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**COUNSEL TO THE DEBTORS
AND DEBTORS IN POSSESSION**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	
	§	Chapter 11
FRESH ACQUISITIONS, LLC, <i>et al.</i> , ¹	§	
	§	Case No. 21-30721 (SGJ)
Debtors.	§	
	§	(Jointly Administered)
	§	

**DEBTORS' MOTION TO REJECT
NON-RESIDENTIAL REAL PROPERTY LEASE (EL PASO, TX)**

NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE BANKRUPTCY COURT AT EARLE CABELL FEDERAL BUILDING, 1100 COMMERCE ST., RM. 1254, DALLAS, TX 75242-1496 BEFORE THE CLOSE OF BUSINESS ON THE DATE THAT IS TWENTY-FOUR (24) DAYS FROM THE DATE OF SERVICE HEREOF.

ANY RESPONSE SHALL BE IN WRITING AND FILED WITH THE CLERK, AND A COPY SHALL BE SERVED UPON COUNSEL FOR THE MOVING PARTY PRIOR TO THE DATE AND TIME SET FORTH HEREIN. IF A RESPONSE IS

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor's taxpayer identification number are as follows: Alamo Fresh Payroll, LLC (1590); Fresh Acquisitions, LLC (2795); Alamo Ovation, LLC (9002); Buffets LLC (2294); Hometown Buffet, Inc. (3002); Tahoe Joe's Inc. (7129); OCB Restaurant Company, LLC (7607); OCB Purchasing, Co. (7610); Ryan's Restaurant Group, LLC (7895); Fire Mountain Restaurants, LLC (8003); Food Management Partners, Inc. (7374); FMP SA Management Group, LLC (3031); FMP-Fresh Payroll, LLC (8962); FMP-Ovation Payroll, LLC (1728); and Alamo Buffets Payroll, LLC (0998). The Debtors' principal offices are located at 2338 N. Loop 1604 W., Suite 350, San Antonio, TX 78248, United States.

FILED, A HEARING MAY BE HELD WITH NOTICE ONLY TO THE OBJECTING PARTY.

IF NO HEARING ON SUCH MOTION IS TIMELY REQUESTED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT HEREIN.

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) respectfully state as follows in support of this motion (this “Motion”):

Relief Requested

1. The Debtors seek entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Order”), (a) authorizing the rejection of the Lease (as defined below) effective as the date of this Motion, (b) authorizing the abandonment of any *de minimis* equipment, furniture, and other personal property at the Leased Premises (as defined below), and (c) granting related relief.

Jurisdiction and Venue

2. The United States Bankruptcy Court for the Northern District of Texas (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The bases for the relief requested herein are sections 105(a), 365(a), and 554(a) of title 11 of the United States Code (the “Bankruptcy Code”), rules 6004, 6006, and 6007 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and rule 9013-1 of the Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas.

Background

6. On April 20, 2021 (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their

businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

7. On April 30, 2021, the United States Trustee for the Northern District of Texas (the “U.S. Trustee”) appointed an official committee of unsecured creditors (the “Committee”) pursuant to section 1102 of the Bankruptcy Code. [Docket No. 94]. No party has requested the appointment of a trustee or examiner in these chapter 11 cases.

5. Prior to the COVID-19 pandemic, the Debtors were a significant operator of buffet-style restaurants in the United States with approximately 90 stores operating in 27 states. The Debtors’ concepts include six buffet restaurant chains and a full service steakhouse, operating under the names Furr’s Fresh Buffet®, Old Country Buffet®, Country Buffet®, HomeTown® Buffet, Ryan’s®, Fire Mountain®, and Tahoe Joe’s Famous Steakhouse®, respectively. Much like its competitors in the all-you-can-eat (AYCE) and dine-in restaurant businesses, the Debtors’ recent history has been impacted by the uncertainty, unexpected challenges, and ever changing landscape resulting from the COVID-19 pandemic. A more detailed history of the Debtors’ operations are discussed in the *Declaration of Mark Shapiro, Chief Restructuring Officer, in Support of Chapter 11 Petition and First Day Motion* [Docket No. 20].

