] On November 12, 2012, the Debtors were forced to permanently close their baking facilities located in Cincinnati, Ohio; Seattle, Washington; and St. Louis, Missouri because those facilities had insufficient manpower to continue to bake goods. The Debtors shifted production for customers in the geographic areas served by the closed facilities to other baking facilities.

year and in prior years both to seek an outside investor and to market the Debtors' assets. These activities resulted in the receipt in late September 2012 of a number of potentially-viable proposals to purchase limited pools of the Debtors' assets. No viable buyer emerged for the Debtors as a whole. The Debtors anticipate filing in the near term certain motions seeking approval of a bid process for and sale of certain of their assets on a stand-alone basis.

22. Given the daunting obstacles to reorganization present from the outset of these cases, the Debtors have, in recent months, and in consultation with their advisors and certain of their secured lenders, refined a plan for the orderly wind down and sale of their assets. This alternative is now embodied in the Winddown Plan as described in this Motion. In light of the foregoing, the Debtors now seek approval of, and authority to implement, the Winddown Plan from the Court on an emergency basis. The Debtors have begun to implement a number of time-sensitive aspects of the Winddown Plan immediately, prior to the hearing on this Motion, due to business necessities and to preserve the assets of their estates.[2]

The Winddown Plan

23. The Winddown Plan (a summary of which is attached hereto as Exhibit A) is the result of significant contingency planning by the Debtors in consultation with their advisors and certain of their secured lenders. Generally, the Winddown Plan is designed to maximize the value of the Debtors' now-liquidating chapter 11 estates while protecting the safety of consumers and the Debtors' employees through, among other things: (a) the completion of tasks and implementation of procedures to preserve, maintain and protect the Debtors' assets pending ultimate liquidation; (b) the return, sale or disposal of certain of the Debtors' perishable

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2 For example, the Debtors have begun to implement the following aspects of the Winddown Plan (among others): (a) the removal of in process material from the Debtors' production equipment to prevent any damage thereto; (b) the "dry packing" of certain production equipment (e.g., boilers) to preserve such equipment for sale; and (c) the aggregation and securing of the Debtors' fleet and vehicle assets for return (if leased) or sale (if owned).

ingredients and generic packaging; (c) the continued employment of initially approximately 3,200 employees to oversee the Winddown (collectively, the "Remaining Employees");[3] (d) the provision of retention payments to retain non-senior management employees (the "Non-Senior Management Employees") and incentive payments to approximately 19 corporate officers and/or high-level managers (the "Senior Management Employees") to motivate and encourage such employees to complete and achieve certain tasks and goals associated with the Winddown; and (e) the use of certain third-party contractors (e.g., security personnel; barricade providers; millwright labor; transportation/logistics personnel; environmental consultants; and temporary finance and accounting staff) (collectively, "Third-Party Contractors") where necessary to implement the Winddown Plan.

24. The desired outcome of the Winddown is the sale of groups of assets that can be operated on a going concern basis, which would result in the buyer assuming as many of the related administrative expenses and other claims as possible. The Debtors hope to complete the Winddown and the sale(s) of substantially all of the Debtors' assets[4] in approximately one year. For planning purposes, the Winddown has been divided into thirteen discrete four-week phases (each, a "Winddown Period"). The Debtors have completed planning for the operational aspects of the Winddown for 13 Winddown Periods — the entire one-year projected duration of

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3 The Winddown Plan contemplates that the headcount for Remaining Employees will decrease by approximately 94% within the first 16 weeks of the Winddown as the majority of activities necessary to sell perishable goods and inventory and to clean, secure and prepare the Debtors' various plants, depots, retail stores and corporate offices will be completed within that time frame.

4 Other than as expressly requested hereunder with respect to GOB Sales of finished goods and the sale of excess ingredients and packaging, the Debtors are not seeking authority for, or prospective approval of, any asset sales in connection with this Motion. The Debtors currently anticipate that, other than as expressly set forth herein, all non-ordinary course asset sales will be effected either pursuant to (a) discrete orders authorizing and approving such sales on an individualized basis pursuant to section 363 of the Bankruptcy Code or (b) this Court's existing Order, Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code, Approving Procedures to Sell or Transfer Certain *De Minimis* Assets, Free and Clear of Liens, Claims and Encumbrances, and to Pay Market Rate Broker Commissions in Connection with Such Sales Without Further Court Approval (Docket No. 387), entered on February 22, 2012 (the "*De Minimis* Asset Sale Order").

the Winddown. However, the Debtors have only finalized their operational and other cost projections for the first thirteen weeks of the Winddown, as seeking to project revenues and costs further than that would require utilizing numerous and material assumptions that may or may not prove to be correct.

25. The Debtors, in consultation with their advisors, have organized the Winddown Plan around four major categories of their businesses/assets: (a) bakery (or "plant") assets at which the Debtors' products were produced (the "Plants"); (b) depots (and combination depots/stores) (the "Depots") at which the Debtors' finished products are stored (and sold, in instances where there is a Retail Store co-located with a depot) and at which the Debtors' route sales representatives and other parties obtain products for delivery to customers; (c) retail and thrift store outlets at which the Debtors' finished products are sold (the "Retail Stores");[5] and (d) the Debtors' corporate functions ("Corporate"). A unique set of activities is necessary for each of the foregoing categories.

26. Plant Winddown. The Debtors currently own 37 Plants across the United States, with 36 being operational. The Winddown Plan contemplates that each Plant will maintain a dedicated team to prepare, preserve, secure and clean the real estate, the facility and the various assets located at the facility (e.g., production equipment; fleet vehicles; finished products; raw materials) for sale. During the initial four weeks of the Winddown, it is anticipated that each Plant will require approximately 28 Remaining Employees to effectuate the Winddown. By the end of the third four-week Winddown Period, it is anticipated that each Plant will maintain only one Remaining Employee on site (while certain tasks related to security, millwright labor

5 Certain of the Debtors' locations function both as Depots and Retail Stores. Costs related to the Depot component of such locations are addressed in the Winddown Plan for Depots (as described below) and costs for the Retail Store component of such locations are addressed in the Winddown Plan for Retail Stores (as described below).

and transportation will be outsourced to third parties).[6] The Debtors will maintain 24/7 security at each Plant, with the heaviest presence on site during the initial Winddown Period.

27. Among other things, Remaining Employees will assist with: (a) shutting down, cleaning and packing all equipment; (b) properly disposing of waste in accordance with applicable environmental regulations; (c) collecting and securing the Debtors' vehicle fleet; (d) transferring finished product to stores for liquidation or arranging for other disposal; (e) preparing production machinery and other material handling equipment (e.g., racks, trays, baskets and dollies) for sale (if sold separately from the Plant itself); and (f) performing other tasks required for the orderly winddown of baking operations. All leased equipment will be prepared for lessor/supplier pick-up upon rejection of the applicable lease.

28. All excess raw material ingredients (such as flour, sugar and corn starch) (collectively, "Excess Ingredients") located at the Plants (as well as Excess Ingredients in transit to the Debtors' bakeries) as of the commencement of the Winddown either have been or will be (a) refused, (b) returned to the Debtors' suppliers or (c) sold to third parties. The Debtors estimate that they hold approximately $29.3 million worth of Excess Ingredients. In addition, the Debtors have less than $1 million in generic (clear or nonbranded) packaging materials ("Excess Packaging") that the Debtors will (a) return to their suppliers or (b) sell to third parties.[7]

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6 The Winddown Plan further provides that the Debtors will continue to employ 28 Remaining Employees (the "Plant Oversight Staff") at various locations to serve in a "plant oversight" capacity. The Plant Oversight Staff consists of a management team that will be responsible for managing (a) the Remaining Employees located on site at each of the Debtors' individual plants and (b) the overall wind down and sales/marketing process for the Plants generally. The Winddown Plan contemplates that the headcount for Plant Oversight Staff will be reduced to 10 Remaining Employees by the end of the ninth four-week Winddown Period, and reduced to two by the end of the thirteenth four-week Winddown Period.

7 In addition, the Debtors currently hold approximately $12.0 million in pre-printed packaging that they may not be able to resell. The Debtors are not seeking authority to sell this packaging pursuant to this Motion.

29. Costs associated with the wind down and disposition of each of the Plants and their related assets are anticipated to total approximately $17.58 million over the first thirteen weeks of the Winddown.[8]

30. Depot Winddown. The Debtors currently own 165 Depots and lease another 388 such facilities (including the Debtors' hybrid Depot/Retail Store facilities). The primary Winddown activities to be undertaken at the Depots are the cleaning — including the proper handling of any environmental waste — and preparation of such sites for return (for leased locations) or sale (for owned locations). Equipment and vehicles owned or leased by the Debtors that are located at leased Depots will be aggregated, secured and transferred to owned locations prior to the rejection of any underlying Depot lease. Baked goods that remain at the Depots either have been or will be (a) sold to third-party retailers, (b) sold at the Debtors' attached Retail Store (where applicable) or (c) donated or destroyed.[9] The Debtors will maintain on-site security during the initial stages of the Winddown at certain of their high-value Depot locations.

31. Once the Winddown is commenced, the Debtors anticipate completing the Winddown upon an accelerated four week schedule for leased Depots and seven week schedule for owned Depots. At the commencement of the Winddown, the Debtors anticipate that they will require approximately 826 Remaining Employees at Depots. This number will rapidly decline to zero by the end of the seventh week of the Winddown as the Depots are cleaned and prepared for closure and the associated Depot leases are rejected (as applicable).

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8 Of this anticipated $17.58 million in costs over this thirteen week period, approximately (a) $7.27 million is related to salary for Remaining Employees (which includes Plant Oversight Staff), (b) $1.15 million is related to payments to Remaining Employees under the Employee Retention Plan, (c) $6.02 million is related to operational expenses, such as utility costs and taxes and (d) $3.14 million is for various third party contractors, such as security personnel and millwright labor.

9 As is the case with finished goods inventory that is at the Debtors' Plants, the Debtors expect to negotiate bulk sales of finished goods with a national chain, and for finished goods not sold to a national chain, will seek to sell excess finished goods inventory through the Debtors' own retail stores. The Debtors consider any such sale of finished goods inventory to a national chain to be an ordinary course business transaction.

