IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
ALSET OWNERS, LLC, *et al.*,[1]	:	Case No. 09-11960 (BLS)
	:	(Jointly Administered)
Debtors.	:	
	:	**Bid Procedures Hearing Date: 7/7/09 at 11:30 a.m. (EDT)**
	:	**Bid Procedures Objections Due: 6/30/09 at 4:00 p.m. (EDT)**
	:	**Sale Hearing and Sale Objections: To Be Determined**

MOTION OF DEBTORS FOR ENTRY OF ORDERS UNDER 11 U.S.C. §§ 105(a), 363, AND 365 AND FEDERAL RULES OF BANKRUPTCY PROCEDURE 2002, 6004, 6006 AND 9014 (I) (A) APPROVING BIDDING AND AUCTION PROCEDURES, AND BIDDING INCENTIVES FOR THE STALKING HORSE BIDDER; (B) APPROVING NOTICE PROCEDURES FOR THE SOLICITATION OF BIDS, AN AUCTION, AND THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (C) SCHEDULING AN AUCTION AND SALE HEARING FOR THE SALE OF SUBSTANTIALLY ALL OF DEBTORS' ASSETS; (II) APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS AND APPROVING THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (III) GRANTING RELATED RELIEF

Alset Owners, LLC and certain of its direct and indirect subsidiaries, the debtors and debtors in possession in the above-captioned cases (collectively, the "Debtors")[2], hereby file this motion (the "Motion") under sections 105(a), 363(b), (f), and (m), and 365 of title 11 of the United States Code (the "Bankruptcy Code"), Rules 2002, 6004, 6006, and 9014 of the Federal

[1] The Debtors and the last four digits of their respective tax identification numbers are: Alset Owners, LLC, a Delaware limited liability company (7520); Altes, LLC, a Delaware limited liability company (6927); Setla, LLC, a Delaware limited liability company (6752); and Checkers Michigan, LLC, a Delaware limited liability company (8016). The Debtors' service address is Altes, LLC/Setla, LLC, 1200 North Federal Highway, Suite 111-B, Boca Raton, FL 33432-2813.

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Purchase Agreement (as defined below).

Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 6004-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules") for entry of: (A) an order substantially in the form annexed as **Exhibit A** hereto that (i) approves bidding and auction procedures; (ii) approves bidding incentives including a breakup fee and an overbid amount; (iii) establishes a date for an auction; (vi) establishes a date for a sale hearing; (v) approves the form and manner of notice of the sale or sales of all or substantially all of the Debtors’ assets annexed as **Exhibit C**; (vi) approves the form and manner of notice of the assumption and assignment, including cure amounts, of executory contracts and unexpired leases annexed as **Exhibit D**; and (vii) grants related relief; and (B) an order(s) that: (i) approves the sale(s) (the “Sale”) of substantially all of the Debtors’ assets pursuant to the asset purchase agreement dated June 5, 2009 attached hereto as **Exhibit B** (as such may be modified or amended from time to time, and including all schedules and exhibits attached thereto, including the Letter Agreement (defined below), collectively, the "Purchase Agreement") free and clear of all liens, claims, interests, and encumbrances to Checkerco, Inc. ("Buyer") or to another successful bidder(s) at the auction; (ii) authorizes the Debtors to assume and assign executory contracts and unexpired leases; and (iii) grants related relief. In support of this Motion, the Debtors respectfully represent as follows:

JURISDICTION

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A), (M), (N), and (O). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are sections 105(a), 363(b), (f), and (m), and 365 of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, 6006, and 9014, and Local Rule 6004-1.

BACKGROUND

3. On June 5, 2009 (the "Petition Date"), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

4. No trustee or examiner has been appointed in these chapter 11 cases, and no official committee of unsecured creditors has been established to date.

5. The events leading up to the Petition Date and additional facts and circumstances supporting the relief requested herein are set forth in the Amended Declaration of Leonard Levitsky in Support of Chapter 11 Petitions and First Day Relief (the "Levitsky Declaration"), which is fully incorporated herein by reference.[3]

A. The Debtors And Debtors In Possession

6. There are four separate Debtor entities that have filed for chapter 11 relief before this Court. Alset Owners, LLC ("Alset") is a holding company for the operating Debtors, Altes, LLC ("Altes") and Setla, LLC ("Setla"). Alset has no bank accounts, cash or operations and is essentially a shell company for tax purposes.

7. Altes, a franchisee of the Rally's restaurant chain, operates several restaurants in various states, while Setla, also a franchisee of the Rally's restaurant chain, operates several restaurants in Ohio. Altes and Selta are wholly owned subsidiaries of Alset.

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[3] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Levitsky Declaration.

Checkers Michigan, LLC ("Checkers Michigan"), a franchisee of the Checker's restaurant chain, operated several restaurants in Michigan but no longer has any operations. Checkers Michigan is a wholly owned subsidiary of Altes.

8. None of the Debtors are publicly traded companies, nor have they issued any public debt.

B. Overview Of The Debtors' Business

9. The Debtors are the largest franchisee of Checkers Drive-In Restaurants, Inc. (the "Franchisor"), the national franchisor of the Rally's and Checkers' restaurant chains. Specifically, Debtors Altes and Setla operate Rally's restaurants in Arkansas, Missouri, Illinois, and Ohio. Checkers Michigan operated Checkers restaurants in Michigan but has recently ceased operations there. Each of the Debtors' franchise locations is governed by the franchise agreements (the "Franchise Agreements") entered into between the Debtors and the Franchisor requiring, among other things, the Debtors to pay monthly royalties to the Franchisor.

10. The Rally's/Checkers brand is comprised of over 820 restaurants of which approximately 600 are franchised with the balance being owned and operated by the Franchisor. The Rally's/Checkers brand is the nation's largest chain of double drive-thru restaurants in the United States. Nations Restaurant News, the foodservice industry's leading publication, named Rally's/Checkers the "Hot Again" restaurant concept for its sizzling business performance and Rally's/Checkers was named "Best Drive-Thru in America" by QSR magazine, a trade publication. The American Business Awards have recognized the excellence of the Franchisor's leadership team. The Franchisor has embarked on a new development including new sandwiches, beverages, and a distinct "Value Menu" of competitive offerings and launched a new creative campaign under the theme "little place, BIG TASTE".

11. Among its food staples, the Rally's and Checkers enterprise sells the Champ Burger (Checkers), the Rally Burger (Rally's), the "Big Buford" and the signature "Famous Fries" at the Rally's and Checkers locations. In addition, Rally's and Checkers have implemented the "Double Value Menu" which offers its customers numerous dining choices at affordable prices.

12. Altes and Setla were together ranked 95th among the 200 largest multi-unit restaurant operators in the United States by Restaurant Finance Monitor in 2008. The operations and infrastructure at each of the Debtors' restaurants are comprised of double drive-thru, quick service restaurants administered by regional, area, and store managers.

