

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

EARTH FARE, INC., *et al.*,¹

Debtors.

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Chapter 11

Case No. 20-10256 (KBO)

(Joint Administration Requested)

**DEBTORS' EMERGENCY MOTION FOR INTERIM AND FINAL ORDERS
(A)(1) CONFIRMING, ON AN INTERIM BASIS, THAT THE STORE CLOSING
AGREEMENT IS OPERATIVE AND EFFECTIVE AND (2) AUTHORIZING, ON A
FINAL BASIS, THE DEBTORS TO ASSUME THE STORE CLOSING AGREEMENT,
(B) AUTHORIZING AND APPROVING STORE CLOSING SALES FREE AND CLEAR
OF ALL LIENS, CLAIMS, AND ENCUMBRANCES, (C) APPROVING DISPUTE
RESOLUTION PROCEDURES, (D) AUTHORIZING CUSTOMARY BONUSES TO
EMPLOYEES ESSENTIAL TO STORE CLOSINGS, AND (E) APPROVING THE
DEBTORS' STORE CLOSING PLAN**

Earth Fare, Inc. (the “**Merchant**”) and EF Investment Holdings, Inc. (each a “**Debtor**” and, collectively, the “**Debtors**”) hereby file this motion (this “**Motion**”) for the entry of an interim order, substantially in the form annexed hereto as Exhibit I (the “**Interim Order**”), and a final order, substantially in the form annexed hereto as Exhibit II (the “**Final Order**” and, together with the Interim Order, the “**Proposed Orders**”), pursuant to sections 105(a), 363, 365, and 554 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “**Bankruptcy Code**”), and Rules 6003, 6004, and 6007 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), (a)(1) authorizing, upon entry of the Final Order, the Debtors to assume²

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Earth Fare, Inc. (3936) and EF Investment Holdings, Inc. (8084). The mailing address for each of the Debtors is 220 Continuum Drive, Fletcher, North Carolina 28732.

² Pursuant to this Motion, the Debtors seek entry of the Interim Order confirming that the Store Closing Agreement (as defined below) is operative and effective, and entry of the Final Order granting the Debtors authority to assume the Store Closing Agreement.

the agreement dated as of January 30, 2020, by and among a contractual joint venture composed of Hilco Merchant Resources, LLC and Gordon Brothers Retail Partners, LLC (together, the “**Consultant**”), on the one hand, and the Merchant, on the other, a copy of which is attached hereto as Exhibit III (as amended, modified, or restated as of the date hereof, and together with all exhibits thereto, the “**Store Closing Agreement**”) and (2) confirming, upon entry of the Interim Order, that the Store Closing Agreement is operative and effective until the Court considers the relief requested by the Motion on a final basis; (b) authorizing the Debtors to continue to conduct store closing sales (collectively, the “**Closing Sales**”) at the store locations listed on Exhibit A to the Store Closing Agreement (the “**Closing Stores**”) in accordance with the proposed sale guidelines (the “**Sale Guidelines**”) attached hereto as Exhibit IV, with such sales to be free and clear of all liens, claims, encumbrances, and interests (collectively, the “**Encumbrances**”); (c) approving the proposed dispute resolution procedures described herein to resolve any disputes with governmental units regarding certain applicable non-bankruptcy laws that regulate liquidation and similar-themed sales; (d) authorizing customary bonuses to non-insider Closing Store employees and non-insider corporate employees deemed essential to the Closing Sales process (the “**Store Closing Bonuses**”); and (e) approving the Debtors’ strategic plan in connection with the closure of certain retail locations by implementing the foregoing documents and procedures (the “**Store Closing Plan**”). In support of this Motion, the Debtors rely on the *Declaration of Charles Goad in Support of Debtors’ Chapter 11 Petitions and First Day Motions* (the “**First Day Declaration**”),³ filed contemporaneously herewith, and respectfully represent as follows:

³ Except where otherwise explicitly denoted, capitalized terms used herein, but not otherwise defined, shall have the meanings ascribed to such terms in the First Day Declaration.