32. Costs associated with the wind down and disposition of each of the Depots and their related assets are anticipated to total approximately $6.85 million over the first thirteen weeks of the Winddown.[10]

33. Retail Store Winddown. The Debtors currently own 48 stand-alone Retail Stores, lease an additional 168 such stand-alone stores and, as noted above, own 113 hybrid Depot/Retail Store facilities and lease another 198 such facilities. The primary Winddown activities to be undertaken at the Retail Stores are facility cleaning and the sale and disposition of finished product inventory. During the Winddown, all perishable baked goods inventory ("Perishable Inventory") located at the Retail Stores will be either (a) sold to customers through going-out-of-business sales ("GOB Sales"), (b) abandoned and donated to charity or destroyed (for Perishable Inventory that cannot be sold in the GOB Sales or for which it is uneconomical to transport it to a retail store for sale) or (c) grouped together and transferred, as applicable, to owned Retail Stores (for any products with significant shelf life).[11] Shelving and other miscellaneous equipment located at the Retail Stores will be disassembled, stacked and transferred to owned Depots for eventual liquidation, as is practicable. Owned Retail Stores will eventually be marketed and sold. The leases for the remaining Retail Stores will be rejected.

34. The GOB Sales will be conducted within the following parameters:

- Conduct of Sales: The GOB Sales will be conducted in accordance with the Debtors' normal business practices and with the collection and remittance of applicable sales taxes related to any applicable goods sold during the GOB Sales. The GOB Sales will be conducted during the Debtors' normal or expanded business hours.

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10 Of this anticipated $6.85 million in costs over this thirteen week period, approximately (a) $4.00 million is related to salary for Remaining Employees, (b) $782,000 is related to payments to Remaining Employees under the Employee Retention Plan, (c) $1.47 million is related to operational expenses such as lease and utility costs and (d) $598,000 is related to hiring certain third party contract security for 24 "high value" Depots.

11 Finished product inventory in transit at the time this Motion is filed is being routed to Retail Stores for sale, unless such inventory is slated to be sold to one of the Debtors' existing customers.

- Pricing: Sales of Perishable Inventory will start at current pricing levels and may be adjusted upward or downward at periodic intervals depending on the level of demand at various Retail Stores during the course of the GOB Sales in the discretion of each applicable store manager.

- Payment: All Perishable Inventory will be sold in accordance with the Debtors' ordinary business practices, and the Debtors will continue to accept cash, checks and charge cards as payment for Perishable Inventory.

- Advertising: The Debtors do not intend to engage in any special advertising projects with respect to the GOB Sales, but appropriate signs may be posted in and around Retail Stores and other locations to advertise the GOB Sales as circumstances warrant.

35. The Winddown of Retail Stores and the GOB Sales are expected to occur on an expedited basis and to be completed in approximately four weeks after the commencement of the Winddown. Initially, the Debtors expect to require a total of 1,076 Remaining Employees to effect the Winddown of the Retail Stores and the GOB Sales (including 22 Remaining Employees who are retail sales senior managers, retail sales managers and district sales managers to oversee the Winddown of Retail Stores (the "Retail Store Oversight Staff")). That headcount will drop to zero by the fifth week of the Winddown as the Retail Stores are closed and the GOB Sales are concluded.

36. Costs associated with the wind down and disposition of each of the Retail Stores and their related assets are anticipated to total approximately $8.76 million over the first thirteen weeks of the Winddown.[12]

37. Corporate Winddown. One of the more critical challenges that the Winddown Plan addresses is the need to simultaneously wind down the Debtors' various corporate functions while ensuring the ability to complete tasks that are necessary for the

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12 Of this anticipated $8.76 million in costs over this thirteen week period, approximately (a) $5.00 million is related to salary for Remaining Employees, including the Retail Store Oversight Staff, (b) $977,000 is related to payments to Remaining Employees under the Employee Retention Plan and (c) $2.79 million is related to operational expenses, such as lease and utility costs.

chapter 11 process. The Debtors' large operational footprint will require the services of approximately 237 Remaining Employees at the corporate level to implement the winddown of the Debtors' information technology, human resources, legal and financial affairs (and to address any related issues arising over the course of the Winddown).

38. The majority of the corporate level Remaining Employees (131 of the 237) are financial and accounting personnel. The need to retain such a large number of financial personnel is the direct result of the Debtors' decentralized accounting system, which necessitates that field accounting personnel facilitate the collection of, and accounting for, remaining accounts receivable across 18 field locations. Although workloads and headcounts will diminish over time, the Debtors anticipate that the collection of receivables and the settlement of disputed balances by financial personnel will continue for the duration the Winddown. The Debtors will also require financial personnel to (a) ensure proper accounting as assets are monetized over time, (b) assist with the Debtors' claims resolution process and (c) process various ordinary course administrative tasks (e.g., paying the various costs associated with the Winddown).

39. The corporate level Remaining Employees will also include 19 Senior Management Employees who will be offered incentive payments as motivation and encouragement to take on additional job responsibilities and to complete and achieve certain tasks and goals associated with the Winddown.

40. In addition, the Winddown Plan contemplates that the Debtors will retain various third parties to complete the winding up of their corporate affairs (e.g., services related to document and records management, temporary finance and accounting roles, payroll and storage).

41. Costs associated with the winddown of the Debtors' corporate functions are anticipated to total approximately $8.10 million over the first thirteen weeks of the Winddown.[13]

Financing the Winddown Plan[14]

42. The terms of the DIP Credit Agreement and the Final DIP Order already contemplated that the Debtors might be required to liquidate their assets under certain circumstances. The Debtors propose to fund the costs of the Winddown Plan and pay for other administrative costs incurred by the Debtors' estates with borrowings under the DIP Credit Agreement, the consensual use of the cash collateral of the DIP Lenders and the First Lien Term Loan Lenders and the non-consensual use of the cash collateral of the ABL Lenders. These sources of financing will be supplemented with the proceeds realized by the Debtors as their assets are liquidated. All of the Debtors' assets are subject to the liens of the Debtors' prepetition and postpetition lenders under the terms of the Final DIP Order.

43. Section 5.17 of the DIP Credit Agreement requires the Debtors and the DIP Agent to cooperate in good faith to develop a revised budget (the "Liquidation Budget") to fund the Winddown Plan.[15] In addition, the terms of the DIP Credit Agreement specifically permit the Debtors to dispose of their assets in accordance with the terms of the Liquidation Budget without violating the DIP Credit Agreement. (DIP Credit Agreement § 6.8).

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13 Of this anticipated $8.10 million in costs over this thirteen week period, approximately (a) $4.03 million is related to salary for Remaining Employees, (b) $221,000 is related to payments to Remaining Employees under the Employee Retention Plan, (c) $2.98 million is related to operational expenses and (d) $878,000 is for hiring third party contractors for certain tasks.

14 All capitalized terms used in this section and not otherwise defined in this Motion have the meanings given to them in the Final DIP Order.

15 Similarly, under paragraph 12(b) of the Final DIP Order, upon the commencement of the Winddown Plan (among other possible triggers) the Debtors, the DIP Agent and the Pre-Petition Revolving Agent are required to work together in good faith to develop the Liquidation Budget. The Debtors' negotiations with the Pre-Petition Revolving Agent are described in greater detail below.

44. Accordingly, the Debtors have consulted and negotiated with the DIP Agent and have developed a 13-week cash flow Liquidation Budget, which is attached hereto as Exhibit F.[16] The DIP Agent has not committed to the Debtors' use of their cash collateral past the 13-week Liquidation Budget. As provided for in paragraph 12(a) of the Final DIP Order, however, the Debtors contemplate that the Liquidation Budget, like the Budget (as defined in the DIP Credit Agreement and pursuant to which the Debtors have operated throughout these cases) will be a rolling 13-week budget that will be updated monthly after negotiations with the DIP Agent, and that such updated monthly Liquidation Budgets, as they are agreed upon, will authorize the Debtors to make disbursements set forth therein. In addition, the variances from the Budget permitted under the Final DIP Order shall continue to apply to the Liquidation Budget.

45. Among other things, the initial Liquidation Budget contemplates and reflects using cash collateral and borrowings under the DIP Credit Agreement to provide funding for the initiation of the Winddown Plan (as described in this Motion) during the 13-week period covered thereby. The current 13-week Liquidation Budget provides adequate funds for the Debtors to: (a) provide a pay down of all of the $45 million of ABL Pre-Petition Indebtedness as asset sales permit and as set forth in the Liquidation Budget; (b) pay the Winddown-related administrative expenses that arise from and after the commencement of the Winddown, as specified in the Liquidation Budget; and (c) pay accrued ordinary course administrative expenses that are specified in the Liquidation Budget, such as accrued wages and benefits for hours worked prior to the commencement of the Winddown, sales taxes, utility payments and certain other amounts.

[16] Certain elements of the Liquidation Budget have been adjusted as described in footnote **[17]** below.

46. As part of the agreement between the Debtors and the DIP Agent regarding the Liquidation Budget, the Debtors have agreed that they will seek specific authorization from the DIP Agent prior to paying certain claims. In particular, with respect to the category "Other Pre-Liquidation Expenses" within the Liquidation Budget, the Debtors will pay claims within this category only after consulting with and obtaining the consent of the DIP Agent. Further, while certain administrative claims will be paid under the Liquidation Budget, the Liquidation Budget does not include provision for payment of all of the administrative claims that have accrued against the Debtors' estates to date. The DIP Agent and certain of the Debtors' prepetition secured lenders have advised that they cannot at this time commit to the payment of all accrued administrative expense claims. Only after significant assets have been sold and proceeds realized will the parties be in a position to determine whether or not administrative claims will be paid in full. It is possible, however, that these estates will prove to be administratively insolvent.

47. While the Debtors expect that the liquidation of their assets will generate sufficient proceeds to pay those administrative claims that are included within the Liquidation Budget,[17] given the time it will take to liquidate assets, cash may not be available to pay included claims as they become due. In an instance where the Liquidation Budget provides for and permits payment of a claim, and the Debtors intend to pay such claim, but lack current liquidity necessary to make the payment, the Debtors propose to send notice in the form attached hereto as Exhibit G to such claimant stating that payment of such claim will be delayed for up to 90 days (subject to further extension by the Debtors with Court approval) from the date of the notice (the "Payment

17 The Liquidation Budget currently contains line items within which certain claims ultimately may be disputed by the Debtors. The inclusion of an item in the Liquidation Budget does not represent a commitment on the part of the Debtors to pay such amount — it simply limits the Debtors from paying more than the budgeted amount (plus any permitted variation) without obtaining additional lender consent. Nothing in the Liquidation Budget or this Motion is intended as, or should be deemed or construed as, an admission by the Debtors of the validity of any liability reflected on the Liquidation Budget. The Debtors expressly reserve all of their rights to dispute the validity of line items tentatively included within the Liquidation Budget.

Grace Period"). Until the expiration of the Payment Grace Period, such claimants shall not be permitted to seek relief from this Court for the immediate payment of their administrative claim(s). If, however, the claimant remains unpaid at the expiration of the Payment Grace Period, the claimant shall be permitted to seek relief from the Court under section 503 of the Bankruptcy Code.