8. Debtor Fresh Acquisitions, LLC (the “Lessee”) and BRE RC Las Palmas MP TX, LP (the “Landlord,” and together with the Lessee, the “Parties”) are Parties to a lease (the “Lease”) under which the Lessee leased from the Landlord certain real property located at 11925 Gateway West Blvd., El Paso, Texas 79936 (the “Leased Premises”). The monthly base rent under the Lease

is \$10,262.28 and the Lease term expires on June 30, 2025. Additionally, the Debtors have listed approximately \$191,095.53 as prepetition rent owed to the Landlord. *See* Docket No. 268.²

9. Prior to the Petition Date, the Lessee ceased operations at the Leased Premises due to flooding. The Leased Premises are currently under construction and remain closed. The Debtors seek to reject the Lease effective immediately as of the filing of this Motion. Prior to filing this Motion, the Debtors have notified the Landlord of their intention to reject the Lease and surrender possession of the Premises.³

10. The Debtors have determined in their business judgment that the costs of the Lease exceed any marginal benefits that could potentially be achieved from the assignment or sublease of such Lease. The Debtors' stalking horse bidder has indicated that it does not intend to assume the Lease, nor have the Debtors received offers from any interested third parties to assume the Debtors' obligations under the Lease. Absent approval of the rejection of the Lease, the Debtors may be obligated to pay postpetition rent for a location that has long since closed and is providing—and will provide—no benefit to the Debtors' estates. Accordingly, the Debtors have determined that rejecting the Lease effective as of the Petition Date, or alternatively, as of the date hereof, is in the best interests of their estates.

11. For the avoidance of doubt, this Motion shall serve as the Debtors' unequivocal notice to the Landlord of their immediate surrender of the Leased Premises, effective as of the date this Motion is filed.

² While the Debtors have not verified the amount, the Landlord has asserted that it is owed a total Cure Claim of \$276,935.22. *See Limited Objection of BRE RC Las Palmas MP TX LP to Notice of Executory Contracts and Unexpired Leases Subject to Possible Assumption and Assignment and Proposed Cure Amounts* [Docket No. 295].

³ The Debtors were unable to locate their keys to the Premises prior to the filing of this Motion, but they have notified counsel for the Landlord that they consent to the Landlord's taking possession and changing any locks as necessary to secure the Premises.

12. The Debtors do not believe there is any personal property remaining in the Leased Premises. However, to the extent all personal property has not been removed from the Leased Premises, such property is of inconsequential value to the Debtors' estates, or the cost of removing and storing such property outweighs any potential benefit of retaining such property. Accordingly, the Debtors believe in the exercise of their sound business judgment that the abandonment of any property that may be located in the Leased Premises is appropriate and in the best interests of their estates.

Basis for Relief

A. The Rejection of the Lease is in the Best Interests of the Debtors' Estates.

13. Section 365(a) of the Bankruptcy Code provides that a debtor in possession, subject to the court's approval, "may assume or reject any executory contract or unexpired lease." 11 U.S.C. § 365(a). The decision to assume or reject an ordinary executory contract or unexpired lease is governed by the debtor's business judgment. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984); *see also Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985) ("[i]t is well established that 'the question whether a lease should be rejected ... is one of business judgment'" (alteration in original) (citation omitted); *In re Armstrong World Indus., Inc.*, 348 B.R. 136, 162 (Bankr. D. Del. 2006) ("Courts have uniformly deferred to the business judgment of the debtor to determine whether the rejection of an executory contract or unexpired lease by the debtor is appropriate under section 365(a) of the Bankruptcy Code"); *In re Senior Care Centers, LLC*, 607 B.R. 580, 587 (Bankr. N.D. Tex. 2019) ("A court evaluates whether a lease should be assumed or rejected employing the business judgment standard."); *In re TransAmerican Nat'l Gas Corp.*, 79 B.R. 663, 667 (Bankr. S.D. Tex. 1987) (explaining that section 365 "was meant to aid reorganization by relieving the debtor of burdensome contracts in the exercise of its business judgment.").

14. The Debtors have determined, in their sound business judgment, that rejection of the Lease will maximize the value of their estates. As mentioned above, the Lease would require a greater expense than it would garner in revenue, given that the restaurant is closed and under construction, with no reopening date in the foreseeable future.