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b), and pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”), the Debtors consent to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution. Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are sections 105(a), 363, 365, and 554 of the Bankruptcy Code and Bankruptcy Rules 6003, 6004, and 6007.

BACKGROUND

A. General Background

2. On the date hereof (the “**Petition Date**”), the Debtors filed voluntary petitions for relief (the “**Chapter 11 Cases**”) under chapter 11 of the Bankruptcy Code. Concurrently with this Motion, the Debtors have also filed certain other motions and applications seeking certain “first day” relief.

3. The Debtors have continued in the possession of their properties and the operation of their business as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. No request has been made for the appointment of a trustee or examiner and no official committee has been appointed in the Chapter 11 Cases.

5. Additional information about the Debtors' business and the events leading up to the Petition Date can be found in the First Day Declaration, which is incorporated herein by reference.

B. Engagement of the Consultant and the Closing Sales

6. As noted in the First Day Declaration, at the same time as the Debtors were negotiating with the Potential Bidder, the Debtors also reached out to four nationally-recognized liquidation firms so that such parties could provide proposals for the liquidation of the Debtors' inventory (as defined in the Store Closing Agreement, including the DSD Merchandise (defined below) that the Merchant authorizes the Consultant to sell, the "**Merchandise**") and certain furniture, fixtures, and equipment owned by the Debtors that the Debtors do not wish to retain (collectively, the "**Offered FF&E**"⁴ and, together with the Merchandise and the Non-Inventory (as defined below and in the Store Closing Agreement), the "**Store Assets**") in the event that the Sale Process was not consummated. The Debtors provided the liquidation firms with access to a data room with all of the relevant information necessary to build a liquidation model and for the liquidation firms to evaluate the potential transaction. The Debtors obtained two proposals from liquidators.

7. Swiftly after obtaining notice from the Potential Bidder that it no longer intended to pursue a going-concern bid, the Debtors retained Malfitano Advisors, LLC ("**Malfitano**") on January 30, 2020, to serve as asset disposition advisor and consultant to negotiate optimal liquidation proposals from the liquidators. The Debtors, through Malfitano, sent a request for proposals ("**RFP**") to the bidding groups, providing the deadline to submit

⁴ For the avoidance of doubt, the Offered FF&E includes furniture, fixtures, and equipment owned by the Debtors wherever those items may be located including, for example, the Debtors' corporate office and stores that have already closed.

final, binding bids and related materials. The RFP set forth particular instructions for submitting bids, including the structure and format for such bids.

8. After evaluating the bids and providing each of the bidders with the opportunity to submit their best and final proposals, the Debtors determined that the bid submitted by the Consultant was in the best interests of the Debtors and their estates. The Debtors made this determination after considering numerous factors, including, but not limited to, (i) the Consultant's prior experience handling the liquidation of various similar retailers, (ii) the amount and experience of supervisors designated by the Consultant to handle the project, (iii) potential upside that could be realized under a "fee" based structure,⁵ (iv) the ability of the Consultant to source and supplement the Debtors' inventory with staples such as milk, bread, eggs, meat, *etc*, through "direct store delivery" inventory that Consultant may include in the Closing Sales with the Merchant's consent in order to maximize the return on the Merchandise (the "**DSD Merchandise**"), and (v) overall economics.

9. In short, the Debtors determined that entering into the Store Closing Agreement and commencing Closing Sales immediately was essential to ensure that the liquidation of the Store Assets is managed efficiently and effectively. This became even more important when, on January 31, 2020, the Debtors' largest supplier advised them that it would no longer be shipping goods to the Debtors on account of the unpaid balances owed. The lack of new supply in the Closing Stores created additional pressure to engage a third-party liquidator

⁵ A "fee" based structure generally provides for a commission or fee to the liquidation firm in exchange for assisting with the sale of particular asset(s) in addition to reimbursing the liquidation firm for its out of pocket expenses. The "fee" based structure allows the company to retain a majority of the dollars realized for the asset(s) since the liquidation firms do not risk their own capital and also gives the company the maximum amount of flexibility in the process.

like the Consultant who has the ability to immediately source and supplement the Debtors' inventory with DSD Merchandise.