13. Altes began operating on June 28, 2000 by purchasing 52 Rally's restaurant locations in Missouri, Illinois, Arkansas, and Virginia directly from the Franchisor. Six additional stores were opened by Altes from 2002 through 2006. Setla was formed approximately fifteen months later on October 15, 2001, when the owners of Altes decided to expand to the Ohio market. Setla acquired 64 Rally's locations from Snapp's Restaurants in October 2001. Three additional locations were opened by Setla from 2004 through 2006. Finally, in 2005, Checkers Michigan was formed to operate several stores in Michigan, a new market for the Debtor group. Initially, one Michigan restaurant with the Checkers brand was opened in December 2005, and later five additional Checkers restaurants were opened in 2006 and early 2007.

14. As a result of these various acquisitions and store openings, at their peak, in 2007, the Debtors collectively operated approximately 120 restaurants with the Rally's or Checkers brand in six states, and had over 2,500 employees. The competitive atmosphere, as well as the rise in food and labor costs, among other things, led the Debtors to restructure their

operations starting in late 2007. As of the Petition Date, the Debtors operated 77 restaurants, down from their peak of about 120 restaurants in 2007. An additional restaurant is still owned by the Debtors but is currently being operated by Mr. Alan Balan.

15. Since the Petition Date, the Debtors have continued to operate their business while continuing to market their assets for sale as a going concern. An electronic data room will soon be established and made available to potential buyers who have executed confidentiality agreements. The Debtors have retained Praetorian Group, Inc. ("Praetorian") as sales advisor. Praetorian will utilize their extensive resources to contact strategic and financial entities to determine potential interest in the Debtors' assets.

THE SALE PROCESS

16. By this Motion, the Debtors seek authority to market and ultimately sell substantially all of their assets. The Debtors are proposing sale procedures as a means by which to facilitate the sale of assets. The Debtors submit that a successful sale of substantially all of their assets is the best way to maximize the value of the Debtors' estates under the facts and circumstances of these cases. The Debtors, subject to the Court's availability, propose that the Court schedule a hearing to consider the Sale and the assumption and assignment of executory contracts and leases (the "Sale Hearing") for **August 13, 2009** at or about **12:00 p.m**. **(EDT)**. In the event the Sale Hearing is scheduled for such date, the Debtors further propose a Bid Deadline of **August 7, 2009 at 4:00 p.m. (EDT)** and an Auction for **August 11, 2009 at 12:00 p.m. (EDT)**.

17. After failing to obtain financing, the Debtors engaged in discussions with the Franchisor in which the Franchisor initially was to assist the Debtors in restructuring the operations at the various restaurants in which the Debtors were franchisees. Thereafter, the

Debtors and the Franchisor entered into a management agreement dated March 5, 2009 (the "Management Agreement") in which the Franchisor assisted the Debtors in their operations and provided high level advice to the Debtors. Several months later, after extensive negotiations, Buyer, an affiliate of Franchisor, entered into the Purchase Agreement to purchase substantially all of the Debtors' assets. The Debtors and their advisors have determined that the Purchase Agreement with Buyer represents the best opportunity for the Debtors to maximize the value of their assets and serve as a basis for conducting an auction to seek higher and/or better offers. A copy of the Purchase Agreement is attached hereto as **Exhibit B**.

18. The Purchase Agreement contemplates the sale of substantially all of the Debtors' assets, subject to higher and/or better bids, on terms that include the following:[4]

- **Assets to be Sold**. The assets being sold under the Purchase Agreement are described in § 1.1(a) of the Purchase Agreement and include substantially all of the Debtors' assets and restaurants (the "Acquired Assets") including:

  (a) all owned restaurant equipment, supplies, and certain leased equipment,;

  (b) all of the Debtors' rights in contracts in which the Debtors are party relating to the Acquired Assets or Restaurants that Buyer elects to have assumed and assigned to it;

  (c) merchandise inventory;

  (d) Real Property Leases;

  (e) Franchise Agreements with Franchisor;

  (f) all permits and consents necessary for the conduct of the Debtors' business;

  (g) books and records related to the Debtors' business;

  (h) goodwill;

[4] The following summary is not comprehensive and is provided for convenience only. In the event of any inconsistency between the summary and the Purchase Agreement, the latter shall control. Parties are encouraged to review the Purchase Agreement in its entirety.

(i) all telephone numbers associated with the Restaurants;

(j) all deposits, advances, rebates, and credits;

(k) all insurance proceeds relating to the Debtors' business for periods after the Closing Date;[5]

(l) the general change fund of the Debtors;

(m) certain Employment Agreements and the Management Agreement; and

(n) any rights and causes of any action relating to any of the Acquired Assets or Assumed Liabilities or contracts or leases being assigned to Buyer (the "Acquired Actions").

- **Excluded Assets**. The Excluded Assets include:

(a) the Debtors' tax returns and corporate documents relating to the Debtors;

(b) benefit plans;

(c) non-transferable permits;

(d) any rights or claims of the Debtors under the Purchase Agreement or the Management Agreement;

(e) tax refunds relating to any tax periods prior to the Closing Date;

(f) any Excluded Restaurant and related assets;

(g) all equity security interests of the Debtors;

(h) all cash of the Debtors as of the Petition Date; and

(i) any rights, claims, or causes of action of the Debtors against third parties and any avoidance actions under the Bankruptcy Code, including preference actions, fraudulent conveyance actions and merchandise credits, other than the Acquired Actions.

- **Purchase Price**. The Purchase Price for the Acquired Assets can be broken down as follows: (a) $1,200,000 for all of the Debtors' Acquired Assets, except the Acquired Textron Assets, (b) $300,000 for the Acquired Textron Assets, (c) $3,800,000 payable to Franchisor for outstanding royalties and other payment obligations under the Franchise Agreements that are to be assumed and assigned to Buyer, (d) up to $500,000 for

[5] Any insurance proceeds related to any loss prior to the Closing shall remain with the Debtors' estates.

restructuring costs of estate professionals payable by Buyer and Franchisor in accordance with Section 1.9 of the Purchase Agreement and a letter agreement dated June 5, 2009 (the "Letter Agreement") between the Debtors and the Franchisor (Purchase Agreement, §§ 1.5, 1.8, 1.9)

- **Assumed Liabilities and Cure Amounts**. Upon the transfer and delivery of the applicable Acquired Assets, including the Assigned Contracts, in accordance with the terms of the Purchase Agreement, the Buyer shall assume and agree to pay or discharge when due in accordance with their respective terms the obligations of the Sellers under the Real Property Leases being assumed by the Buyer, the Franchise Agreements, the Management Agreement, the Employment Agreements, the Assumed Contracts and the Assumed Liabilities set forth on Schedule 1.3(a) of the Purchase Agreement. In addition, the Buyer shall be liable for all Cure Costs as set forth in § 4.1 of the Purchase Agreement. Further, pursuant to the Letter Agreement, Franchisor has agreed to defer any royalties and other obligations under the Franchise Agreements for the first 60 days of the Debtors' cases.