48. Consistent with paragraph 12(b) of the Final DIP Order, the Debtors have also had discussions with the Pre-Petition Revolving Agent about the form of the Liquidation Budget but, as of the date of this Motion, have not reached agreement. Therefore, by this Motion, the Debtors are requesting the Court approve the Debtors' non-consensual use of the cash collateral of the ABL Lenders.

49. Under paragraph 26 of the Final DIP Order, the Strikes may constitute a "Cash Collateral Liquidation Event," triggering a requirement that "all collections received by the Debtors from the Revolving Priority Collateral shall be immediately applied to the ABL Pre-Petition Indebtedness to effectuate a reduction … of such ABL Pre-Petition Indebtedness." (Final DIP Order ¶ 26). However, the Final DIP Order also specifies that the timing and method of such payment will be negotiated by the Debtors, the DIP Agent and the Pre-Petition Revolving Agent. (See Final DIP Order ¶ 26) (providing that "[u]pon a Cash Collateral Liquidation Event … the Debtors, the DIP Agent and the Pre-Petition Revolving Agent shall work together in good faith to adjust the Budget to reflect the change in circumstances, and the Debtors, the DIP Agent and the Pre-Petition Revolving Agent shall work together in good faith to effectuate the Revolver Paydown"). An immediate dollar-for-dollar application to the ABL Pre-Petition Indebtedness as the Revolving Priority Collateral is liquidated would leave the Debtors with insufficient funds to effectuate the Winddown Plan (including paying the employees that are collecting and liquidating the Revolving Priority Collateral). Therefore, the Liquidation Budget

provides for the payment of the ABL Pre-Petition Indebtedness in two installments as follows: (a) $2.5 million in Week 8 of the Liquidation Budget; and (b) $42.5 million in Week 12 of the Liquidation Budget.

50. In order to provide assurances to the ABL Lenders that they will be adequately protected during the Winddown, the DIP Agent, on behalf of the Requisite DIP Lenders, and the Pre-Petition First Lien Agent, on behalf of the First Lien Term Loan Lenders, have agreed to provide the Pre-Petition Revolving Agent, for itself and for the benefit of the ABL Lenders, with further adequate protection. Specifically, the DIP Agent, on behalf of the Requisite DIP Lenders, and the Pre-Petition First Lien Agent, on behalf of the First Lien Term Loan Lenders, have agreed to provide that the ABL Adequate Protection Liens of the Pre-Petition Revolving Agent, for itself and for the benefit of the ABL Lenders, on the First Lien Term Loan Priority Collateral to secure principal, interest and fees shall be senior to the DIP Liens and all Pre-Petition Liens thereon to the extent of any diminution of the Revolving Priority Collateral as the result of the Debtors' continued use of Cash Collateral constituting proceeds of Revolving Priority Collateral (e.g., accounts receivable and inventory) during the Winddown.[18] In addition, as shown in the Liquidation Budget, the ABL Lenders will receive payments from the net cash proceeds of the sale of the First Lien Term Loan Priority Collateral prior to any payments being made from such proceeds to the DIP Lenders, the First Lien Term Loan Lenders, the Third Lien Term Loan Lenders or the Pre-Petition Fourth Lien Parties (other than interest payments to the DIP Lenders and payment of other adequate protection required by the Final DIP Order). As a result of the consent of the DIP Agent and the Pre-Petition First Lien Agent to the modification to

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18 The Pre-Petition Third Lien Agent and the Pre-Petition Fourth Lien Trustee have also consented to such reordering of the lien priorities under the terms of Final DIP Order.

the DIP Credit Agreement and the Final DIP Order, the ABL Lenders will be adequately protected.

51. The Debtors are still hopeful that they might achieve a consensual agreement with the Pre-Petition Revolving Agent prior to the hearing on this matter. In the event that such agreement is not achieved, however, by this Motion the Debtors are requesting that the Court authorize the Debtors' non-consensual use of the ABL Lenders' cash collateral in accordance with the terms of the Liquidation Budget. The Debtors believe that, with the amendment to the DIP Credit Agreement and the Final DIP Order proposed above, the ABL Lenders have sufficient adequate protection to justify such non-consensual use until asset sales permit the ABL Lenders to be paid in full.

Further Modifications to Final DIP Order and DIP Credit Agreement

52. As a corollary to the above request, the Debtors are also seeking two changes to the covenants set forth in the Final DIP Order, as these covenants are rendered unnecessary in light of the additional adequate protection being provided to the Pre-Petition Revolving Agent, for itself and for the benefit of the ABL Lenders. In particular, the Debtors seek relief from the covenant set forth in paragraph 23(a), which requires the Debtors to maintain a "Total Borrowing Base Availability" of a specified amount. The covenant, in essence, requires the Debtors to maintain minimum levels of accounts receivable and inventory. Because the Debtors will be seeking to liquidate all of their accounts receivable and inventory during the initial weeks and months of the Winddown and will not be replenishing them through operations, the Debtors would expect that "Total Borrowing Base Availability" will decrease over time and they might breach this covenant early in the Winddown process. Similarly, the Debtors seek to be relieved of the Revolver Paydown obligations of paragraph 26 of the Final DIP Order. That paragraph requires paydowns of the ABL Pre-Petition Indebtedness in the event of a winddown,

significant workforce reduction or material labor disruptions. Providing relief from these covenants is appropriate because the adequate protection being proposed above directly addresses these issues. The additional adequate protection liens being provided to the Pre-Petition Revolving Agent, for itself and for the benefit of the ABL Lenders, on collateral of a value in the hundreds of millions of dollars is more than sufficient adequate protection for any diminution in the value of Revolving Priority Collateral in light of the $45 million principal amount of the ABL Pre-Petition Indebtedness. Accordingly, there is no need to require the maintenance of minimum collateral levels or to require automatic paydowns of the ABL Pre-Petition Indebtedness.

53. Likewise, by this Motion, the Debtors are also seeking approval of a seventh amendment to the DIP Credit Agreement (the "Seventh Amendment"), substantially in the form attached hereto as Exhibit H. Like the Final DIP Order, the DIP Credit Agreement contains certain provisions that need to be revised given the Debtors' change in circumstances and to ensure the Debtors continue to have the ability to borrow funds under the terms of the DIP Credit Agreement. Amendments to the DIP Credit Agreement are authorized under paragraph 29 of the Final DIP Order so long as notice and an opportunity to object is provided to certain parties in interest (which notice is being provided by the filing of this Motion). Finally, because the changes are beneficial to the Debtors and are being done with the consent of the DIP Agent, the Debtors submit that these modifications are entirely appropriate under sections 361, 363 and 364 of the Bankruptcy Code.

54. The Seventh Amendment to the DIP Credit Agreement will, among other things, (a) permit the Debtors to access the full amount of the $75 million loan advanced to the Debtors pursuant to DIP Credit Agreement during the Winddown, (b) eliminate the Chapter 11 Milestones related to a plan of reorganization process and (c) make certain other changes to ensure the Debtors do not lose access to the funding pursuant to the terms of the DIP Credit

Agreement as a result of the implementation of the Winddown Plan. These modifications are plainly beneficial to the Debtors and should thus be approved..

<u>The Employee Retention Plan and Senior Management Incentive Plan</u>

55. As described above, the primary purpose of the Winddown is to maximize the value of the Debtors' assets. To accomplish this objective, it is imperative that the Debtors retain the Non-Senior Management Employees and incentivize the Senior Management Employees, in each case, to implement and effectuate the Winddown Plan. The success of the Winddown Plan will depend on the Debtors' ability to retain Non-Senior Management Employees who (a) have a valuable institutional knowledge of the Debtors' businesses and (b) in many instances, specialized knowledge and skills that may be highly desirable and marketable to other employers. Given the absence of any expectation of long-term employment with the Debtors, the Debtors' Non-Senior Management Employees will be understandably reluctant to forgo the search for alternative employment (or offers from other employers) during the period when the Debtors require their services. The success of the Winddown Plan will also depend on the Debtors' ability to incentivize Senior Management Employees who will need to take on additional job responsibilities to ensure timely completion and achievement of certain tasks and goals associated with the Winddown Plan. Such tasks and goals are complex and challenging, and therefore, it will be critical for the Debtors to motivate and encourage the Senior Management Employees to contribute their services to the Winddown Plan by providing appropriate incentives for such employees upon the completion and achievement of certain tasks and goals.

56. Accordingly, to induce the Non-Senior Management Employees to remain with the Debtors as needed during the Winddown, the Debtors propose to provide such employees with a one-time retention payment of 25% of the amount of wage compensation earned by the Non-Senior Management Employee from the date of this Motion until their

applicable tasks under the Winddown Plan are completed (the "Employee Retention Plan"). A comprehensive summary of the proposed Employee Retention Plan is attached hereto as Exhibit I. The total cost of the Employee Retention Plan is expected to be approximately $4.36 million.

57. In addition, in order to incentivize the Senior Management Employees to expeditiously and cost-effectively implement the Winddown, the Debtors propose to provide such employees with a one-time incentive payment (the "Baseline Incentive Payment") ranging from 25% to 75% of the employee's annual base compensation (the "Senior Management Incentive Plan"). Senior Management Employees have been split into eight groups under the Senior Management Incentive Plan. Depending upon the Senior Management Employee, either 75% or 85% of the Baseline Incentive Payment will be paid to the Senior Management Employee based upon the successful completion of various metrics for that employee's group. The remaining 25% or 15% of the Baseline Incentive Payment will be paid to the Senior Management Employee if the Debtors spend less than the budgeted amount in certain specified cost categories during the one-year period after commencement of the Winddown. Further, to incentivize the two Senior Management Employees that are Executive Vice Presidents (and thus will generally oversee the Winddown process) to perform better than the Liquidation Budget as much as possible, the Senior Management Incentive Plan includes the possibility for an additional award (the "Budget Outperformance Award") for those two Senior Management Employees. The Budget Outperformance Award will vary in size depending on the amount by which the Debtors perform better than the budgeted amounts over the first year of the Winddown with respect to certain specified cost categories. A description of the benchmarks and awards that comprise the Senior Management Incentive Plan is attached hereto as Exhibit J. The total amount of Baseline

Incentive Payments under the Senior Management Incentive Plan is expected to be between $0.00 and approximately $1.75 million.