10. The Debtors negotiated the terms and conditions of the Store Closing Agreement in good faith and at arms' length, and entered into the Store Closing Agreement on January 30, 2020. In order to avoid, among other potential negative outcomes, a disorganized "self-liquidation" scenario, *i.e.*, a scenario in which more desirable items sell faster than items with a slower turnover, the Closing Sales began on February 3, 2020.

11. The Debtors anticipate that, given the nature of the Merchandise, the Closing Sales will take less than a month to complete. By moving expediently, the Debtors hope to maximize overall recovery for the estates while minimizing the Debtors' liabilities.

C. Store Closing Agreement

12. The material terms of the Store Closing Agreement⁶ are summarized in the table below:

TERM	STORE CLOSING AGREEMENT
Services Provided by the Consultant	<p>(i) Recommend appropriate discounting to effectively sell all of Merchant's goods located at or to be delivered to the Closing Stores in accordance with a "store closing," "everything must go," "sale on everything," or other mutually agreed upon themed sale, and recommend appropriate point-of-purchase, point-of-sale, and other internal and external advertising in connection therewith.</p> <p>(ii) Provide qualified supervision to oversee the conduct of the Sale, which supervisors, once identified to Merchant, shall not be removed from the Sale event unless Merchant otherwise agrees or requests removal.</p> <p>(iii) Maintain focused and constant communication with Closing Store-level Employees and managers to keep them abreast of</p>

⁶ Capitalized terms used in the summary of the Store Closing Agreement, but not otherwise defined herein, shall have the meanings ascribed to such terms in the Store Closing Agreement. To the extent there is any conflict between this summary and the Store Closing Agreement, the Store Closing Agreement shall govern in all respects.

TERM	STORE CLOSING AGREEMENT
	<p>strategy and timing and to properly effect Closing Store-level communication by Merchant's employees to customers and others about the Sale.</p> <p>(iv) Establish and monitor accounting functions for the Sale, including evaluation of sales of Merchant's goods located at the Closing Stores by category, sales reporting and expense monitoring, all of which shall be shared with the Merchant's advisors monitoring the Sale.</p> <p>(v) Meet with the Merchant and its advisors, on at least a weekly basis, to review sales, sales reporting and expenses in an effort to minimize expenses and maximize overall net recovery of the Sale.</p> <p>(vi) Recommend loss prevention strategies.</p> <p>(vii) Coordinate with Merchant so that the operation of the Closing Stores are being properly maintained including ongoing customer service and housekeeping activities.</p> <p>(viii) Recommend appropriate staffing levels for the Closing Stores and appropriate bonus and/or incentive programs (to be funded by Merchant) for Closing Store employees.</p> <p>(ix) Recommend loss prevention strategies.</p> <p>(x) Recommend appropriate levels of DSD Merchandise to be included in the Sale.</p> <p>(xi) Subject to the approval of the Bankruptcy Court, assist Merchant to commence the Sale as a "store closing," "sale on everything," "everything must go," or such other themed sale.</p>
Sale Term	<p>The term "Sale Term" with respect to each Closing Store shall commence on February 3, 2020 (the "Sale Commencement Date") and shall end with respect to each respective Closing Store no later than February 29, 2020 (the "Sale Termination Date"); <u>provided, however</u>, that Merchant may decide on an earlier or later Sale Commencement Date or Sale Termination Date with respect to any one or more Closing Stores (on a Closing Store-by-Closing Store basis).</p>
Vacating Stores	<p>Upon the conclusion of the Sale Term at each Closing Store, Consultant shall leave such Closing Store in broom clean condition, subject to Consultant's right pursuant to Section 6 of the Store Closing Agreement to abandon in a neat and orderly manner all unsold Offered FF&E and all Retained FF&E.</p>