- **Deposit**. Cash deposit of $75,000 in total of which $3,500 is allocated to the Acquired Textron Assets (Purchase Agreement, § 1.5)

- **Break-Up Fee**. $200,000 (the "Break-Up Fee"), which is equal to approximately 3 % of the estimated Purchase Price (exclusive of the Cure Amounts) to be received under the Purchase Agreement, with the Break-Up Fee to be payable upon consummation of an Alternative Transaction, or if the Purchase Agreement is terminated in accordance with Section 9.1(e) of the Purchase Agreement.

- **Optional Restaurants**. Buyer shall have until June 30, 2009 to determine whether to purchase certain of the other Restaurants as set forth in Schedule A of the Purchase Agreement that are not presently "Acquired Assets" under the Purchase Agreement. To the extent any of the Optional Restaurants are to be purchased, the Buyer will send the Debtors written notice or an updated Schedule A reflecting the purchase of the Optional Restaurants prior to June 30, 2009.

- **Employees**. Buyer intends to hire substantially all of the Debtors' employees at the Restaurants that will be acquired. There is no closing condition with respect to the hiring of specific employees or a minimum number of employees.

- **Release of Claims**. Section 9.6 of the Purchase Agreement provides for a mutual release of any and all claims between the Buyer and the Debtors, provided however that the parties will not waive any rights under the Purchase Agreement.

- **Closing.** The Closing shall taken place within three business days of the Sale Hearing, provided all conditions precedent of the Buyer and Debtors have been satisfied or waived.

19. The Purchase Agreement is subject to higher or better offers. The Debtors propose that the Purchase Agreement be further "tested" in the marketplace by the sale and bidding process described below so as to ensure that every effort has been made to realize maximum value for the Debtors' assets. In connection therewith, the Debtors request that this Court approve the following bidding procedures annexed as Exhibit 1 to the Bidding Procedures Order (the "Bidding Procedures") in connection with the Sale:[6]

- **Initial Bids**. Any third party (other than Buyer) interested in acquiring any of the Debtors' assets must be a Qualified Bidder who submits an "Initial Bid" in conformance with the following procedures at or prior to the date set forth in the Bidding Procedures Order, currently proposed as **August 7, 2009 at 4:00 p.m. (EDT.)** (the "Bid Deadline"). For purposes of the Bidding Procedures, the Purchase Agreement shall be deemed to be a Qualified Bid and the Buyer shall be deemed a Qualified Bidder. For any Initial Bid to constitute a Qualified Bid for all of the Acquired Assets of solely the Acquired Textron Assets, such Initial Bid must:

  I. Initial Bids For All Acquired Assets.

  (a) The Initial Bid must be received by the Bid Deadline;

  (b) The Initial Bid must contain a signed definitive asset purchase agreement (together with a copy marked to show changes from the Purchase Agreement) (a "Qualified APA") and identifying the Acquired Assets the party seeks to purchase with, at a minimum, the following requirements: (i) having terms and conditions no less favorable to the Debtors than those of the Purchase Agreement except with higher or better consideration, which can be determined by aggregating bids made on different portions of the Acquired Assets (provided that no Initial Bid shall provide for the payment to such bidder of any breakup fee, topping fee, expense reimbursement, or other

[6] The following summary is not comprehensive and is provided for convenience only. In the event of any inconsistency between the summary and the Bidding Procedures, the latter shall control. Parties are encouraged to review the Bidding Procedures in their entirety. The Bidding Procedures are annexed to the Bidding Procedures Order at Exhibit A. Capitalized terms in this summary of Bidding Procedures, to the extent not otherwise defined in this Motion, shall have the meanings ascribed to them in the Bidding Procedures.

similar arrangement); (ii) provide for a Purchase Price under the Purchase Agreement as follows: (a) $1,200,000 for all of the Debtors' Acquired Assets, except the Acquired Textron Assets, (b) $300,000 for the Acquired Textron Assets, (c) $3,800,000 payable to Franchisor for outstanding royalties and other payment obligations under the Franchise Agreements that are to be assumed and assigned to Buyer, (d) up to $500,000 for restructuring costs of estate professionals payable by Buyer and Franchisor in accordance with Section 1.9 of the Purchase Agreement and the Letter Agreement, plus (B) the amount of the Break-Up Fee, plus (C) the Assumed Liabilities including Cure Costs and amounts owed in connection with Section 1.9 of the Purchase Agreement, plus (D) $250,000 (the "Overbid Amount"); (iii) not being subject to any (w) financing contingency, (x) contingency relating to the completion of unperformed due diligence, (y) contingency relating to the approval of the bidder's board of directors or other internal approvals or consents, or (z) any other conditions precedent to the bidder's obligation to purchase the Assets other than those already included in the Purchase Agreement;

(c) The Initial Bid(s) must be accompanied by the provision of a certified or bank check, wire transfer, or letter of credit reasonably acceptable to the Debtors in the aggregate amount of at least $75,000 as a good faith deposit (the 'Deposit"), to be held in escrow by Debtors' counsel and credited to the closing payment if the bidder(s) are ultimately determined to be the Successful Bidder(s) (as defined below) or to be returned to the bidder(s) otherwise and a written statement that the bidder(s) agree to be bound by the terms of the Bidding Procedures and the Bidding Procedures Order;

(d) The Initial Bid must identify the Assigned Contracts that the bidder(s) desires be assumed and assigned to bidder(s).

(e) To the extent not previously provided to Debtors, the Initial Bid must be accompanied by evidence satisfactory to Debtors in their commercially reasonable discretion that the bidder is willing, authorized, capable and qualified financially, legally and otherwise, of unconditionally performing all obligations under its Qualified APA (or its equivalent) in the event that it submits a Successful Bid (as defined below) at the Auction and within the timeframe contemplated under the Purchase Agreement;

(f) Remain open and irrevocable until the earlier of the end of the second business day following the closing of the transaction and fifteen (15) days after the entry of a final order by the Court approving a definitive agreement providing for the Sale of Assets;

(g) The Initial Bid must clearly state the range of cash consideration, in U.S. dollars, that the bidder(s) are prepared to pay for any or all of Debtors' assets. Only cash consideration will be evaluated for this purpose; the utilization of notes or other instruments to make up a portion of the cash consideration will not be evaluated as cash;

(h) The Initial Bid must be accompanied by information and assurances satisfactory to the Debtors that the bidder(s) can obtain all required consents, approvals and licenses to fulfill the terms, conditions and obligations under any and all related agreements, including but not limited to, sufficient information to permit the Court, the Debtors and any applicable lessors or counterparties to determine the proposed assignee's ability to comply with the requirements of section 365 of the Bankruptcy Code (to the extent applicable);

(i) The Initial Bid(s) must state that they have been approved (subject to stated conditions) by all necessary governing bodies or investors (e.g., board of directors or minority partners) and fully disclose the identity of each entity that will be bidding for the Acquired Assets or otherwise participating in connection with such bid, and the complete terms of any such participation;

(j) The Initial Bid(s) must state that they are made by the principals of the Bidder(s), and not by any person acting as agent for another, whether the principals are disclosed or undisclosed; however, a bidder(s) may appoint a representative to act on its behalf in connection with the Initial Bid(s); and

(k) The Initial Bid must state that bidder(s) will purchase the Acquired Assets even in the event the Acquired Textron Assets are sold separately in accordance with the Bidding Procedures.