58. Notably, payments under the Employee Retention Plan and the Senior Management Incentive Plan would replace, and not be in addition to, any payments the Debtors would have historically offered the Remaining Employees under their prepetition bonus and severance plans, and the amount of the potential incentive or retention payments are generally in line with market practice. The average payment per Non-Senior Management Employee under the Employee Retention Plan is below the market average of per-employee payments under retention plans approved in comparable recent chapter 11 cases. Likewise, the total potential cost of the Senior Management Incentive Plan closely approximates the mean total cost for incentive plans approved in comparable recent chapter 11 cases. In addition, total cash compensation[19] for all Senior Management Employees under the Senior Management Incentive Plan (assuming the achievement of all metrics by all groups and achievement of the budget targets) would be $4.02 million, or roughly equivalent to the average total cash compensation earned by such employees in fiscal years 2009-2011. Similarly, even assuming the achievement of all targets by all groups, total cash compensation for Senior Management Employees would be 18% less than the market median for non-bankrupt companies with significant bakery operations or in the food / beverage industry. The cost to the Debtors' estates of the Employee Retention Plan and the Senior Management Incentive Plan is, thus, reasonable in light of the benefit gained by the Debtors' from the provision of services by the Remaining Employees. Finally, all Remaining Employees will be required to sign a general release of all claims against the Debtors and certain

19 Total cash compensation includes the potential Baseline Incentive Payments, but excludes the potential Budget Outperformance Award for the two Executive Vice Presidents who are included in the Senior Management Incentive Plan.

other parties as a condition to participating in either the Employee Retention Plan or the Senior Management Incentive Plan, as applicable.

59. A failure to retain the Non-Senior Management Employees that are necessary to implement the Winddown Plan would cause the Debtors to incur significant costs attempting to obtain replacements for those employees. This would hinder and delay the Winddown, thus imposing further costs upon the Debtors' estates (e.g., increased carrying costs for assets; increased employee costs; additional taxation) and would impair the value of the Debtors' assets to the detriment of all stakeholders. The continuity promised by the retention of such employees, on the other hand, promotes the success of the Winddown Plan. Further, incentivizing the Senior Management Employees to expeditiously and cost-effectively implement the Winddown and achieve the highest possible sale value for the Debtors' assets by setting appropriate targets for achievement will ultimately inure to the benefit of the Debtors' creditors. Accordingly, the Employee Retention Plan and the Senior Management Incentive Plan are critical elements of the Winddown Plan.

60. As set forth above, the Debtors are seeking interim and final orders with respect to this Motion. On an interim basis, the Debtors are only seeking Court approval to make payments under the Employee Retention Plan for awards that would accrue through the date of the final hearing on this Motion. The Debtors estimate that the award amount that would accrue through the date of the final hearing will be approximately $1.45 million, assuming a final hearing date no later than two weeks after the interim hearing. Such awards would be considered earned and would be paid even if the Court ultimately denies the relief sought hereunder on a final basis. The Debtors are not seeking relief under the Senior Management Incentive Plan on an interim basis.

The Use of Third Party Contractors

61. In certain circumstances, the Debtors contemplate the use of Third Party Contractors to complete certain tasks necessary to the Winddown Plan. For example, the Debtors anticipate that they may require: (a) various security personnel and barricade providers to secure the Debtors hundreds of locations across the country pending the preparation and disposition of such locations; (b) millwright labor to clean, repair, pack and preserve the Debtors' production equipment; (c) transportation/logistics personnel to coordinate the collection and transportation of, among other things, finished product inventory and miscellaneous handling equipment, as well as the aggregation of the Debtors' owned and leased vehicle fleet; (d) environmental consultants to address, among other things, issues related to water management (e.g., wastewater, stormwater and groundwater), air permits, asbestos, lead and refrigerants; (e) payroll services; (f) document management services; and (g) various temporary services.[20] A nonexclusive list of the Third Party Contractors that the Debtors currently contemplate utilizing is attached hereto as Exhibit K. Given the impending termination of the majority of the Debtors' workforce, the discrete nature of the tasks to be performed and the Debtors' need for professional expertise in certain critical areas (e.g., environmental consulting), the use of Third Party Contractors as proposed in the Winddown Plan is the most cost effective means of performing those functions under the Winddown Plan.[21]

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[20] This list is non-exclusive. To the extent the Debtors have the authority to hire certain professional parties under existing court orders, nothing in this Motion is intended to limit the Debtors' exercise of those rights during the Winddown.

[21] None of the Third Party Contractors will be performing services that rise to the level of requiring their retention by the Debtors pursuant to section 327 of the Bankruptcy Code. Generally, courts will find that an entity rises to the level of a "professional" that must be retained by a debtor under section 327 of the Bankruptcy Code if such entity (a) plays a "central role" in the administration of a debtor's estate or (b) is permitted to exercise discretion and autonomy in addressing the administration of a debtor's estate. See In re First Merchants Acceptance Corp., No. 97-1500, 1997 WL 873551, at *2 (D. Del. Dec. 15, 1997). Neither is the case with respect to the Third Party Contractors the Debtors intend to use in connection with the Winddown Plan.

Exculpation and Indemnification for Protected Persons

62. The Debtors recognize that the Winddown Plan, and the actions contemplated thereby, constitute events that could be challenged by various stakeholder constituencies interested in these chapter 11 cases. The Debtors further realize that, in such a potentially volatile environment, parties could seek to alter the Winddown Plan and/or increase their own recoveries to the possible detriment of other constituencies by, among other things, making threats or seeking to obtain leverage by initiating third party actions against one or more of the Protected Persons (collectively, the "Third Party Actions"). If this Motion is granted, such Third Party Actions would amount to a collateral attack on any order of this Court approving the Winddown Plan. Moreover, such actions might improperly influence the Protected Persons in the performance of their duties and distract them from their value-maximizing efforts.

63. Successful implementation of the Winddown Plan — and, indeed, the orderly conclusion of the Debtors' bankruptcy cases — is infeasible without a functioning board of directors and certain key officers and employees in place to implement and oversee the Winddown. Under these circumstances, it is unreasonable to expect the Protected Persons to participate in the Winddown if doing so has limited benefit to them but will subject them to potential personal liability. Accordingly, the Protected Persons — i.e., the individuals who developed and approved the Winddown Plan and/or will be charged with its implementation and oversight[22] — should be protected for any and all actions they have taken (or will take) in good faith, and any and all actions that they have refrained, or will refrain, from taking in good faith, to develop, approve, implement and/or oversee the Winddown Plan (the "Exculpation"). Further, the Exculpation should be enforced by the Court through the issuance of an injunction against the

22 The identities of the Protected Persons are set forth on Exhibit L attached hereto and incorporated herein by reference.

taking of such actions against the Protected Persons, and claims or causes of action challenging the foregoing should be enjoined (the "Injunction").

64. Despite the Exculpation and the Injunction, the Protected Persons may nevertheless become the targets of Third Party Actions, and may be required to incur costs in defense against such actions (including, but not limited to, defenses related to the Exculpation and Injunction). The articles of incorporation, by-laws or other constituent documents of the Debtors, and a newly-created trust (the "Trust") the funding for which the Debtors seek approval hereby,[23] generally provide for indemnification of the applicable Debtor's directors, officers and employees to the full extent permitted under the laws of their respective states of formation. As no provision for such claims is being made in the Liquidation Budget, the Protected Persons may, despite the Exculpation and Injunction, terminate their relationships with the Debtors to avoid the resulting risk of personal exposure for otherwise indemnifiable losses on exculpated and enjoined claims. The Trust and the Debtors' directors' and officers' insurance policies are intended to provide the Protected Persons with sufficient comfort to permit them to remain employed by the Debtors' estates and focus on the task of implementing the Winddown Plan.

Expedited Contract Rejection Procedures

65. In connection with the Winddown, the Debtors will be required to reject the vast majority of their executory contracts and unexpired leases. The Debtors are in the process of identifying a number of executory contracts and unexpired leases that should be immediately rejected (collectively, the "Immediate Rejection Contracts") as they are no longer required as the Debtors are not actively operating their businesses. The Debtors expect that they

[23] The Liquidation Budget attached to this Motion provides for the funding of the Trust.

will soon file separate motions seeking the Court's approval of the rejection of the Immediate Rejection Contracts.

66. In addition, the Debtors anticipate that they will need to reject a number of additional executory contracts and unexpired leases (collectively, the "Future Rejected Contracts") over the course of the Winddown. In order to minimize (a) any potential administrative expense claims associated with a Future Rejected Contract and (b) costs associated with the necessity of rejecting Future Rejected Contracts by separate motion, the Debtors propose the following procedures (the "Expedited Contract Rejection Procedures") to effect the expedited rejection of any Future Rejected Contract:

- After one of the Debtors determines to reject a Future Rejected Contract (the "Proposed Rejection"), the applicable Debtor will send a notice describing the proposed rejection and the proposed effective date thereof (which proposed effective date will be no earlier than the date of the Rejection Notice (as defined below)), substantially in the form attached hereto as Exhibit M, via overnight delivery service, facsimile or email (if available), to the nondebtor party to the Future Rejected Contract (the "Rejection Notice"), with a copy to the following parties (collectively with the non-Debtor party to the Future Rejected Contract, the "Contract Notice Parties"): (a) counsel to the Creditors' Committee; (b) counsel to the DIP Agent; (c) counsel to the Pre-Petition Revolving Agent; and (d) the U.S. Trustee.

- Contract Notice Parties (other than the U.S. Trustee) will have five business days from the date of service (the "Notice Period") to object to the Proposed Rejection.

- Any objections to a Proposed Rejection (an "Objection") must be in writing, filed with the Court and served on the other Contract Notice Parties and counsel to the Debtors so as to be *received* prior to the expiration of the Notice Period. Each Objection must state with specificity the grounds for objecting to the Proposed Rejection.

- If no Objections are properly asserted prior to the expiration of the Notice Period, the Debtors will be authorized, without further notice and without further Court order, to reject the Future Rejected Contract, effective as of the date identified in the Rejection Notice.

- If an Objection to a Proposed Rejection is properly filed and served, the Proposed Rejection may not proceed absent withdrawal of the Objection or the entry of an order of the Court specifically approving the Proposed Rejection.

- Any Objection may be resolved without a hearing by an order of the Court submitted on a consensual basis by the applicable Debtor or Debtors and the objecting party(ies).

- If an Objection is not resolved on a consensual basis, the applicable Debtor or Debtors or the objecting party(ies) may schedule the Proposed Rejection and the Objection for hearing at the next available omnibus hearing date in these cases by giving at least seven days' written notice of the hearing to each of the Contract Notice Parties.

- On the 20th day of each month, the Debtors shall file with the Court and serve upon each of the Contract Notice Parties a notice that identifies the Future Rejected Contracts that were rejected pursuant to the foregoing procedures during the preceding month. If no Future Rejected Contracts are rejected in a given month, no monthly notice need be filed.

67. The Debtors believe that the Expedited Contract Rejection Procedures will provide sufficient notice and opportunity to object to the Contract Notice Parties, while preserving precious resources of the Debtors' estates and facilitating the prompt winddown of the Debtors' businesses. Because the implementation of the Winddown Plan ultimately will obviate the Debtors' need for all executory contracts and unexpired leases, the Debtors submit that their future determinations to reject the Future Rejected Contracts as the Winddown gradually renders such contracts and leases purposeless will generally represent a manifestly proper and non-controversial exercise of their business judgment made in the best interests of their estates and creditors.

