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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’ SECOND EMERGENCY MOTION FOR AN ORDER
PURSUANT TO SECTION 365(d)(4) OF THE BANKRUPTCY CODE
EXTENDING PERIOD WITHIN WHICH THEY MUST ASSUME OR REJECT
PURPORTED UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”), for their Second Emergency Motion for Order Pursuant to Section 365(d)(4) of the Bankruptcy Code

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtors’ 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.

Extending Period Within Which They Must Assume or Reject Purported Unexpired Leases of Nonresidential Real Property (the “Motion”), respectfully represent as follows:

Jurisdiction and Venue

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).
2. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The basis for the relief requested herein is section 365(d)(4) of title 11 of the United States Code (the “Bankruptcy Code”).

Background

4. Prior to the COVID-19 pandemic, the Debtors were significant operators of buffet-style restaurants in the United States with approximately 90 stores operating in more than 27 states. The Debtors’ concepts include six buffet restaurant chains and a full-service steakhouse, operating under the names Furr’s®, Old Country Buffet®, Country Buffet®, HomeTown® Buffet, Ryan’s®, Fire Mountain®, and Tahoe Joe’s Famous Steakhouse®, respectively. Much like their 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 is discussed in the *Declaration of Mark Shapiro, Chief Restructuring Officer, in Support of Chapter 11 Petitions and First Day Motion* [Docket No. 20].

5. 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. No party has requested the appointment of a trustee or examiner in these chapter 11 cases. 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].

6. On August 18, 2021, this Court entered its *Order Pursuant to Section 365(d)(4) of the Bankruptcy Code Extending Period Within Which They Must Assume or Reject Purported Unexpired Leases of Nonresidential Real Property* [Docket No. 357] (the “First 365(d)(4) Order”), extending the Debtors’ deadline to assume or reject nonresidential leases of real property (the “Section 365(d)(4) Deadline”) 45 days, to October 2, 2021.

7. On September 21, 2021, this Court entered its *Order (A) Approving Bidding Procedures and Certain Bid Protections, (B) Scheduling Bid Deadline, Auction Date, and Sale Hearing and Approving Form and Manner of Notice Thereof, and (C) Approving Cure Procedures and the Form and Manner of Notice Thereof* [Docket No. 436] (the “Bidding Procedures Order”).

8. Pursuant to the terms of the Bidding Procedures Order, as evidenced by the *Notice of Bid Deadline, Auction, and Sale Hearing* [Docket No. 438], a hearing to consider the approval of a sale of substantially all of the Debtors’ assets (the “Sale”) is scheduled for October 7, 2021, at 9:30 a.m. Central Time (the “Sale Hearing”). The Sale Hearing and anticipated closing date for the Sale are currently scheduled after the current Section 365(d)(4) Deadline of October 2, 2021.

Relief Requested

9. By this Motion, the Debtors respectfully request entry of an order further extending the period within which they must assume or reject any remaining nonresidential real property leases (each, a “Lease,” and collectively, the “Leases”) by another 45 days (for a total extension of 90 days), through and including November 16, 2021.

Basis for Relief

10. An unexpired lease of nonresidential property under which a debtor is the lessee is deemed rejected if the debtor does not assume or reject such lease by the earlier of 120 days after

the petition date or the date of an order confirming a plan. 11 U.S.C. § 365(d)(4)(A). The Court may extend this period for 90 days “for cause,” and may grant subsequent extensions with the lessor’s consent. *See id.* § 365(d)(4)(B); *Chapman Inv. Assocs. v. Am. Healthcare Mgmt. (In re Am. Healthcare Mgmt., Inc.)*, 900 F.2d 827, 830 (5th Cir. 1990) (noting that “upon adequate demonstration of cause, bankruptcy courts may grant lessees extensions of time in which to assume or reject”).

11. The Fifth Circuit has indicated that section 365(d)(4) should be interpreted broadly such that extensions thereunder are matters of discretion for the Court. *See Am. Healthcare*, 900 F.2d at 830 (affirming extension of time and stating that a “liberal interpretation of the statute is necessary to effectuate the intent of Congress”); *S. St. Seaport Ltd. P’ship v. Burger Boys (In re Burger Boys)*, 94 F.3d 755, 761 (2nd Cir. 1996) (“The decision to grant or deny a motion for an extension of time is generally within the discretion of the appropriate court”). In determining whether cause exists to extend the Section 365(d)(4) Deadline, courts consider a number of non-exhaustive factors, including:

- (a) whether rent is being paid;
- (b) whether the Debtors’ continued occupation could potentially lead to non-compensable damages to the landlords;
- (c) whether the leases are primary assets of the estate;
- (d) whether the debtor has had sufficient time to formulate a plan of reorganization; and
- (e) whether the case is large and complex.