II. Initial Bids For Acquired Textron Assets.

(a) All of the requirements for bids for all of the Acquired Assets, as set forth above, except paragraphs (b) and (c) of the above section;

(b) The Initial Bid must contain a signed definitive asset purchase agreement (together with a copy of the signed agreement that is marked to show changes from the Purchase Agreement) (a "Qualified APA") and identifying the Acquired Textron Assets the party seeks to purchase with, at a minimum, the following requirements: (i) having terms and conditions no less favorable to the Debtors than those of the Purchase Agreement as it relates to the Acquired Textron Assets, except with higher or better consideration (provided that no Initial Bid shall provide for the payment to such bidder of any breakup fee, topping fee, expense reimbursement, or other similar arrangement); (ii) providing for consideration that is, greater than the sum of (A) the Consideration of $300,000 provided for in the Purchase Agreement for the Acquired Textron Assets, plus (B) $14,000; (iii) not being subject to any (w) financing contingency, (x) contingency relating to the completion of unperformed due diligence, (y) contingency relating to the approval of the bidder's board of directors or other internal approvals or consents, or (z) any conditions precedent to the bidder's obligation to purchase the Assets other than those included in the Purchase Agreement;

(c) The Initial Bid must be accompanied by the provision of a certified or bank check, wire transfer, or letter of creditor reasonably acceptable to the Debtors in the aggregate amount of $3,500 as a good faith deposit (the "Textron Deposit") to be held in escrow and credited to the closing payment if the bidder(s) are ultimately determined to be the Successful Bidder(s) (as defined below) or to be returned to the bidder(s) otherwise and a written statement that the bidder(s) agree to be bound by the terms of these Bidding Procedures and the Bidding Procedures Order; and

(d) Textron shall be permitted to credit bid on the Acquired Textron Assets pursuant to § 363(k) of the Bankruptcy Code.

- **Auction**. In the event that the Debtors timely receive a conforming Qualified Bid or Qualified Bids, individually or in the aggregate, then the Debtors will conduct an auction (the "Auction") currently proposed to be held on or about **August 11, 2009 at 12:00 p.m. (EDT)** with respect to the sale(s) of the Acquired Assets at the time and place set forth in the Bidding Procedures Order, subject to change. In order to participate in the Auction, each prospective purchaser must be a Qualified Bidder and shall be required to comply with the requirements of the Bidding Procedures. In the event Qualified Bids for the Acquired Textron Assets are received, the Debtors will conduct the appropriate auctions. At the Auction,

Qualified Bidders may submit successive bids in increments of at least $50,000 greater than the prior bid (the "Incremental Bid Amount")[7] for the purchase of the Acquired Assets until there is only one offer that Debtors determine, subject to Bankruptcy Court approval, is the highest and/or otherwise best offer(s) (the "Successful Bid"). When bidding at the Auction, the Buyer may "credit bid" for up to the amount of the Break-Up Fee. If no conforming Initial Bid from a Qualified Bidder shall have been received at or prior to the Bid Deadline, the Auction will not be held and the Sale Hearing will proceed with respect to the Purchase Agreement. All bids made at the Auction shall remain open until the earlier of the end of the second business day following the closing of the transaction and fifteen (15) days after the entry of an order(s) by the Court approving a definitive agreement providing for the Sale of the Acquired Assets;

- **Highest and/or Best Bid**. The Debtors shall retain full discretion and right to determine which bid(s) should be selected as the Successful Bid(s), all subject to final approval by the Court. The Debtors may adopt rules for the Auction that will better promote the goals of the Auction and that are not inconsistent with the other Bidding Procedures.

- **Sale Hearing**. The Debtors intend to present the Successful Bid(s) for approval by the Court pursuant to the provisions of sections 105, 363(b), 363(f), 363(m), and 365 of the Bankruptcy Code at the final hearing to approve the Sale Motion (the "Sale Hearing") to be scheduled by the Court and currently proposed as **August 13, 2009.** The Debtors shall be deemed to have accepted a bid only when the bid has been approved by the Court at the Sale Hearing. Upon the failure to consummate a sale of the assets after the Sale Hearing because of the occurrence of a breach or default under the terms of the Successful Bid, the next highest or otherwise best bid(s), if any, as disclosed at the Sale Hearing, shall be deemed the Successful Bid(s) without further order of the Court and the parties shall be authorized to consummate the transaction contemplated by the backup Successful Bid(s) without further notice or court order.

- **Notice of Auction, Sale Hearing, and Assumption and Assignment of Contracts and Leases**. Prior to the Sale Hearing, the Debtors will cause (i) the Sale Notice (defined below) and (ii) the Assignment Notice (defined below), to be served in accordance with the Bidding Procedures Order. The Sale and Assignment Notices shall specify that objections to the relief requested by the Motion, including objections relating to the proposed assumption and assignment of executory contracts and unexpired leases and any proposed Cure Amounts (defined below), shall be set forth in writing and shall specify with particularity the grounds for such objections or other statements of position. Objections shall be filed and served in accordance with the Bidding Procedures Order. The failure to

[7] The Incremental Bid Amount for the Acquired Textron Assets alone will be $2,800.

file and serve objections in accordance with the Bidding Procedures Order shall be deemed a waiver of such objections and the objecting party shall be forever barred from asserting such objections with respect to the consummation and closing of the Sale, including without limitation, any objections to the proposed assumption and assignment of the Contracts and any objections to the Cure Amounts. Any objections timely filed and served in accordance with the Bidding Procedures Order shall be heard by the Court at the Sale Hearing or at such other hearing as the Court may determine.

- **Sale Implementation**. Following the approval of the Successful Bid at the Sale Hearing, the Debtors will be authorized to take all commercially reasonable and necessary steps to complete and implement the transaction(s) contemplated by the Successful Bid.

Relief Requested

20. By this Motion, the Debtors are requesting entry of certain orders concerning the sale(s) of the Acquired Assets.

21. First, the Debtors seek prompt entry of an order approving the Bidding Procedures and Auction rules as set forth above (the “Bidding Procedures Order”). This relief requested by the Debtors is intended to provide for a competitive bidding and auction process with the goal of maximizing value for the Debtors’ estates, creditors and other stakeholders. The form of Bidding Procedures Order, if approved, also includes certain bidding incentives relating to the Break-Up Fee and Overbid Amount (collectively, the "Bidding Incentives") for the benefit of the Buyer. Finally, the Bidding Procedures Order, if approved, will schedule the Auction and Sale Hearing and authorize and approve the forms of Sale Notice and Assignment Notice that will be served upon interested parties in these cases.