ARGUMENT

Justifications for the Winddown Plan

68. Section 363(b) of the Bankruptcy Code provides that a debtor "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). A debtor must demonstrate a sound business justification for

a sale or use of assets outside the ordinary course of business. See, e.g., Licensing by Paolo, Inc. v. Sinatra (In re Gucci), 126 F.3d 380, 387 (2d Cir. 1997); Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1070 (2d Cir. 1983). Further, "[w]here the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct." Comm. Of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986). In addition, section 105(a) of the Bankruptcy Code confers upon the Court broad equitable powers to fashion relief in accordance with the policies underlying the Bankruptcy Code.[24]

69. As described herein, the Winddown Plan as a whole, as well as its various discrete elements, are supported by sound business justifications and should be approved by the Court. The Debtors have suffered significantly due to labor unrest in the past week. Since the Strikes were commenced on November 9, the Debtors estimate that, by November 19, they will have incurred between $7.5-9.5 million in losses in the aggregate, due to lost sales and increased costs of production. These losses and other factors, including increased vendor payment terms contraction, have resulted in a significant weakening of the Debtors' cash position and, if continued, would soon result in the Debtors completely running out of cash.

70. As described in detail above and in the Carroll Declaration, the Winddown Plan is the culmination of months of planning and analysis, developed using a comprehensive analysis of each of the Debtors' major operating segments and separate cost and timing assumptions for the winddown of the Debtors' Plants, Depots, Retail Stores and corporate

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[24] See, e.g., Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.), 25 F.3d 1132, 1136 (2d Cir. 1994) ("It is well settled that bankruptcy courts are courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process."); Chinichian v. Campolongo (In re Chinichian), 784 F.2d 1440, 1443 (9th Cir. 1986) ("Section 105 sets out the power of the bankruptcy court to fashion orders as necessary pursuant to the purposes of the Bankruptcy Code.").

functions. As is evident from the Winddown Plan, the cessation of the Debtors' operations is not a simple matter of turning off the lights and shutting the doors: baked goods and inventory must be sold or disposed of; production equipment must be properly cleaned, packed and prepared to preserve its value; owned and leased assets must be collected from across the nation and transferred to owned locations; and the Debtors' hundreds of Plants, Depots and Retail Stores must be staffed, cleaned and secured in advance of return or disposition. The full administration of the Debtors' chapter 11 estates requires, and will continue to require, intensive planning, staffing and funding to ensure a proper, safe and orderly winddown thereof. A freefall shutdown and fire sale liquidation would, among other things, irreparably damage production equipment, could result in the failure to dispose, or improper disposal, of waste materials and could force the Debtors to incur significant additional administrative expenses. These consequences would dissipate the value of the Debtors' assets and harm creditor recoveries in these chapter 11 cases.

71. The responsible and orderly process contemplated by the Winddown Plan avoids these harsh consequences, thus preventing the further devaluation of creditor recoveries and promoting public safety. The Debtors submit that the Winddown Plan represents the best possible outcome to be achieved in the wake of a catastrophic event for the Debtors and their employees, business partners and creditors.

72. For these reasons, the implementation of the Winddown Plan — and each of the constituent elements thereof — represents a sound exercise of the Debtors' business judgment and effectuates the general policy of the Bankruptcy Code to maximize estate value for the benefit of all stakeholders.

Justifications for Approving the Liquidation Budget
<u>and the Debtors' Non-Consensual Use of Cash Collateral</u>[25]

73. As described above, in accordance with the terms of the DIP Credit Agreement, the Debtors and the DIP Agent have agreed to the Liquidation Budget.[26] Under paragraph 12(b) of the Final DIP Order, upon the occurrence of a Liquidation Event or a Cash Collateral Liquidation Event (as defined in the DIP Credit Agreement and the Final DIP Order, respectively), the Debtors, the DIP Agent and the Pre-Petition Revolving Agent are required to "cooperate in good faith to adjust the Budget to reflect the change in circumstances … in accordance with the DIP Credit Agreement and paragraph 26 [of the Final DIP Order]."[27] After agreeing on the Liquidation Budget, such budget becomes the "Budget" for purposes of the DIP Credit Agreement and the Final DIP Order. (<u>See</u> DIP Credit Agreement § 5.17; Final DIP Order ¶ 12(b)). Further, pursuant to the terms of the DIP Credit Agreement and the Final DIP Order, the Debtors are (a) only permitted to use borrowings under the DIP Credit Agreement and their secured lenders' cash collateral in accordance with the terms of the Budget or the Liquidation Budget, as the case may be, and (b) without the prior written consent of the DIP Agent, the Pre-Petition Revolving Agent and the Pre-Petition First Lien Agent, cannot make any payment in settlement or satisfaction of any administrative or other claim, unless in compliance with the

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25 All capitalized terms used in this section and not otherwise defined in this Motion have the meanings given to them in the Final DIP Order.

26 The terms of the Final DIP Order preclude the Debtors from seeking to charge against or recover expenses from their secured lenders' collateral without such lenders' consent, whether under section 506(c) of the Bankruptcy Code or under any other theory. (<u>See</u> Final DIP Order ¶ 13).

27 As noted above, the Strikes constitute a Liquidation Event under the terms of the DIP Credit Agreement and a Cash Collateral Liquidation Event under the terms of the Final DIP Order. (<u>See</u> DIP Credit Agreement § 1.1; Final DIP Order ¶ 26(d)).

Budget or the Liquidation Budget, as the case may be. (See DIP Credit Agreement §§ 5.17 and 6.19(d); Final DIP Order ¶¶ 14 and 22).[28]

74. The Debtors require access to cash under the DIP Credit Agreement to survive during the Winddown. In the opening weeks of the Winddown, it is anticipated that the Debtors' expenses will temporarily exceed the proceeds from the liquidation of the Debtors' assets. During this time, the only source of funding for the Debtors is borrowing under the DIP Credit Agreement and cash collateral, including proceeds of collateral liquidated during this period. If the Liquidation Budget is not approved in its present form, and payments to the ABL Lenders are required sooner, the Debtors will have insufficient funds under the DIP Credit Agreement to pay essential Winddown expenses. Because the Pre-Petition Revolving Agent has not yet agreed to the Liquidation Budget, by this Motion the Debtors are requesting that the Court approve the non-consensual use of the ABL Lenders' cash collateral in accordance with the terms of the Liquidation Budget until such time as the ABL Pre-Petition Indebtedness is paid in full.

75. As noted above, the DIP Credit Agreement and the Final DIP Order will be amended to provide that the ABL Adequate Protection Liens of the Pre-Petition Revolving Agent, for itself and for the benefit of the ABL Lenders, on the First Lien Term Loan Priority Collateral shall be senior to the DIP Liens and all Pre-Petition Liens thereon to the extent of any diminution of the Revolving Priority Collateral as the result of the Debtors' continued use of Cash Collateral constituting proceeds of Revolving Priority Collateral (e.g., accounts receivable and inventory) during the Winddown. In addition, as shown in the Liquidation Budget, the ABL Lenders will

[28] Specifically, paragraph 22 of the Final DIP Order provides that "[n]otwithstanding anything herein or in any other order by this Court to the contrary, without the prior written consent of the DIP Agent, the Pre-Petition Revolving Agent and the Pre-Petition First Lien Agent, none of the DIP Obligations, the Cash Collateral, Collateral or the Carve Out may be used for the following purposes: ... (iv) to make any payment in settlement or satisfaction of any pre-petition or administrative claim, unless in compliance with the covenants related to the Budget (as set forth herein or in the DIP Credit Agreement) ...." (Final DIP Order ¶ 22).

receive payments from the net cash proceeds of the sale of the First Lien Term Loan Priority Collateral prior to any payments being made from such proceeds to the DIP Lenders, the First Lien Term Loan Lenders, the Third Lien Term Loan Lenders or the Pre-Petition Fourth Lien Parties (other than interest payments to the DIP Lenders and payment of other adequate protection required by the Final DIP Order). Therefore, even though it is anticipated that much of the Revolving Priority Collateral will be liquidated prior to the ABL Pre-Petition Indebtedness being paid in full, the ABL Lenders will be first in priority for payment from the proceeds of the sale of First Lien Term Loan Priority Collateral, which is worth well over $45 million. As such, the Debtors submit that the ABL Lenders are being adequately protected to justify the Debtors' non-consensual use of their cash collateral until such time as they are paid. This adequate protection similarly justifies providing the Debtors with relief from restrictive covenants of the Final DIP Order that did not contemplate this additional form of valuable adequate protection.

76. In considering whether to authorize the use of cash collateral, a court must find that the interests of the holder of the secured claim are adequately protected if they do not consent to such use. See 11 U.S.C. § 363(e). The principal purpose of adequate protection is to safeguard the interests of the secured creditor in the collateral against diminution in the value of that interest postpetition. See In re 495 Cent. Park Ave. Corp., 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992) (stating that the goal of adequate protection is to safeguard the secured creditor from diminution in value of its interest during chapter 11).

77. There is a great deal of flexibility in terms of what may constitute adequate protection. MBank Dallas, N.A. v. O'Connor (In re O'Connor), 808 F.2d 1393, 1396-97 (10th Cir. 1987). Ultimately, adequate protection is determined on a case-by-case basis in light of the particular facts and circumstances presented. Id. (stating that "the courts have considered 'adequate protection' a concept which is to be decided flexibly on the proverbial 'case-by-case'

basis); In re 495 Cent. Park, 136 B.R. at 631 (stating that, although section 361 presents some specific illustrations of adequate protection, the statute is not exclusive and suggests a broad and flexible definition).

78. Among other options, adequate protection may be provided by granting a secured creditor "an additional or replacement lien to the extent that [the] stay, use, sale, lease or grant results in a decrease in the value of such entity's interest in such property." 11 U.S.C. § 361(2). It is black letter law that providing a creditor with first priority liens on additional collateral of a value in excess of any possible diminution in the value of such creditor's collateral is sufficient adequate protection. See In re Beker Indus. Corp., 58 B.R. 725, 741 (Bankr. S.D.N.Y. 1986) (holding that secured lender was adequately protected by virtue of receiving replacement liens); see also In re Polaroid Corp., 460 B.R. 740, 743-44 (B.A.P. 8th Cir. 2011) (affirming bankruptcy court's ruling that replacement lien provided sufficient adequate protection). In this instance, the ABL Lenders are receiving additional, first priority adequate protection liens on the First Lien Term Loan Priority Collateral as adequate protection for any diminution in the value, which collateral is worth well in excess of the ABL Pre-Petition Indebtedness. As such, by virtue of obtaining additional first priority liens, the ABL Lenders are more than adequately protected from any possible diminution in the value of their collateral.