B. Retroactive relief is appropriate.

15. Courts have held that bankruptcy courts may allow retroactive rejection of executory contracts and unexpired leases under a “balancing of the equities” standard. *See, e.g., In re CiCi’s Holdings, Inc.*, No. 21-30146 (SGJ) (Bankr. N.D. Tex. Jan. 27, 2021) (approving rejection of leases as of the Petition Date); *In re Cafeteria Operators, L.P.*, 299 B.R. 384, 394 (Bankr. N.D. Tex. 2003) (granting retroactive relief for contract rejection where debtors were “receiving no benefit” from the lease and the contract counterparties “had unequivocal notice of Debtors’ intent to reject prior to the filing of the Motions”); *In re O’Neil Theatres, Inc.*, 257 B.R. 806, 808 (Bankr. E.D. La. 2000) (granting retroactive relief based on the circumstances of the case); *In re Amber’s Stores, Inc.*, 193 B.R. 819, 827 (Bankr. N.D. Tex. 1996) (finding that “nothing precludes a bankruptcy court, based on the equities of the case, from approving” retroactive rejection); *Constant Ltd. P’ship v. Jamesway Corp. (In re Jamesway Corp.)*, 179 B.R. 33, 37 (S.D.N.Y. 1995) (stating that section 365 of the Bankruptcy Code does not include “restrictions as to the manner in which the court can approve rejection”); *see also In re Joseph C. Spiess Co.*, 145 B.R. 597, 606 (Bankr. N.D. Ill. 1992) (“[A] trustee’s rejection of a lease should be retroactive to the date that the trustee takes affirmative steps to reject said lease.”).

16. Here, the balance of equities favors rejection of the Lease effective as of the filing of this Motion. Without such relief, the Debtors would potentially incur unnecessary postpetition expenses related to the Lease, *see* 11 U.S.C. § 365(d)(3), and the Landlord will not be unduly prejudiced by such relief. The Landlord has long been aware of the flooding at the property and

that the restaurant has long been closed. Possession of the Leased Premises was delivered, or will be delivered, to the Landlord contemporaneously with the filing of this Motion with an unequivocal and irrevocable statement of surrender and abandonment of the Leased Premises to the Landlord. Further, by this Motion, the Landlord is receiving unequivocal notice of the Debtors' intention to reject the Lease and tender immediate possession of the Leased Premises to the Landlord.

17. The Debtors will cause notice of this Motion to be served on the Landlord, thereby allowing the Landlord sufficient opportunity to respond accordingly. The Debtors do not seek to reject the Lease effective as of the date hereof due to any undue delay on their own part. Accordingly, the Debtors respectfully request that the Court deem the Lease rejected effective as of the date this Motion is filed. In the event the Debtors are unable to turn over possession of the Leased Premises on or before the date this Motion is filed, as anticipated, the effective date of the rejection of the Lease shall be no earlier than the date the Debtors turn over the Lease Premises.

C. Abandonment of personal property is in the best interests of the Debtors' estates.

18. Bankruptcy Code section 554(a) provides that "[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a). Any property to be abandoned at the Leased Premises would be of inconsequential value or burdensome to the Debtors' estates, and the cost of retrieving, marketing, and selling such property would outweigh any recovery the Debtors could attain therefore. Accordingly, the abandonment of such property is in the best interests of the Debtors and their estates.

Waiver of Bankruptcy Rule 6004(a) and 6004(h)

19. The Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established cause to exclude such relief from the 14-day stay period under Bankruptcy Rule 6004(h).

Reservation of Rights

20. Nothing contained herein or any actions taken pursuant to such relief requested is intended or shall be construed as: (a) an admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any other party in interest's right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Motion or any order granting the relief requested by this motion or a finding that any particular claim is an administrative expense claim or other priority claim; (e) a request or authorization to assume, adopt, or reject any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code, other than as specifically provided herein; (f) an admission as to the validity, priority, enforceability, or perfection of any lien on, security interest in, or other encumbrance on property of the Debtors' estates; (g) a waiver or limitation of the Debtors', or any other party in interest's, rights under the Bankruptcy Code or any other applicable law; (h) a concession by the Debtors that any liens (contractual, common law, statutory, or otherwise) that may be satisfied pursuant to the relief requested in this Motion are valid, and the rights of all parties in interest are expressly reserved to contest the extent, validity, or perfection or seek avoidance of all such liens; or (g) an admission that the Lease has not yet terminated, is unexpired, or that rent is owing under the Lease.

Notice

21. The Debtors will provide notice of this Motion to the following parties or their counsel: (a) the U.S. Trustee for the Northern District of Texas; (b) the holders of the 30 largest unsecured claims against the Debtors (on a consolidated basis); (c) counsel to Arizona Bank & Trust; (d) counsel to the Debtors' DIP lender; (e) counsel for the Committee; (f) the Landlord; and (g) any party that has requested notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Debtors submit that no other or further notice is needed.