22. Second, following completion of the sale process and any Auction, the Debtors intend to request entry of an order(s) (a) approving the sale(s) of the Acquired Assets free and clear of all liens, claims, encumbrances, and interests (collectively, the “Liens”) (with such Liens attaching to the proceeds of sale in the same order of priority and to the same extent

as such Liens were valid, perfected and enforceable prior to entry of the sale order), to the Successful Bidder(s) and (b) authorizing the Debtors to assume and assign executory contracts and unexpired leases. A proposed form of the sale order in a form reasonably acceptable to Buyer or the Successful Bidder will be filed with the Court after conclusion of the Auction and prior to the Sale Hearing.

Basis for Relief Requested

A. Entry Of The Bidding Procedures Order Is Necessary And Appropriate Under The Facts And Circumstances Of These Cases.

23. After notice and a hearing, a debtor may sell assets outside the ordinary course of business. 11 U.S.C. § 363(b). Generally, to obtain approval of a proposed sale of assets under section 363(b), a debtor should demonstrate that the proffered purchase price is the highest or best offer under the circumstances of the case. *See e.g., Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 107 F.3d 558, 564-65 (8th Cir. 1997) (holding that in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand"); *In re Integrated Res.*, 147 B.R. 650, 659 (S.D.N.Y. 1992) ("It is a well-established principle of bankruptcy law that the . . . Debtors' duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.") (quoting *Cello Bay Co. v. Champion Int'l Corn. (In re Atlanta Packaging Prods., Inc.)*, 99 B.R. 124, 131 (Bankr. N.D. Ga. 1988)).

24. The implementation of competitive bidding procedures to facilitate the sale of a debtor's assets outside the ordinary course of business is routinely approved by bankruptcy courts as a means of ensuring that such sale will generate the highest or best recovery for a debtor's estate. The proposed Bidding Procedures and the opportunity for competitive bidding embodied therein are reasonable and designed to maximize the value received for the

Debtors' assets by facilitating a competitive bidding process in which all potential and qualified bidders are encouraged to participate and submit competing bids.

25. The Debtors desire to receive the greatest value possible for the Acquired Assets. The Bidding Procedures were developed so as to be consistent with the Debtors' need to expedite the sale process but with the object of promoting active bidding that will result in the highest and/or best offer(s) possible. In addition, the proposed Bidding Procedures reflect the Debtors' objective of conducting an Auction in a controlled, but fair and open, manner that promotes maximum interest in the Debtors' assets by financially capable, motivated bidders who are likely to close a transaction(s), while simultaneously discouraging offers from persons the Debtors do not believe are sufficiently capable or likely to actually consummate a transaction.

26. In the event Qualified Bids are received by the Bid Deadline, if the Court holds the Sale Hearing on **August 13, 2009** as proposed herein, the Debtors currently propose to hold an auction of the Debtors' assets on or about **August 11, 2009 at 12:00 p.m. (EDT)** at the New York offices of Blank Rome LLP, or such other location determined by the Debtors. At the Auction, the Debtors may select the highest and/or best Qualified Bid for any particular asset of the Debtors. All bid(s) shall be subject to the approval of the Bankruptcy Court.

27. During the Auction, bidding with respect to the Debtors' assets as a whole shall begin with the highest Qualified Bid (which shall include the Overbid Amount of $250,000), and continue thereafter in minimum increments of at least $50,000. Buyer has the right to credit the amount of the Break-Up Fee as part of any subsequent bid made by the Buyer at the Auction. The Debtors shall also hold a separate Auction relating to any Qualified Bids (which shall include the Overbid Amount of $14,000) for the Acquired Textron Assets. The Auction for the Acquired Textron Assets will proceed with minimum incremental bids at $2,800.

Textron will have the right to "credit bit" on the Acquired Textron Assets in accordance with section 363(k) of the Bankruptcy Code. It should be noted that the Buyer has confirmed with the Debtors that it will close on the Sale of the Acquired Assets even if the Buyer is outbid on the Acquired Textron Assets.

28. Given the current circumstances of these cases, the Debtors believe that implementation of a prompt sale process is the best way to maximize the value of the Debtors' assets. Prompt entry of the Bidding Procedures Order will permit the formal sale process contemplated by the proposed Bidding Procedures to begin as expeditiously as possible.

B. The Proposed Bidding Incentives Are Fair And Reasonable And Should Be Approved Under Applicable Standards And Practices Of This Court.

29. In recognition of Buyer's significant expenditure of time, energy, and resources invested and to be invested in this process, and the benefits afforded by the Purchase Agreement to the Debtors' estates, the Debtors request approval of the proposed Bidding Incentives which will provide the Buyer with a $200,000 Break-Up Fee and which will establish a floor for an Initial Bid that will include a $250,000 Overbid Amount.

30. The use of bidding incentives such as those proposed here has become an established practice in chapter 11 cases involving the sale of significant assets. Bidding incentives enable a debtor to ensure a sale to a contractually committed bidder at a price the debtor believes is fair, while providing the debtor and its bankruptcy estate with the potential of obtaining an enhanced price through an auction process. Historically, bankruptcy courts have approved bidding incentives similar to the Bidding Incentives by reference to the "business judgment rule," which proscribes judicial second-guessing of the actions of a corporation's board of directors taken in good faith and in the exercise of honest judgment. *See, e.g., In re 995 Fifth Ave. Assocs., L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1992) (holding that bidding incentives "may

be legitimately necessary to convince a 'white knight' to enter the bidding by providing some form of compensation for the risks it is undertaking") (internal citation omitted); s*ee also In re Integrated Resources*, 147 B.R. 650, 657-58 (S.D.N.Y. 1992).

31. The Third Circuit Court of Appeals has clarified the standard for determining the appropriateness of bidding incentives in the bankruptcy context. In *Calpine Corp. v. O'Brien Envtl Energy, Inc. (In re O'Brien Envtl Energy, Inc.)*, 181 F.3d 527 (3d Cir. 1999), the Third Circuit held that even though bidding incentives are measured against a business judgment standard in non-bankruptcy transactions, the administrative expense provisions in section 503(b) of the Bankruptcy Code govern in the bankruptcy context. Accordingly, to be approved, bidding incentives must provide a benefit to the debtor's estate. *Id.* at 532-33.

32. *O'Brien* identified at least two instances in which bidding incentives may provide a benefit to the estate. First, a break-up fee or expense reimbursement may be necessary to preserve the value of the estate if assurance of the incentives "promote[s] more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited." *Id.* at 537. Second, where the availability of bidding incentives induced a bidder to research the value of the debtor and submit a bid that serves as a minimum or floor bid on which other bidders can rely, "the bidder may have provided a benefit to the estate by increasing the likelihood that the price at which the debtor is sold will reflect its true worth." *Id; see also O'Brien*, 181 F.3d at 536 (reviewing nine factors set forth by the lower court as relevant in deciding whether to award a breakup fee, which factors include the reasonableness of the breakup fee relative to the purchase price and the support of the principal secured creditors and creditors committee).