TERM	STORE CLOSING AGREEMENT										
Expenses of Consultant	<p>All expenses incident to the conduct of the Sale and the operation of the Closing Stores during the Sale Term (including without limitation all Consultant Controlled Expenses and all other Closing Store-level and corporate expenses associated with the Sale) shall be borne by Merchant; except solely for any of the specifically enumerated Consultant Controlled Expenses that exceed the aggregate budgeted amount (as provided in Section 3(B) of the Store Closing Agreement) for such Consultant Controlled Expenses.</p> <p>Upon approval of the assumption of the Store Closing Agreement by the Court, after taking the Advance (as defined below) into account, Consultant will advance funds for the Consultant Controlled Expenses, and Merchant shall reimburse Consultant therefor (up to the aggregate budgeted amount) in connection with each weekly reconciliation contemplated by Section 5(B) of the Store Closing Agreement upon presentation of reasonable documentation for such actually-incurred expenses.</p>										
The Advance	<p>On February 3, 2020, Merchant provided an advance payment in the amount of \$350,000 for Consultant Controlled Expenses anticipated to be incurred between execution of the Store Closing Agreement and the approval of the Court of the assumption of the Store Closing Agreement (the “Advance”), which shall be held by the Consultant and applied towards Consultant Controlled Expenses as incurred.</p>										
Compensation for Consultant	<p>Merchant shall pay Consultant a “Base Fee” equal to one percent (1.0%) of Gross Proceeds. In addition to the Base Fee, Consultant may also earn an “Incentive Fee” (together with the Base Fee, the “Consulting Fee”) equal to the aggregate sum of the percentages shown in the following table, based upon the following thresholds of Recovery Percentage (e.g., in each case, as calculated back to first dollar):</p> <table border="1" data-bbox="467 1434 1411 1623"> <tr> <th>Gross Recovery Percentage on Cost</th><th>Consulting Fee</th></tr> <tr> <td>Up to 95.0%</td><td>1.0% of Gross Proceeds</td></tr> <tr> <td>95.1% to 98.0%</td><td>1.25% of Gross Proceeds</td></tr> <tr> <td>98.1% to 101.0%</td><td>1.50% of Gross Proceeds</td></tr> <tr> <td>Above 101%</td><td>1.75% of Gross Proceeds</td></tr> </table> <p>With respect to (1) goods that belong to sublessees, licensees, or concessionaires of Merchant; (2) damaged or defective merchandise that cannot be sold for any price; (3) goods held by Merchant on memo, on consignment, or as bailee (collectively, the “Non-Inventory”), subject to Court approval, Consultant shall sell Non-Inventory during the Sale at the Closing Stores, and in consideration of such services, Consultant shall</p>	Gross Recovery Percentage on Cost	Consulting Fee	Up to 95.0%	1.0% of Gross Proceeds	95.1% to 98.0%	1.25% of Gross Proceeds	98.1% to 101.0%	1.50% of Gross Proceeds	Above 101%	1.75% of Gross Proceeds
Gross Recovery Percentage on Cost	Consulting Fee										
Up to 95.0%	1.0% of Gross Proceeds										
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98.1% to 101.0%	1.50% of Gross Proceeds										
Above 101%	1.75% of Gross Proceeds										