79. As shown in the Liquidation Budget, the liquidation of the Revolving Priority Collateral is anticipated to generate cash of approximately $77 million in the first 10 weeks of the Winddown — more than 70% greater than the amount of outstanding ABL Pre-Petition Indebtedness. The Pre-Petition Revolving Agent, for itself and for the benefit of the ABL Lenders, will receive additional first priority ABL Adequate Protection Liens on First Lien Term Loan Priority Collateral for every dollar of cash proceeds generated from the liquidation of this collateral that is not paid towards the outstanding amount of the ABL Pre-Petition

Indebtedness. Thus, by virtue of the replacement, first priority ABL Adequate Protection Liens, the collateral position of the ABL Lenders will be preserved and maintained. Accordingly, the Court should approve the non-consensual use of the ABL Lenders' cash collateral as the Debtors' proceed to liquidate their estate in an orderly fashion and repay the balance of the ABL Pre-Petition Indebtedness in a timely manner. In addition, the Court should approve the proposed modifications to the covenants of the Final DIP Order and should approve the Seventh Amendment to the DIP Credit Agreement, as the requested changes are necessary and appropriate in light of the changed circumstances faced by the Debtors here.

Justifications for Relief from Certain Advance Notice Periods Contained in Government Regulations

80. Certain state and local government regulations that may be applicable to various of the Debtors' facilities impose, or purport to impose, certain advance notice periods — some of which can be as long as 60 days — before the Debtors would be permitted to take certain actions such as ceasing operations or terminating the employment of certain of their workers.[29] As is manifest from the description of the Winddown Plan, the immediate cessation of the Debtors' operations at various facilities is essential to preserving and maximizing the value of the Debtors' assets. Indeed, in light of the coordinated Strikes, the Debtors simply do not have the ability to continue to operate all their facilities and employ their employees at this time. Therefore, under these circumstances, it is both necessary and appropriate for the Court to waive compliance with any state or local statute, rule, ordinance or regulation requiring advance notice

[29] See, e.g., Cal. Labor Code § 1401 (West 2012) (requiring employers to provide at least 60 days' written notice to employees and certain other parties before the cessation of operations at a commercial facility that employs 75 or more persons); Kan. Stat. Ann. §§ 44-603, 44-616 (West 2012) (requiring employers involved in the manufacture, transportation or preparation of food products, among others, to apply to the state secretary of labor for approval before discontinuing business operations); Philadelphia Code § 9-1502 (10th ed. 2011) (requiring employers within the City of Philadelphia to provide at least 60 days' written notice to employees and certain other parties before ceasing operations).

of the closure of facilities or the termination of employment of employees (collectively, "Advance Notice Provisions").

81. The Debtors believe that the waiver of particularized state and local notice requirements is warranted because, as a factual matter, they have advised their employees throughout this process regarding the potential shutdown of their facilities. In fact, on May 3, 2012, July 18, 2012, September 5, 2012, October 5, 2012 and November 13, 2012, the Debtors sent notices to all of their hourly employees advising them of the potential shutdown of their facilities in the event that negotiations with the Debtors' unions were unsuccessful. These notices were designed to comply with the federal Worker Adjustment and Retraining Notification Act, with which the Debtors believe they have complied. Accordingly, the Debtors believe that ample notice has been provided in substance.

82. In fact, in light of the Debtors' compliance with federal statutes and the powers granted to bankruptcy courts over debtors, the preemption doctrine applies here. See Missouri v. United States Bankruptcy Court, 647 F.2d 768, 776 (8th Cir. 1981) (holding that an attempt to enforce state regulations governing the liquidation of grain warehouses directly conflicted with the bankruptcy court's control over property of the debtor's estate and, therefore, violated the automatic stay), cert. denied 454 U.S. 1162 (1982); Pereira v. United Jersey Bank, N.A., 201 B.R. 644, 678 (S.D.N.Y. 1996) (noting that "[c]ourts have found a variety of state statutory laws to be preempted by the Bankruptcy Code" and collecting cases); In re Old Carco LLC, 406 B.R. 180, 199-207 (Bankr. S.D.N.Y. 2009) (holding that the Bankruptcy Code preempted state automobile dealer protection statutes, including mandatory notice periods required under state law prior to the termination of automobile dealership agreements); see also In re Dial-A-Mattress Operating Corp., No. 09-41966, 2009 WL 1851059, at *7 (Bankr. E.D.N.Y.

Jun. 24, 2009) (stating that "[s]tate or local laws are preempted where compliance with those laws would frustrate a liquidation" and collecting cases).

83. The requested waiver of the Advance Notice Provisions is narrowly tailored to facilitate the Winddown Plan and the time-sensitive nature of its implementation. Accordingly, the relief from the Advance Notice Provisions is reasonable, necessary and appropriate under the circumstances and should be approved.

Justifications for Authorizing the Sale of
<u>Excess Ingredients and Excess Packaging</u>

84. The return of the Debtors' Excess Ingredients and Excess Packaging to suppliers, or the sale of such materials to third parties, is supported by sound business justifications and thus satisfies section 363 of the Bankruptcy Code.

85. At the outset of the Winddown, the Debtors will attempt to return Excess Ingredients and Excess Packaging to their original suppliers. While few of the Excess Ingredients are highly perishable, many have a relatively limited shelf life. The original suppliers know both the quality and remaining shelf-life of the Debtors' Excess Ingredients. Also, in most instances, the original suppliers of Excess Ingredients and Excess Packaging have a preexisting transportation system that can be used to effectuate the return of such materials without the need for the Debtors to engage third-party logistics and transport services. The Debtors anticipate that the return of raw materials to the original suppliers will result in a partial to full refund of the original purchase price for such materials and/or a reduction or elimination of any valid administrative expense claims of such suppliers.

86. Where feasible and/or in the event a supplier refuses, and has valid legal grounds to refuse, to accept the return of Excess Ingredients or Excess Packaging, the Debtors will explore and, where prudent, seek to consummate, immediate sales to third parties to ensure

the maximization of value for their estates. Given the shelf-life of Excess Ingredients as well as the tightly-controlled ingredient recipes used by food processors, the Debtors anticipate that these sales will need to be negotiated quickly and that many third party sales will need to be at a discount, or even for scrap (i.e., for animal feedstock). Nevertheless, even discounted or scrap recoveries will rid the Debtors of the need to store such ingredients in locations that the Debtors desire to sell.

87. Because the Debtors (a) are not in the business of selling such raw materials, (b) have no sales force to effectuate such sales and (c) do not have the preexisting transportation infrastructure to deliver Excess Ingredients and Excess Packaging to third parties, the Debtors may, on a case-by-case basis, hire third party liquidators to assist with such sales. Such liquidators likely would be hired and paid in accordance with the terms of the De Minimis Asset Sale Order.

88. While the aggregate value of the Excess Ingredients and Excess Packaging is approximately $30.3 million, these materials are distributed throughout the Debtors' plants and warehouses. Accordingly, the Debtors believe that most of the returns or sales will be for less than $750,000 (per individual sale), which is the level that the Debtors can undertake sales with no advance notice to parties in interest (other than the Debtors' DIP Lenders) under the existing De Minimis Asset Sale Order. To ensure that the Debtors are maximizing value to their estates, the Debtors will continue to comply with their consent obligations under the DIP Credit Agreement with respect to asset sales and, for any sales for more than $750,000, will consult additionally with the Creditors' Committee prior to consummating the sale.

89. In either case, whether the Debtors are able to return Excess Ingredients and Excess Packaging to the original suppliers, or the Debtors are able to consummate sales to

third parties, the above-described processes are designed to maximize value for the Debtors' estates and should, therefore, be approved as a sound exercise of the Debtors' business judgment.

Authorization for GOB Sales at Retail Stores

90. As described above, as part of the Winddown, the Debtors plan to conduct immediate GOB Sales at their Retail Stores to liquidate their Perishable Inventory. Such immediate GOB Sales are supported by sound business justifications and are necessary to maximize the value of Perishable Inventory. The failure to immediately sell the Debtors' Perishable Inventory will result in the complete loss of the value of such goods. Accordingly, the GOB Sales should be permitted pursuant to section 363(b) of the Bankruptcy Code. Courts in this District frequently authorize going-out-of-business and store closing sales pursuant to section 363(b) of the Bankruptcy Code where necessary to maximize value for a debtor's estate. See, e.g., In re Betsey Johnson LLC, Case No. 12-11732 (JMP) (Bankr. S.D.N.Y. May 10, 2012) (authorizing debtor to conduct going-out-of-business sales); In re Steve & Barry's Manhattan LLC, Case No. 08-12579 (ALG) (Bankr. S.D.N.Y. Aug. 22, 2008) (authorizing store closing sales); In re Finlay Enters., Inc., Case No. 09-14873 (Bankr. S.D.N.Y. Sept. 25, 2009) (same).[30]

91. In addition, Perishable Inventory should be sold free and clear of any existing liens, claims, interests or encumbrances pursuant to section 363(f) of the Bankruptcy Code. Among other things, section 363(f)(2) is satisfied because the DIP Lenders, who have liens on substantially all of the Debtors' assets, have consented to the Winddown, the Liquidation Budget and, therefore, the GOB Sales, and their liens will attach to the net proceeds of such sales. To the extent that other parties may have an interest in the Perishable Inventory, the Debtors believe one or more of the provisions of section 363(f) will be satisfied and that all parties will be

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30 Hard copies of the unreported orders cited in this Motion will be provided to the Court under separate cover.

protected by having any interests in Perishable Inventory attach to the net proceeds from the GOB Sales. For example, the Debtors believe that section 363(f)(5) is satisfied with respect to the Pre-Petition Revolving Agent and the ABL Lenders because such parties could be compelled to accept a money satisfaction of their interest. Moreover, as noted above, the Pre-Petition Agent, for itself and for the benefit of the ABL Lenders, is receiving additional ABL Adequate Protection Liens to the extent of any diminution in their value of their collateral.

92. Many state and local laws, statutes, rules and ordinances require special and cumbersome licenses and procedures for "going-out-of-business" or store closing sales. Such local ordinances and state laws would impose onerous and inconsistent burdens and limitations on the Debtors and would interfere with the successful implementation of the GOB Sales. Therefore, the Debtors request that the Court, pursuant to section 105(a) of the Bankruptcy Code, expressly authorize the Debtors to conduct the GOB Sales without complying with these non-bankruptcy law requirements. Such relief is consistently granted by courts in this District in the context of liquidation and store-closing sales. See, e.g., In re Betsey Johnson LLC, Case No. 12-11732 (JMP) (Bankr. S.D.N.Y. May 10, 2012); In re Steve & Barry's Manhattan LLC, Case No. 08-12579 (ALG) (Bankr. S.D.N.Y. Aug. 22, 2008); In re Finlay Enters., Inc., Case No. 09-14873 (Bankr. S.D.N.Y. Sept. 25, 2009).