33. The Bidding Incentives are consistent with the "business judgment rule" and satisfy *O'Brien*. Potential purchasers will be afforded an opportunity to submit competing bids modeled on the Purchase Agreement. The proposed $200,000 Break-Up Fee represents less than 3 % of the estimated Purchase Price, exclusive of any additional amounts paid by Buyer as the Cure Amounts or the other Assumed Liabilities. The proposed Bidding Incentives are consistent with the range of bidding protection regularly approved by bankruptcy courts in this district.

34. Further, the Bidding Incentives have already encouraged bidding, in that the Bidding Incentives were a material inducement for, and a requirement by, Buyer to enter into the Purchase Agreement. The Bidding Incentives have thus "induce[d] a bid that otherwise would not have been made and without which bidding would [be] limited." *O'Brien*. 181 F.3d at 537. Similarly, the Purchase Agreement will serve as a minimum or floor bid upon which other bidders will rely, thereby "increasing the likelihood that the price at which the debtor is sold will reflect its true worth." *Id.*

35. Moreover, the existence of the Bidding Incentives will permit the Debtors to insist that competing bids for the Debtors' assets be materially higher or otherwise better than that offered by Buyer, a clear benefit to the Debtors' estates and creditors if Qualified Bids are received.

36. Finally, the proposed Bidding Incentives are fair and reasonable in view of, among other things, (a) the intensive analysis, due diligence investigation and negotiations Buyer has and will have undertaken in connection with the proposed Sale and (b) the fact that if the Bidding Incentives are triggered, the efforts of Buyer will have generated the opportunity for

the Debtors to receive the highest or otherwise best offer for their assets, to the benefit of the Debtors' estates, creditors, employees, and customers.

37. As such, for all of the foregoing reasons, the Bidding Incentives should be approved by this Court.

C. The Proposed Sale Of Assets Should Be Approved As A Product Of The Debtors' Exercise Of Sound And Reasonable Business Judgment.

38. Section 363(b)(1) of the Bankruptcy Code provides: "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." Further, Bankruptcy Rule 6004(b) states, in relevant part, "all sales not in the ordinary course of business may be by private sale or by public auction".

39. Under Delaware law, the business judgment rule operates as a presumption that "directors making a business decision, not involving self-interest, act on an informed basis, in good faith and in the honest belief that their actions are in the corporation's best interest." *Continuing Creditors' Comm. of Star Telecomm., Inc. v. Edgecomb*, 385 F. Supp. 2d 449, 462 (D. Del. 2004) (*quoting Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988)); *see also Ad Hoc Comm. of Equity Holders of Tectonic Network, Inc. v. Wolford*, 554 F. Supp. 2d 538, 555 n. 111 (D. Del. 2008). Thus, this Court should approve the proposed sale if the Debtors demonstrate a sound business reason or justification in support thereof. *Myers v. Martin* (*In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 179 (D. Del. 1991); *In re Phoenix Steel Corp.,* 82 B.R. 334, 335-36 (Bankr. D. Del. 1987) (section 363 sale should be approved if "the proposed sale is fair and equitable, ...a good business reason [exists] for completing the sale and the transaction is in good faith"); *In re Lionel Corp.,* 722 F.2d 1063, 1070 (2d Cir. 1983) (same).

40. Courts generally show great deference to a debtor in possession's decisions when applying the business judgment standard. *See In re Global Crossing, Ltd.,* 295 B.R. 726, 744 n.58 (Bankr. S.D.N.Y. 2003) ("[T]he Court does not believe that it is appropriate for a bankruptcy court to substitute its own business judgment for that of the [d]ebtors and their advisors, so long as they have satisfied the requirements articulated in the caselaw."). Deference is inappropriate only if such business judgment is "so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice." *In re Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1047 (4th Cir. 1985); *In re Integrated Res., Inc.,* 147 B.R. at 656 (there is a strong presumption "that in making a business decision[,] the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company").

41. Once a court is satisfied that there is a sound business justification for the proposed sale, the court must then determine whether (i) the debtor in possession has provided the interested parties with adequate and reasonable notice, (ii) the sale price is fair and reasonable, and (iii) the purchaser is proceeding in good faith. *In re Betty Owens Sch.,* 1997 U.S. Dist. Lexis 5877 (S.D.N.Y. 1997); accord *In re Delaware and Hudson Ry. Co.,* 124 B.R. 169, 166 (D. Del. 1991); *In re Decora Indus., Inc.,* Case No. 00-4459, 2002 WL 32332749 at *3 (Bankr. D. Del. May 20, 2002). The business judgment standard has been met here.

42. Additionally, courts have permitted a proposed sale of all or substantially all of the assets of a debtor outside the ordinary course of business if such sale is necessary to preserve the value of assets. *See In re Lionel Corp.*, 722 F.2d at 1068-69.

43. Here, the proposed public sale of assets in accordance with the Bidding Procedures easily meets the "sound business reason" test and it is clear the proposed Sale is

necessary to preserve the value of the Acquired Assets. First, the fairness and reasonableness of the consideration to be paid for the Purchased Assets by Buyer or other Successful Bidder will be demonstrated by the sale process proposed herein which will place potential purchasers, creditors, and other parties in interest on notice of the Sale. The Purchase Agreement is the good faith product of intense and extensive negotiations among the parties and their respective counsel. Likewise, the final proposed purchase agreement(s) will be the product of good faith, arm's length negotiations between the Debtors and the highest and/or best bidder(s) with respect to the price and other terms of the sale(s) of the Debtors' assets. *See In re WBQ Partnership*, 189 B.R. 97, 103 (Bankr. E.D. Va. 1995) (stating that "[a] negotiation conducted at arm's length helps to ensure that the agreed price ultimately will be fair and reasonable"). Moreover, the Debtors have insufficient liquidity to continue funding operations indefinitely and the Debtors have not been successful to date in obtaining financing that would enable the Debtors to continue operating their business over the next several months. In short, the Debtors believe that a prompt sale of the Debtors' assets to the Buyer or another Successful Bidder presents the best opportunity to realize the maximum value of the assets.

44. The Debtors further believe that the net benefit to their creditors may be adversely affected absent a prompt sale. Absent a prompt sale, the Debtors will continue to incur expenses that likely will erode recoveries for creditors. Such expenses include royalties, maintenance, utility charges, employee wages, salary, benefits, and overhead. Aside from the foregoing, the Sale of the Acquired Assets will redound to the benefit of the Debtors' employees, many of whom will likely be hired by the Buyer or the Successful Bidder.

45. In light of the current circumstances and the fact the Debtors have been able to reach a signed agreement with Buyer, the Franchisor of the Debtors' Restaurants, the

decision to sell the Acquired Assets at this time is fully consistent with and should be approved as an exercise of the Debtors' sound business judgment.