TERM	STORE CLOSING AGREEMENT
	<p>earn a fee equal to the Consulting Fee percentage earned on sales of Merchandise as set forth above multiplied by the aggregate gross receipts, net only of sales taxes, from the sale of Non-Inventory at the Closing Stores.</p> <p>With respect to all FF&E owned by the Debtors as of the Sale Commencement Date that is not Retained FF&E (collectively the “Offered FF&E”), Consultant shall have the right to sell such Offered FF&E during the Sale Term on a commission basis equal to thirteen and one-half percent (13.5%) of the gross sales of Offered FF&E, net only of sales tax (“FF&E Commission”).</p>
DSD Merchandise	The Consultant, subject to the Debtors’ consent, may include “direct store delivery” inventory, which will be used to supplement the Debtors’ inventory.
Insurance; Risk of Loss	<p>(i) Merchant shall maintain (at its expense) insurance with respect to the Merchandise in amounts and on such terms and conditions as are consistent with Merchant’s ordinary course operations, and</p> <p>(ii) Each of Merchant and Consultant shall maintain (at each party’s respective expense) comprehensive auto liability for owned and non-owned autos and general liability insurance covering injuries to persons and property in or in connection with the Closing Stores, in such amounts as are reasonable and consistent with its ordinary practices, for bodily injury, personal injury and/or property damage. Consultant shall add Merchant as an additional insured with respect to its insurance policies covering Consultant and its supervisors, and</p> <p>(iii) Each of Merchant and Consultant shall maintain statutory worker’s compensation, statutory disability and Employer’s Liability coverage of at least \$500,000 covering its own employees.</p>
Indemnification by Consultant	<p>Consultant shall indemnify and hold Merchant and its affiliates, and their respective officers, directors, employees, consultants, and independent contractors (collectively, the “Merchant Indemnified Parties”) harmless from and against all third-party claims, demands, penalties, losses, liabilities and damages, including, without limitation, reasonable and documented attorneys’ fees and expenses, directly or indirectly asserted against, resulting from or related to:</p> <p>(i) Consultant’s material breach of or failure to comply with any of its agreements, covenants, representations, or warranties contained</p>

TERM	STORE CLOSING AGREEMENT
	<p>herein or in any written agreement entered into in connection herewith;</p> <p>(ii) Any harassment or any other unlawful, tortious, or otherwise actionable treatment of any employees or agents of Merchant by Consultant, its affiliates or their respective officers, directors, employees, agents, independent contractors, or representatives (including without limitation any supervisors);</p> <p>(iii) Any claims by any party engaged by Consultant as an employee or independent contractor (including without limitation any non-Merchant employee supervisor) arising out of such employment or engagement; or</p> <p>(iv) The negligence, willful misconduct, or unlawful acts of Consultant, its affiliates, or their respective officers, directors, employees, consultants, independent contractors, or representatives, provided that Consultant shall not be obligated to indemnify any Merchant Indemnified Party from or against any claims, demands, penalties, losses, liabilities, or damages arising primarily from any Merchant Indemnified Party's gross negligence, willful misconduct, or unlawful act.</p>
Indemnification by Debtors	<p>Merchant shall indemnify and hold Consultant, its affiliates and their respective officers, directors, employees, consultants, and independent contractors (collectively, "Consultant Indemnified Parties") harmless from and against all third-party claims, demands, penalties, losses, liabilities and damages, including, without limitation, reasonable attorneys' fees and expenses, directly or indirectly asserted against, resulting from or related to:</p> <p>(i) Merchant's material breach of or failure to comply with any of its agreements, covenants, representations, or warranties contained herein or in any written agreement entered into in connection herewith;</p> <p>(ii) Any claims by any party engaged by Merchant as an employee or independent contractor arising out of such engagement;</p> <p>(iii) Any consumer warranty or products liability claims relating to any Merchandise; and/or</p> <p>(iv) The negligence, willful misconduct, or unlawful acts of Merchant, its affiliates or their respective officers, directors, employees, agents, independent contractors, or representatives, provided that Merchant shall not be obligated to indemnify any Consultant Indemnified Party from or against any claims, demands, penalties,</p>

TERM	STORE CLOSING AGREEMENT
	losses, liabilities, or damages arising primarily from any Consultant Indemnified Party's gross negligence, willful misconduct, or unlawful act.

D. Closing Sales According to Sale Guidelines; Assumption of Store Closing Agreement

13. The Sale Guidelines provide, among other things, that: (a) all sales of Store Assets will be deemed free and clear of all Encumbrances; (b) Merchandise will be sold with the benefit of various marketing techniques and price mark-downs to promote efficient liquidation; and (c) certain Store Assets that cannot be promptly liquidated may be abandoned if and when the Debtors determine, in their business judgment, that retaining, storing, or removing such assets would result in unnecessary expense with little or no benefit to the estates.