Burger Boys, 94 F.3d at 760. That said, this list of factors “is by no means exhaustive and, in appropriate cases, there may be other factors that a bankruptcy court should consider.” *Id.* at 761.

12. The factors weigh in favor of granting the extension requested herein. Since the Petition Date, the Debtors have worked diligently to identify unprofitable Leases and have rejected over 65 such Leases, leaving only six currently pending. However, whether the remaining Leases

will be assumed or rejected depends upon the outcome of the Sale. Given that the Sale Hearing is scheduled for October 7, 2021—after the current Section 365(d)(4) Deadline—the Debtors require a reprieve from the deemed rejection of Leases. The remaining Leases are valuable to their estates and a central part of the proposed Sale. If such Leases are deemed rejected, the Debtors will lose significant value and will be unable to maximize the value of their estates for the benefit of their creditors.

13. The ultimate terms of any potential chapter 11 plan will similarly depend on the outcome of the Sale Hearing. The assets to be distributed and the unexpired contracts and leases to be assumed or rejected through a plan will depend on the outcome of the Sale. Given that the Sale Hearing will not occur until October 7, 2021, this factor weighs in favor of granting another extension.

14. Additionally, undisputed rent is being timely paid to the lessors of all remaining leased locations. Although the Debtors are not current on rent on the Bakersfield location, the rent at such location is the subject of a long-standing dispute. The Debtors anticipate that the rent dispute will be settled and any outstanding rent will be cured through the assumption and assignment of the Bakersfield lease in connection with the proposed Sale.

15. Moreover, the Debtors' continued occupation will not lead to non-compensable damages to the landlords, and, as reflected by the Court's *Order Granting Chapter 11 Complex Case Treatment* [Docket No. 66], the Debtors' significant number of creditors and assets make these cases large and complex.

16. Finally, although this is the Debtors' second request to extend the Section 365(d)(4) Deadline, the First 365(d)(4) Order only extended the deadline 45 days because, at the time, the Debtors expected to consummate a transaction before such date. The relief requested herein will

only extend the Section 365(d)(4) Deadline another 45 days, for a total 90-day extension to the 210th day of these bankruptcy cases, which is permissible under the plain language of the Bankruptcy Code. *See* 11 U.S.C. § 365(d)(4)(B).

17. The Debtors have conferred with the Committee, the U.S. Trustee, and VitaNova Brands, LLC, their postpetition lender, regarding the relief requested herein. Neither the Committee nor Vita Nova Brands, LLC oppose the extension requested herein. Counsel to the U.S. Trustee has not indicated whether the U.S. Trustee opposes the underlying relief requested herein.

18. In light of the foregoing, the Debtors respectfully submit that, under the circumstances, cause exists for the extension sought herein.

Notice

19. 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 counterparties to each remaining Lease; 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.

[Remainder of page intentionally left blank]

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein and granting such other relief as may be just and proper.

Respectfully submitted this 23rd day of September, 2021.

GRAY REED

By: /s/ Jason S. Brookner
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**COUNSEL TO THE DEBTORS
AND DEBTORS IN POSSESSION**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of September, 2021, he caused a true and correct copy of the foregoing pleading to be served via CM/ECF on all parties who have subscribed for electronic notice in this case.

/s/ Jason S. Brookner
Jason S. Brookner

Exhibit A

Proposed Order

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

<p>In re:</p> <p>FRESH ACQUISITIONS, LLC, <i>et al.</i>,¹</p> <p style="text-align: center;">Debtors.</p>	§ § § § § § § §	<p>Chapter 11</p> <p>Case No. 21-30721 (SGJ)</p> <p>(Jointly Administered)</p> <p>Re: Docket No. ____</p>
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**ORDER PURSUANT TO SECTION 365(d)(4) OF THE BANKRUPTCY CODE
EXTENDING THE PERIOD WITHIN WHICH THE DEBTORS MUST ASSUME
OR REJECT UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY**

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”) extending the period within which

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtors’ 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.

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

they must assume or reject unexpired leases of nonresidential real property; and the Court having jurisdiction to consider the Motion pursuant to 28 U.S.C. § 1334; and consideration of the Motion being a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and the Court finding that the relief requested in the Motion is in the best interests of the Debtors and their estates; and it appearing that due and sufficient notice of the Motion has been provided by the Debtors and that no other or further notice is required; and after due deliberation and good cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.
2. The Debtors' period to reject, assume, or assume and assign unexpired leases of nonresidential real property is extended through and including November 16, 2021.
3. Entry of this Order is without prejudice to (a) the Debtors' right to seek such additional and further extensions as they may deem necessary or appropriate and (b) the rights of parties in interest to oppose any such further extension.
3. The terms and conditions of this Order shall be immediately effective and enforceable upon entry.
4. All time periods set forth in this Order shall be calculated in accordance with Bankruptcy Rule 9006(a).
5. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.
6. 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:

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