D. The Sale of Assets Should Be Approved Free And Clear Of Liens Pursuant to Section 363(f) Of The Bankruptcy Code.

46. Pursuant to section 363(f) of the Bankruptcy Code, the Debtors seek authority to sell and transfer their assets to all Successful Bidders free and clear of all Liens, with such Liens to attach to the proceeds of the Sale, subject to the payment of the Break-Up Fee if the Buyer is not the Successful Bidder. Section 363(f) of the Bankruptcy Code is written in the disjunctive and provides, in pertinent part:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

47. With respect to any party asserting a Lien, the Debtors believe this will be able to satisfy one or more of the conditions set forth in section 363(f). A sale free and clear of Liens is necessary to maximize the value of the Debtors' assets. A sale subject to Liens would result in a lower purchase price and be of substantially less benefit to the Debtors' estates. A sale free and clear of Liens is particularly appropriate under the circumstances because any Lien

that exists immediately prior to the closing of any sale will attach to the sale proceeds with the same validity, priority, force and effect as it had at such time, subject to the rights and defenses of the Debtors or any party in interest. The Debtors submit that holders of Liens will be adequately protected by the availability of sale proceeds to satisfy their Liens. Thus, the proposed Sale satisfies § 363(f) of the Bankruptcy Code. Moreover, any holder of a Lien that receives notice of the proposed sale and which fails to object should be deemed to consent to the proposed sale, thereby complying with § 363(f)(2) of the Bankruptcy Code.

E. The Buyer or the Successful Bidder at the Auction Will Be Entitled To The Protections Afforded to Good Faith Purchasers

48. Section 363(m) of the Bankruptcy Code protects a good-faith purchaser's interest in property purchased from the debtor notwithstanding that the sale conducted under § 363(b) is later reversed or modified on appeal. Specifically, § 363(m) states that:

> The reversal or modification on appeal of an authorization under [section 363(b)] . . . does not affect the validity of a sale . . . to an entity that purchased . . . such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale . . . were stayed pending appeal.

11 U.S.C. § 363(m). Section 363(m) "fosters the 'policy of not only affording finality to the judgment of the bankruptcy court, but particularly to give finality to those orders and judgments upon which third parties rely.'" *In re Chateaugay Corp.,* 1993 U.S. Dist. Lexis 6130, at *9 (S.D.N.Y. 1993) (quoting *In re Abbotts Dairies of Penn, Inc.,* 788 F.2d 143 and 147); *see also Allstate Ins. Co. v. Hughes,* 174 B.R. 884, 888 (S.D.N.Y. 1994) ("Section 363(m) . . . provides that good faith transfers of property will not be affected by the reversal or modification on appeal of an unstayed order, whether or not the transferee knew the pendency of the appeal."); *In re Stein & Day, Inc.,* 113 B.R. 157, 162 (Bankr. S.D.N.Y. 1990) ("pursuant to 11 U.S.C. § 363(m).

good faith purchasers are protected from the reversal of a sale on appeal unless there is a stay pending appeal”).

49. The Buyer, represented by capable counsel, is a good faith purchaser under § 363(m) of the Bankruptcy Code as Buyer was involved in extensive good faith discussions and negotiations leading to the execution of the Purchase Agreement. The Buyer, despite being an affiliate of the Franchisor, is not an insider. Although the Franchisor has, over the last several months, provided high level advice and services to assist the Debtors' operations pursuant to the Management Agreement, the Debtors have remained in control of their business. To the extent that the Buyer is subjected to the higher scrutiny exacted upon “insiders”, the Debtors submit that Buyer qualifies as a good faith purchaser under § 363(m) of the Bankruptcy Code.

50. Also, to the extent that another party is the Successful Bidder, the Debtors intends to request at the Sale Hearing a finding that the Successful Bidder is a good-faith purchaser entitled to the protections of § 363(m) of the Bankruptcy Code. The Debtor believes that providing the Successful Bidder with such protection will ensure that the maximum price will be received by the Debtors for the assets and allow for a prompt closing of the Sale.

F. Notice Of The Proposed Sale Is Reasonable Under The Circumstances.

51. As noted above, the Debtors are confronted with business and economic circumstances dictating a prompt sale process and Sale Hearing. In order to receive the highest and/or best price for their assets, the Debtors are seeking to conduct the Auction and hold the Sale Hearing within 60 to 75 days of the Petition Date. The Debtors continue to incur costs associated with preserving the value of their assets. In order to yield the greatest possible return

for the benefit of creditors and to limit potential administrative expenses, the Debtors believe that an expedited auction and sale process is warranted and necessary.

52. Following entry of the Bidding Procedures Order, the Debtors will provide notice of the Auction and Sale (the "Sale Notice"). The Debtors propose to send the Sale Notice, substantially in the form attached to this Motion as **Exhibit C**, to (i) taxing authorities or recording offices which have a reasonably known interest in the relief requested, (ii) the Office of the United States Trustee for Region 3 (the "OUST"), (iii) counsel to Buyer, (iv) Textron Financial Corporation, (v) all other known parties with liens of record on the Debtors' assets as of the Petition Date, (vi) federal, state, and local regulatory authorities with jurisdiction over the Debtors, (vii) insurers, (viii) parties who have executed confidentiality agreements with respect to the Assets or parties known to have expressed an interest in the Assets, (ix) all known creditors, and (x) all other parties known to have requested notices pursuant to Bankruptcy Rule 2002.

53. Accordingly, the Debtors submit that the Sale Notice to be provided to parties in interest is reasonable and appropriate and will be adequate to ensure that the value of the assets has been tested in the marketplace and that all interested parties have the opportunity to object to the proposed Sale of the Debtors' assets and assumption and assignment of the Assigned Contracts.

G. The Court Should Approve (A) The Assumption And Assignment Of Executory Contracts And Unexpired Leases And (B) The Proposed Assignment Notice.

54. Under section 365 of the Bankruptcy Code, a debtor may assume, reject, or assume and assign executory contracts and unexpired leases.

55. In accordance with section 365(a), a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11

U.S.C. § 365(a). The standard governing bankruptcy court approval of a debtor's decision to assume or reject an executory contract or unexpired lease is whether the debtor's reasonable business judgment supports assumption or rejection. *See Sharon Steel Corp. v. Nat'l Fuel Gas Dist. Corp.*, 872 F.2d 36, 39-40 (3d Cir. 1989). The business judgment test "requires only that the trustee [or debtor in possession] demonstrate that [assumption or] rejection of the executory contract will benefit the estate." *Wheeling-Pittsburgh Steel Corp. v. W. Penn Power Co. (In re Wheeling-Pittsburgh Steel Corp.)*, 72 B.R. 845, 846 (Bankr. W.D. Pa. 1987) (*quoting In re Stable Mews Assoc., Inc.*, 41 B.R. 594, 596 (Bankr. S.D.N.Y. 1984).

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

> (b) (1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee -
>
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

57. With respect to assignment of an executory contract or unexpired lease, Section 365(f)(2) of the Bankruptcy Code provides, in pertinent part, that:

> The trustee may assign an executory contract or unexpired lease of the debtor only if --

> (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
>
> (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2).