E. Dispute Resolution Procedures Relating to Liquidation Laws

14. Certain Closing Stores may be subject to liquidation laws, which include but are not limited to various federal, state, and local statutes, ordinances, rules, and licensing requirements directed at regulating “store closing,” “sale on everything,” “everything must go,” “liquidation sale,” “winter clearance outlet,” or similar themed sales or bulk sale laws, laws restricting safe, professional, and non-deceptive customary advertising such as signs, banners, posting of signage, and use of sign-walkers in connection with the sale, including ordinances establishing license or permit requirements, waiting periods, time limits, or bulk sale restrictions that would otherwise apply to the sale of the Store Assets (collectively, the “**Liquidation Laws**”). While many such Liquidation Laws do not apply to court-ordered sales, some Liquidation Laws may not expressly carve-out court-ordered sales.

15. To the extent that the Closing Sales of Store Assets are subject to any Liquidation Laws, the Debtors propose that the following resolution procedures (the “**Resolution Procedures**”) shall apply:

- (a) Provided that the Closing Sales are conducted in accordance with the terms of the Interim Order or the Final Order, as applicable, and the Sale Guidelines, and in light of the provisions in the laws of many Governmental Units (as defined in the Bankruptcy Code) that exempt court-ordered sales from their provisions, the Debtors and the Consultant will be presumed to be in compliance with any Liquidation Laws and are authorized to conduct the Sales in accordance with the terms of the Interim Order or the Final Order, as applicable, and the Sale Guidelines without the necessity of further showing compliance with any such Liquidation Laws.
- (b) Within two (2) business days after entry of the Interim Order, the Debtors will serve by email, facsimile, or first-class mail, copies of the Motion and the as-entered Interim Order, on the following: (i) the landlords for the Closing Stores (the “**Landlords**”); (ii) the Attorney General’s office for each state in which the Closing Sales are being held; (iii) the county consumer protection agency or similar agency for each county in which the Closing Sales are being held; and (iv) the division of consumer protection for each state in which the Closing Sales are being held (collectively, the “**Dispute Notice Parties**”). Within two (2) business days after entry of the Final Order, the Debtors will likewise serve the Dispute Notice Parties with a copy of the as-entered Final Order.
- (c) To the extent that there is a dispute arising from or relating to the Closing Sales, the Interim Order, or the proposed Final Order, as applicable, the Store Closing Agreement, or the Sale Guidelines, which dispute relates to any Liquidation Laws (a “**Reserved Dispute**”), the Court shall retain exclusive jurisdiction to resolve the Reserved Dispute. Any time within ten (10) days following entry of the Interim Order any Governmental Unit may assert that a Reserved Dispute exists by sending a notice (the “**Dispute Notice**”) explaining the nature of the dispute to: (i) Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801, Attn: M. Blake Cleary, Esq.; Sean T. Greecher, Esq., and Ian J. Bambrick, Esq. (mbcleary@ycst.com, sgreecher@ycst.com, and ibambrick@ycst.com); (ii) the Office of the United States Trustee for the District of Delaware, J. Caleb Boggs Building, 844 King Street, Suite 2207, Lockbox 35, Wilmington, DE 19801, Attn: Jane M. Leamy, Esq. (Jane.M.Leamy@usdoj.gov); (iii) counsel to any

statutorily appointed committee; (iv) any affected Landlord; and (v) Pepper Hamilton LLP, 1313 Market Street, Suite 5100, P.O. Box 1709, Wilmington, DE 19899-1709, Attn: Douglas D. Herrmann, Esq. and Marcy McLaughlin Smith, Esq. (herrmannnd@pepperlaw.com and mclaughlinm@pepperlaw.com).