93. Further, certain of the leases for the Debtors' Retail Stores may contain provisions purporting to restrict or prohibit the Debtors from conducting going-out-of-business, store closing, liquidation or similar sales at such leased locations. Such provisions should be deemed unenforceable with respect to the GOB Sales. See, e.g., In re R.H. Macy & Co., Inc., 170 B.R. 69, 77 (Bankr. S.D.N.Y. 1992) (holding that restrictive lease provisions were unenforceable when a debtor sought to conduct a going-out-of-business sale while in bankruptcy); In re Ames Dept. Stores, Inc., 136 B.R. 357, 359 (Bankr. S.D.N.Y. 1992) ("[T]o enforce the

anti-GOB sale clause of the Lease would contravene overriding federal policy requiring [d]ebtor to maximize estate assets by imposing additional constraints never envisioned by Congress.").

94. Finally, to the extent that the Debtors are unable to sell Perishable Inventory during the GOB Sales, the Debtors request authority to abandon such unsold Perishable Inventory pursuant to section 554(a) of the Bankruptcy Code. Section 554(a) of the Bankruptcy Code provides that a debtor-in-possession "may abandon property of the estate that is burdensome to the estate or is of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a). The debtor-in-possession is afforded significant discretion in determining the value and benefits of particular property for purposes of the decision to abandon it. In re Interpictures Inc., 168 B.R. 526, 535 (Bankr. E.D.N.Y. 1994) ("abandonment is in the discretion of the [debtor], bounded only by that of the court"). This right to abandon exists so that "burdensome property" can be removed and the "best interests of the estate" will be furthered. South Chicago Disposal, Inc. v. LTV Steel Co., Inc. (In re Chateaugay Corp.), 130 B.R. 162, 166 (S.D.N.Y. 1991) (quoting In re New York Investors Mutual Group, Inc., 143 F. Supp. 51, 54 (S.D.N.Y. 1956)). If Perishable Inventory is not sold during the GOB Sales, most (if not all) will spoil and become unsafe for consumption. Accordingly, such Perishable Inventory, once expired, will become valueless to the Debtors. Therefore, to the extent Perishable Inventory is not sold during the GOB Sales, the Debtors should be authorized to abandon and destroy or otherwise properly dispose of such expired Perishable Inventory.

Justification for Implementation of the Payment Grace Period

95. The Court has the authority to approve the Payment Grace Period for those ordinary course administrative claims that the Debtors may not be able to pay immediately when they are due. "The timing of distributions for administrative expense payments, other than at the close of [a bankruptcy] case, is within the discretion of the [bankruptcy] [c]ourt." In re King,

392 B.R. 62, 67-68 (Bankr. S.D.N.Y. 2008); see also Local 144 Hosp. Welfare Fund v. Baptist Med. Ctr. of New York , Inc. (In re Baptist Med. Ctr. of New York, Inc.), 781 F.2d 973, 974 (2d Cir. 1986). Among other factors, courts have considered the Bankruptcy Code's goal of an orderly and equal distribution among creditors, the need to prevent a race to a debtor's assets, the particular needs of administrative claimants and the length and expense of the bankruptcy case's administration. See In re Shihai, 392 B.R. 62, 68-69 (Bankr. S.D.N.Y. 2008); In re HQ Global Holdings, Inc., 282 B.R. 169, 173 (Bankr. D. Del. 2002).

96. In this instance, approving the Payment Grace Period will prevent a disorderly race by ordinary course administrative claimants seeking immediate payment of their claims where cash may temporarily be insufficient to satisfy them. Further, it is also unlikely that the proposed delay of 90 days will be unduly burdensome for claimants whose claims are specifically included within the Liquidation Budget. Accordingly, the Court should authorize the Debtors to implement the Payment Grace Period with respect to ordinary course administrative claims, the payment of which is specified in the Liquidation Budget.

Justifications for the Employee Retention Plan and the Senior Management Incentive Plan

97. As described in detail above, the Employee Retention Plan is critical to the Debtors' successful implementation of the Winddown Plan. The Employee Retention Plan is not applicable to any "insiders" (as such term is defined by section 101(31) of the Bankruptcy Code).[31] None of the Non-Senior Management Employees are corporate officers appointed by the Debtors' boards of directors, nor will any such employee exercise control over the Debtors. In evaluating whether any Non-Senior Management Employees were potentially insiders, the Debtors compared Non-Senior Management Employees to be retained under the Winddown Plan

[31] Section 101(31) of the Bankruptcy Code defines "insider" to include, among other things, "an officer of the debtor" and a "person in control of the debtor." 11 U.S.C. § 101(31).

with the non-insider employees for which the Court approved bonuses under either the Hostess Brands FY 2012 Variable Compensation Pay Plan (the "VCP Plan") or the other bonus payments previously approved by the Court.[32] Based on this analysis, the Debtors have determined that all Non-Senior Management Employees are either at an equivalent level or subordinate to the employees covered by such bonus plans. Thus, section 503(c)(1) of the Bankruptcy Code, which generally proscribes payments to "insiders" to induce their continued employment with a debtor, is not applicable to the Employee Retention Plan.[33]

98. Further, the Employee Retention Plan and the Senior Management Incentive Plan are consistent with section 503(c)(3) of the Bankruptcy Code. Section 503(c)(3) of the Bankruptcy Code generally permits payments to a debtor's employees outside the ordinary course of business if such payments are justified by "the facts and circumstances of the case." 11 U.S.C. § 503(c)(3). In this and other districts, courts have concluded that whether payments to employees are justified by the facts and circumstances of a case is to be determined by application of the business judgment rule. See In re Borders Grp., Inc., 453 B.R. 459, 473-74 (Bankr. S.D.N.Y. 2011); In re Dana Corp., 358 B.R. at 576 (describing five factors that courts may consider when determining whether the structure of a compensation proposal meets the "sound business judgment test" in accordance with section 503(c)(3) of the Bankruptcy Code); In re Global Home Prods., LLC, 369 B.R. 778, 783 (Bankr. D. Del. 2007) ("If [the proposed plans

32 See Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code, for an Order Authorizing the Debtors to Perform Under Certain Employee Incentive Plans in the Ordinary Course of Business (Docket No. 264) and Order Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code, Authorizing the Debtors to Perform Under Certain Employee Incentive Plans in the Ordinary Course of Business (Docket No. 813).

33 In addition, section 503(c)(1) of the Bankruptcy Code is not applicable to the Senior Management Incentive Plan because that plan is an incentive plan, not a retention plan, and thus is designed to "increase the value of the estate" by expeditiously and cost-effectively winding down the Debtors' businesses. In re Dana Corp., 358 B.R. 567, 584 (Bankr. S.D.N.Y. 2007).

are] intended to incentivize management, the analysis utilizes the more liberal business judgment review under § 363.").

99. In this instance, the Employee Retention Plan and the Senior Management Incentive Plan are both being implemented consistent with the exercise of the Debtors' sound business judgment. As an initial matter, the consent of many of the Debtors' secured lenders, whose cash collateral will fund the payments under these plans, demonstrates that key creditors concur with the Debtors' business judgment in this regard. In addition, as noted above, all Remaining Employees will be required to execute a general release of claims against the Debtors and certain other parties as a condition to participating in the Employee Retention Plan or Senior Management Incentive Plan, as applicable.

100. The Employee Retention Plan is critical to retaining those Non-Senior Management Employees that are needed to effectuate the Winddown Plan. The Debtors have already experienced significant difficulty in retaining key Non-Senior Management Employees as a result of the uncertainty surrounding their businesses. Attrition has accelerated since the bankruptcy filing, which has stressed the Debtors' businesses. Given the shutdown and liquidation of the Debtors' businesses contemplated by the Winddown Plan, it is anticipated that the Debtors' ability to retain approximately 3,200 of their key Non-Senior Management Employees will be significantly more difficult in the coming months.

101. During the Winddown, the Debtors can ill afford to lose additional Non-Senior Management Employees — employees who have the experience and institutional knowledge necessary to successfully implement the Winddown Plan. A failure to retain such Non-Senior Management Employees once the Winddown has commenced would cause the Debtors to incur significant costs attempting to obtain replacements for those employees. This would hinder and delay the Winddown Plan, thus imposing further costs upon the Debtors' estates

and would impair the value of the Debtors' assets to the detriment of all stakeholders. The continuity promoted, and the institutional knowledge preserved, by the retention of such employees, on the other hand, facilitates the success of the Winddown Plan.

102. The Senior Management Incentive Plan is designed to incentivize the Senior Management Employees to expeditiously and cost-effectively execute the Winddown Plan and control costs to maximize value for the Debtors' creditors. As demonstrated by the challenges and complexities associated with the Winddown Plan described in this Motion, the Winddown Plan has little precedent. Because of such challenges and complexities, it will be critical for the Debtors to motivate and encourage the Senior Management Employees to contribute their services to the Winddown Plan by providing appropriate incentives for such employees upon the completion and achievement of certain tasks and goals and if costs are kept below certain targeted amounts.

103. The metrics, including budget categories and targets, that will be used to determine whether payments will be made under the Senior Management Incentive Plan were developed after significant discussion and consultation with the Debtors' employees and have been designed to reward the Senior Management Employees only if they achieve positive results that will benefit creditors. These metrics will not be easy to achieve. Moreover, the Senior Management Incentive Plan is consistent with a number of other plans approved by courts in other chapter 11 cases. (See Imhoff Decl. Ex. 1). Finally, the Debtors believe that the Senior Management Incentive Plan is reasonable because, even if all of the metrics and budget targets are achieved, the payments made will still result in the Debtors' Senior Management Employees being paid less than employees with similar job responsibilities at companies with significant bakery operations or in the food/beverage industry, with a focus on production and retailing of food and beverage products.

104. Ultimately, the quick and cost effective wind down of the Debtors' businesses will preserve and protect the value of the Debtors' estates for the benefit of creditors. Accordingly, both the Employee Retention Plan and the Senior Management Incentive Plan should be approved pursuant to section 503(c)(3) of the Bankruptcy Code.