58. The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical pragmatic construction." *EBG Midtown South Corp. v. McLaren/Hart Env. Eng'g Corp. (In re Sanshoe Worldwide Corp.)*, 139 B.R. 585, 593 (S.D.N.Y. 1992). Adequate assurance does not mean absolute assurance or a guarantee that the assignee will thrive and make all payments required under the subject contract. *See In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985).

59. Among other things, adequate assurance may be provided by demonstrating the proposed assignee's financial health and experience in managing the type of enterprise or property assigned. *See, e.g., In re Bygaph, Inc.,* 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (finding adequate assurance of future performance present when prospective assignee of lease from debtor has financial resources and has expressed willingness to devote sufficient funding to business in order to give it strong likelihood of succeeding).

60. To the extent any defaults exist under any contract or lease that is to be assumed and assigned through the Purchase Agreement (the "Assigned Contracts"), any such default will be promptly cured by Buyer or the Successful Bidder or adequate assurance that such default will be cured will be provided prior to the assumption and assignment.

61. There can be little doubt as to Buyer's ability to perform under the Purchase Agreement and to provide the adequate assurances of future performance and cure of existing defaults under executory Assigned Contracts that are required under 11 U.S.C. § 365(b).

The Buyer is an affiliate of a success franchisor of the Debtors' stores. As stated herein, the Rally's/Checkers brand is the nation's largest chain of double drive-thru restaurants in the United States. If necessary, the Debtors will adduce facts at the Sale Hearing to show the financial wherewithal and credibility of Buyer (or its designee) or other Successful Bidder and its willingness and ability to perform under the Assigned Contracts. Further, to the extent that another Successful Bidder is the winning bidder, the Debtors will demonstrate the Successful Bidder's financial wherewithal at the Sale Hearing. Therefore, the Sale Hearing will therefore provide the Court and other interested parties the opportunity to evaluate and, if necessary, challenge the ability of the Successful Bidder to provide adequate assurance of future performance under the Assigned Contracts. The Court should therefore authorize the Debtors to assume and assign the Assigned Contracts as set forth herein.

62. To facilitate the assumption and assignment of the Assigned Contracts, the Debtors propose to serve an assumption and assignment notice with cure amounts (the "Assignment Notice"), in substantially the form attached hereto as **Exhibit D**, upon the non-debtor parties to the Assigned Contracts within three business days of this Court's entry of the Bidding Procedures Order. The Debtor respectfully submits that the Assignment Notice is appropriate and reasonably tailored to provide all counterparties to executory contracts with adequate notice of the proposed assumption and assignment of the Assigned Contracts. Ample time is provided for contract parties to object to the Assignment Notice.

63. The Debtors will attach to the Assignment Notice their calculation of the cure amounts (the "Cure Amounts") that the Debtors believe must be paid by the Successful Bidder(s) at Closing to cure defaults under all Assigned Contracts subject to assumption and assignment. If the amount listed is zero ($0), the Debtors believe there is no Cure Amount to be

paid in connection with assumption and assignment an Assigned Contract. The Debtors propose a deadline during the week of August 3, 2009 for objections to the Debtors' proposed assumption and assignment of the Assigned Contracts, including to the scheduled Cure Amounts (the "Assignment Objection")

64. If no timely Assignment Objection is received, the Debtors seek entry of an order providing that such non-debtor party (a) be forever barred from objecting to the Cure Amount and from asserting any additional cure or other amounts with respect to such Assigned Contracts, and the Debtors shall be entitled to rely solely upon the Cure Amount; and (b) be deemed to have consented to the assumption and assignment of such Assigned Contract under § 365 of the Bankruptcy Code, and (c) shall be forever barred and estopped from asserting or claiming against the Debtors or the Successful Bidder that any additional amounts are due or defaults exist or conditions to assumption and assignment must be satisfied under such Assigned Contract. In the event that a timely Assignment Objection is filed, the Assignment Objection must set forth (i) all grounds for the objection under § 365 of the Bankruptcy Code and (ii) the amount the party asserts to be the correct Cure Amount. After receipt of the Assignment Objection, the Debtors will attempt to resolve the Assignment Objection and absent a resolution, the Court will resolve the disputed issues at the Sale Hearing or such other hearing scheduled by the Court.

H. The Automatic Ten Day Stay Under Bankruptcy Rules 6004(h) And 6006(d) Should Be Waived.

65. Pursuant to Bankruptcy Rule 6004(h), unless the Court orders otherwise, all orders authorizing the sale of property pursuant to § 363 of the Bankruptcy Code are automatically stayed for ten days after entry of the order. Similarly, under Bankruptcy Rule

6006(d), unless the Court orders otherwise, all orders authorizing the assignment of executory contracts or unexpired leases are automatically stayed for ten days after entry of the order.

66. Although Bankruptcy Rules 6004(g) and 6006(d) and the Advisory Committee Notes are silent as to when a court should "order otherwise" and eliminate or reduce the 10-day stay period, Collier on Bankruptcy suggests that the 10-day stay period should be eliminated to allow a sale or other transaction to close immediately where there has been no objection to the procedure. 10 *Collier on Bankruptcy* ¶ 6004.09 (15th ed. 1999). Furthermore, Collier on Bankruptcy provides that if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time necessary to file such appeal. *Id.*

67. To preserve and maximize the value of their assets for the benefit of all creditors, the Debtors seek to close the Sale immediately after all closing conditions have been met or waived. Thus, waiver of any applicable stays afforded by the Bankruptcy Rules is appropriate under the facts and circumstances of these cases.

NOTICE

68. Notice of this Motion has been provided to: (a) the OUST; (b) the United States Securities and Exchange Commission; (c) the Office of the United States Attorney for the District of Delaware; (d) the Internal Revenue Service; (e) the Debtors' top 30 creditors on a consolidated basis; (f) Textron Financial Corporation; (g) all other known parties with liens of record on the Debtors' assets as of the Petition Date; (h) counsel to Buyer and (i) all parties requesting notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary or required.

NO PRIOR REQUEST

69. No prior motion for the relief requested herein has been made to this or any other Court.

WHEREFORE, for the foregoing reasons, the Debtors respectfully request entry of: (A) an order substantially in the form annexed as **Exhibit A** hereto (i) approving the Bidding Procedures and the Bidding Incentives; (ii) establishing the date for an Auction; (iii) establishing the date for the Sale Hearing; (iv) approving the form and manner of notice of the sale or sales of the Debtors' assets, in substantially the form of the Sale Notice annexed as **Exhibit C**; (v) approving the form and manner of notice of the proposed assumption and assignment, including cure amounts, of executory contracts and unexpired leases, in substantially the form of the Assignment Notice annexed as **Exhibit D**; and (vi) granting related relief; and (B) an order: (i) approving the sale(s) of all or substantially all of the Debtors' assets free and clear of all Liens (with such Liens attaching to the proceeds of sale as described above); (ii) authorizing the Debtors to assume and assign the Assigned Contracts; and (iii) granting related relief.

Dated: June 19, 2009

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PROPOSED ATTORNEYS FOR DEBTORS AND DEBTORS IN POSSESSION