WHEREFORE, the Debtors respectfully request that the Court enter an Order, substantially in the form attached hereto as **Exhibit A**, (i) rejecting the Lease effective as of the date of this Motion, (ii) authorizing the abandonment of any *de minimis* equipment, furniture, and other personal property at the Leased Premises; and (iii) granting such other relief as the Court deems appropriate under the circumstances.

Respectfully submitted this 21st day of July, 2021.

GRAY REED

By: /s/ Jason S. Brookner

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**COUNSEL TO THE DEBTORS
AND DEBTORS IN POSSESSION**

CERTIFICATE OF SERVICE

I certify that on July 21, 2021, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Texas.

/s/Jason Brookner

Jason Brookner

Exhibit A

Proposed Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

FRESH ACQUISITIONS, LLC, *et al.*,¹

Debtors.

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§

Chapter 11

Case No. 21-30721 (SGJ)

(Jointly Administered)

Re: Docket No. _

**ORDER GRANTING DEBTORS' MOTION TO REJECT
NON-RESIDENTIAL REAL PROPERTY LEASE (EL PASO, TX)**

Upon the motion (the "Motion")² of the above-captioned debtors and debtors in possession (collectively, the "Debtors") for entry of an order (this "Order"), and this Court having jurisdiction over this matter pursuant to 28 U.S.C. § 1334; and this Court having found that this is a core

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² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate and no other notice need be provided; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.
2. The Lease is hereby rejected effective as of the date the Motion was filed.
3. The Debtors are authorized to abandon property, if any, that may be located at the Leased Premises and all such property is deemed abandoned, effective as of the date the Motion was filed. The Landlord may effectuate its rights and remedies with respect to such property. The automatic stay, to the extent applicable, is modified to allow for such utilization or disposition.
4. Nothing in this Order authorizes the Debtors to lease, sell, or otherwise transfer to any other party, the personal identifying information (which means information which alone or in conjunction with other information identifies an individual, including but not limited to an individual's first name (or initial) and last name, physical address, electronic address, telephone number, social security number, date of birth, government-issued identification number, account number and credit or debit card number) ("PII") of any customers unless such sale or transfer or lease is permitted by the Debtors' privacy policy and state or federal privacy and/or identity theft prevention laws and rules. The Debtors shall remove or cause to be removed any PII in any of the Debtors' hardware, software, computers or cash registers or similar equipment which are to be abandoned pursuant to the Motion (if any) so as to render the PII unreadable or undecipherable.

5. Entry of this Order will not prevent the Debtors from seeking to assume or reject an executory contract and/or unexpired lease, other than the Lease, by separate motion or pursuant to a chapter 11 plan.

6. All rights and defenses of the Debtors are preserved, including all rights and defenses of the Debtors with respect to a claim for damages arising as a result of the Lease rejection, including any right to assert an offset, recoupment, counterclaim, or deduction. The Debtors reserve the right to assert that any provisions in any executory contract or unexpired lease that expressly or effectively restrict, prohibit, condition, or limit the assignment or effectiveness of the contract or lease are unenforceable anti-assignment or ipso facto clauses. In addition, nothing in this Order or the Motion shall limit the Debtors' ability, or the ability of the Landlord, to subsequently assert that the Lease is terminated and is no longer an unexpired lease.

7. Notwithstanding the relief granted in this Order and any actions taken pursuant to such relief, nothing in this Order shall be deemed: (a) an admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any other party in interest's right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Order or the Motion or a finding that any particular claim is an administrative expense claim or other priority claim; (e) a request or authorization to assume, adopt, or reject any prepetition agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) an admission as to the validity, priority, enforceability, or perfection of any lien on, security interest in, or other encumbrance on property of the Debtors' estates; (g) a waiver or limitation of the Debtors' or any other party in interest's rights under the Bankruptcy Code or any other applicable law; or (h) a concession by the Debtors

that any liens (contractual, common law, statutory, or otherwise) that may be satisfied pursuant to the Motion are valid, and the rights of all parties in interest are expressly reserved to contest the extent, validity, or perfection or seek avoidance of all such liens.

8. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

9. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order are immediately effective and enforceable upon its entry.

10. The Debtors are authorized to take all reasonable actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

11. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

END OF ORDER

Submitted by:

Jason S. Brookner
Texas Bar No. 24033684
Aaron M. Kaufman
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Amber M. Carson
Texas Bar No. 24075610

GRAY REED

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