The Exculpation and Injunction are Supported by Precedent and Policy Considerations and Should be Approved

105. The authority to approve the Exculpation and Injunction derives from section 105(a) of the Bankruptcy Code. That section empowers a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the [Bankruptcy Code]." 11 U.S.C. § 105(a). Under relevant Second Circuit precedent, bankruptcy courts are empowered to issue injunctions to prevent actions "which might interfere in the rehabilitative process whether in a liquidation or in a reorganization case." Johns-Manville Corp. v. Asbestos Litig. Grp. (In re Johns-Manville Corp.), 40 B.R. 219, 226 (S.D.N.Y. 1984) (quoting 2 Collier on Bankruptcy ¶ 362.05 (15 ed. 1982)). Indeed, courts frequently utilize their equitable powers under section 105(a) to enjoin actions against non-debtors that would threaten a debtor's efforts to effect the orderly administration of its estate. See MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 94 (2d Cir. 1988) (finding that enjoining actions against the debtor's insurer that would interfere with the prospects for a "workable reorganization" was within the bankruptcy court's authority), cert. denied, 488 U.S. 868 (1988); see also In re Markos Gurnee P'ship, 182 B.R. 211, 222 (Bankr. N.D. Ill. 1995) (holding that it was within the court's authority to issue injunctions against actions that would "embarrass, burden, delay or otherwise impede" the bankruptcy proceedings), aff'd, 195 B.R. 380 (N.D. Ill. 1996).

106. In these situations, courts need only find that the issuance of the requested injunction "conform[s] to the objectives of the Bankruptcy Code." Homestead Holdings, Inc. v.

Broome & Wellington (In re PTI Holding Corp.), 346 B.R. 820, 825 (Bankr. D. Nev. 2006) (quoting Beck v. Fort James Corp. (In re Crown Vantage, Inc.), 421 F.3d 963, 975 (9th Cir. 2005)); see Johns-Manville Corp. v. Asbestos Litig. Grp. (In re Johns-Manville Corp.), 26 B.R. 420, 425 (Bankr. S.D.N.Y. 1983) (stating that "[a] bankruptcy court may use its equitable powers to issue injunctive relief against proceedings in other courts when the bankruptcy court is satisfied that such a proceeding will either defeat or impair its jurisdiction with respect to a case pending before it"); In re Creative Cuisine, Inc., 96 B.R. 144, 147 (Bankr. N.D. Ill. 1989) (enjoining state court proceeding against debtor and debtor's principal where it was "necessary to ensure the orderly disposition of the debtor's estate and to protect the bankruptcy court's jurisdiction").

107. Here, the Court is being asked to approve the Winddown Plan pursuant to section 363(b) of the Bankruptcy Code. The key directors, officers and employees of the Debtors have developed and will implement the Winddown Plan with the blessing of the Court. As such, in aid of the grant of authority under section 363(b), the Court may, under section 105(a) of the Bankruptcy Code, grant the Exculpation and issue the Injunction to ensure the implementation of the Winddown Plan and the orderly disposition of the Debtors' assets in a value-maximizing process. Suits against the Protected Persons for designing and implementing the Winddown Plan would be nothing more than disguised attempts to attack this Court's order approving the Winddown Plan. Based upon just this rationale, other Courts have issued injunctions and granted similar relief. See Creative Cuisine, 96 B.R. at 148-49 (noting that because "a corporate debtor may only act through its agents, the same protection must be afforded to an operating officer of the debtor-in-possession acting in his official capacity" and because "[a] contrary result would subject debtor-in-possession officers to the risk of post-conversion claims and that risk would significantly hinder the reorganization process"); In re Caldor, Inc., Case No. 95 B 44080 (CB)

(Bankr. S.D.N.Y. Oct. 2, 2001), at ¶ 20 (enjoining claims against, among others, the debtors' directors and officers in connection with the winddown of the debtors' businesses); In re LTV Steel Co., Inc., Case No. 00-43866 (Bankr. N.D. Ohio Dec. 7, 2001), at ¶ 5 ("No person to whom notice of this order shall come shall take any action whatsoever which would embarrass, burden, delay or otherwise impede any person acting in good faith to implement the terms of this order, and in addition to any other remedy available to Debtor and any such individual, the Court will retain jurisdiction to determine if any such action constitutes contempt."). Under the same rationale employed in those cases, the Exculpation and the Injunction for the Protected Persons should be approved here. To hold otherwise would put the Protected Persons in the untenable position of being subject to potential liability for acting in accordance with an order of this Court.

Approval of the Expedited Contract Rejection Procedures

108. Section 365(a) of the Bankruptcy Code provides that a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease." 11 U.S.C. § 365(a). Courts routinely approve motions to assume, assume and assign or reject executory contracts or unexpired leases upon a showing that the debtor's decision to take such action will benefit the debtor's estate and is an exercise of sound business judgment. See Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1098 (2d Cir. 1993) (stating that section 365 of the Bankruptcy Code "permits the trustee or debtor-in-possession, subject to the approval of the bankruptcy court, to go through the inventory of executory contracts of the debtor and decide which ones it would be beneficial to adhere to and which ones it would be beneficial to reject."); see also NLRB v. Bildisco & Bildisco, 465 U.S. 513, 523 (1984) (stating that the traditional standard applied by courts to authorize the rejection of an executory contract is that of "business judgment"); In re Gucci, 193 B.R. 411, 415 (S.D.N.Y. 1996) ("A bankruptcy court reviewing a trustee's decision to assume or reject an executory contract should

apply its 'business judgment' to determine if it would be beneficial or burdensome to the estate to assume it.").

109. Courts generally will not second-guess a debtor's business judgment concerning the assumption or rejection of an executory contract or unexpired lease. See In re Balco Equities Ltd., Inc., 323 B.R. 85, 98 (Bankr. S.D.N.Y. 2005) ("A court 'should defer to a debtor's decision that rejection of a contract would be advantageous.'") (citing In re Sundial Asphalt Co., 147 B.R. 72, 84 (E.D.N.Y. 1992)); In re Riodizio, Inc., 204 B.R. 417, 424 (Bankr. S.D.N.Y. 1997) ("[A] court will ordinarily defer to the business judgment of the debtor's management"); accord Phar-Mor, Inc. v. Strouss Bldg. Assocs., 204 B.R. 948, 951-52 (Bankr. N.D. Ohio 1997) ("Whether an executory contract is 'favorable' or 'unfavorable' is left to the sound business judgment of the debtor . . . . Courts should generally defer to a debtor's decision whether to reject an executory contract."). The "business judgment" test is not a strict standard; it merely requires a showing that either assumption or rejection of the executory contract or unexpired lease will benefit the debtor's estate. See, e.g., Bregman v. Meehan (In re Meehan), 59 B.R. 380, 385 (E.D.N.Y. 1986) ("The business judgment test is a flexible one . . . . The primary issue under the business judgment test is whether rejection of the contract would benefit general unsecured creditors."); In re Helm, 335 B.R. 528, 538 (Bankr. S.D.N.Y. 2006) ("To meet the business judgment test, the debtor in possession must establish that rejection will benefit the estate."); Westbury Real Estate Ventures, Inc. v. Bradlees, Inc. (In re Bradlees Stores, Inc.), 194 B.R. 555, 558 n.1 (Bankr. S.D.N.Y. 1996) ("In reviewing a debtor's decision to assume or reject an executory contract, the court must examine the contract and circumstances and apply its best 'business judgment' to determine if the assumption or rejection would be beneficial or burdensome to the estate.").

110. Because the Future Rejected Contracts will be (a) generally economically unjustified in light of the Debtors' cessation of operations, (b) unnecessary to the Winddown and/or (c) simply unprofitable, the Debtors' obligations under the Future Rejected Contracts will impose a burden on their chapter 11 estates. The Debtors believe that maintaining the Future Rejected Contracts within the context of the Winddown would unnecessarily deplete the assets of their estates to the direct detriment of their creditors. Moreover, where Future Rejected Contracts were entered into at or above market rates, the Debtors believe that such agreements do not have any realizable value in the marketplace. Accordingly, rejection of the Future Rejected Contracts pursuant to section 365 of the Bankruptcy Code will be an exercise of the Debtors' sound business judgment and in the best interests of the Debtors' estates. Therefore, the Court should approve the Expedited Contract Rejection Procedures to obviate the need for the Debtors to incur the cost and expense of filing separate motions seeking the rejection of Future Rejected Contracts.

REQUEST FOR IMMEDIATE RELIEF AND WAIVER OF STAY

111. Given the pressing need to implement the Winddown Plan to preserve and protect the value of the Debtors' assets, the Debtors desire to effect such implementation immediately upon the entry of an interim order approving this Motion (the "Interim Order"). Accordingly, the Debtors hereby request that the Court, in the discretion provided to it under Rules 4001(b)(2) and 6004(h) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), immediately enter the Interim Order, waive the 14-day stay of such interim order and approve the Debtors' use of cash collateral in accordance with the terms of the Liquidation Budget pending a final hearing on the Motion. The Debtors submit that the exigency of their present circumstances, as described herein, warrants the entry of the Interim Order without further delay permitting the Debtors to immediately implement the Winddown Plan and pay the costs associated with the Winddown arising in the near term, pending a final hearing on this Motion.

Accordingly, the Debtors request that the Interim Order be entered and that procedures for the consideration of the Motion on a final basis be included in such order. Similarly, the Debtors submit that cause exists for waiving the stay imposed by Bankruptcy Rule 6004(h) to the extent it is applicable.

NOTICE

112. Pursuant to the Administrative Order, Pursuant to Rule 1015(c) of the Federal Rules of Bankruptcy Procedure, Establishing Case Management and Scheduling Procedures (Docket No. 371) (the "Case Management Order"), entered on February 21, 2012, notice of this Motion has been given to the parties identified on the Special Service List and the General Service List (as such terms are defined in the Case Management Order). The Debtors have also provided an abbreviated notice of this Motion to all of the Debtors' creditors that have filed proofs of claim in the Debtors' chapter 11 cases or whose claims are listed by the Debtors in their schedules of liabilities as undisputed, noncontingent and liquidated. The Debtors submit that no other or further notice need be provided.

WHEREFORE, the Debtors respectfully request that the Court enter interim and final orders, substantially in the forms attached hereto as Exhibit N and Exhibit O: (i) approving (A) the Winddown Plan, (B) the returns or sales of Excess Ingredients and Excess Packaging, (C) the Employee Retention Plan, (D) the Senior Management Incentive Plan, (E) the Debtors' use of Third Party Contractors as necessary to implement the Winddown Plan, (F) the Exculpation, the Injunction and the creation and funding of the Trust and (G) the Expedited Contract Rejection Procedures; (ii) authoring the Debtors' non-consensual use of cash collateral and approving modifications to the Final DIP Order and the Seventh Amendment; (iii) authorizing the Debtors to take any and all actions that are necessary in the exercise of their business judgment to implement the Winddown Plan; (iv) waiving the 14-day stay under Bankruptcy Rule 6004(h); and (v) granting such other and further relief as the Court may deem proper.

Dated: November 16, 2012
New York, New York

Respectfully submitted,

/s/ Corinne Ball

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