- (d) If the Debtors, the Consultant, and the Governmental Unit are unable to resolve the Reserved Dispute within fourteen (14) days after service of the Dispute Notice, the Governmental Unit may file a motion with the Court requesting that the Court resolve the Reserved Dispute (a “**Dispute Resolution Motion**”).
- (e) In the event that a Dispute Resolution Motion is filed, nothing in the Interim Order or the Final Order, as applicable, shall preclude the Debtors or any other interested party from asserting (i) that the provisions of any Liquidation Laws are preempted by the Bankruptcy Code or (ii) that neither the terms of the Interim Order or the Final Order nor the conduct of the Debtors pursuant to the Interim Order or the Final Order violates such Liquidation Laws. Filing a Dispute Resolution Motion as set forth herein shall not be deemed to affect the finality of the Interim Order or the Final Order or to limit or interfere with the Debtors’ or the Consultant’s ability to conduct or to continue to conduct the Closing Sales pursuant to the Interim Order or the Final Order, absent further order of the Court. Upon the entry of the Interim Order or the Final Order, as applicable, the Court grants authority for the Debtors and the Consultant to conduct the Closing Sales pursuant to the terms of the Interim Order or the Final Order, as applicable, the Store Closing Agreement, and the Sale Guidelines and to take all actions reasonably related thereto or arising in connection therewith. The Governmental Unit will be entitled to assert any jurisdictional, procedural, or substantive arguments it wishes with respect to the requirements of its Liquidation Laws or the lack of any preemption of such Liquidation Laws by the Bankruptcy Code. Nothing in the Interim Order or the Final Order will constitute a ruling with respect to any issues to be raised in any Dispute Resolution Motion.
- (f) If, at any time, a dispute arises between the Debtors or the Consultant and a Governmental Unit as to whether a particular law is a Liquidation Law, and subject to any provisions contained in the Interim Order or the Final Order related to the Liquidation Laws, then any party to that dispute may utilize the provisions of subparagraphs (c) and (d) above by serving a notice to the other party and proceeding thereunder in accordance with those subparagraphs. Any determination with respect to whether a particular law is a Liquidation Law shall be made *de novo*.

F. Fast Pay Laws

16. Many states in which the Debtors operate have laws and regulations that require the Debtors to pay an employee substantially contemporaneously with his or her termination (the “**Fast Pay Laws**” and together with the Liquidation Sale Laws, the “**Applicable State Laws**”). These laws often require payment to occur immediately or within a period of only a few days from the date such employee is terminated.

17. The nature of the Closing Sales contemplated by this Motion will result in a substantial number of employees being terminated during the Closing Sales. To be clear, the Debtors intend to pay their terminated employees as expeditiously as possible and under normal payment procedures. However, the Debtors’ payroll systems will simply be unable to process the payroll information associated with these terminations in a manner that will be compliant with the Fast Pay Laws. Under ordinary circumstances, the Debtors’ payroll department is able to coordinate delivery of final checks to coincide with an employee’s final day of work where required by state law. This process requires the Debtors’ payroll department to calculate individual termination payments, prepare each termination payment check, obtain authorization for each such check, and then prepare each such check for mailing. Given the number of employees who will likely be terminated during the Closing Sales, this process could easily take several days, making compliance with the Fast Pay Laws burdensome to the Debtors’ estates, if not impossible.

G. Store Closing Bonus Plan

18. Through this Motion, the Debtors are requesting the authority, but not the obligation, to implement a program to pay Store Closing Bonuses (the “**Store Closing Bonus Plan**”) to store-level, non-insider employees and corporate-level, non-insider employees deemed essential to the Closing Sales process who remain in the employ of the Debtors during the

Closing Sales, in the event that the Debtors deem it necessary to motivate employees during the Closing Sales and to enable the Debtors to retain those employees necessary to successfully complete the Closing Sales. The corporate-level employees do not include any senior executives.

19. The amount of the Store Closing Bonuses, if implemented, will vary depending upon a number of factors, including the employee's position with the Debtors. The Debtors would set the amounts of the Store Closing Bonuses and eligible employees in consultation with the Consultant, who typically utilize such bonuses to retain employees and incentivize higher recoveries during store closing sales and is well acquainted with optimal methods for designing such bonus plans. The Debtors seek authority to implement a Store Closing Bonus program in an amount of no more than \$900,000 for the term of the Closing Sales.

RELIEF REQUESTED

20. By this Motion, the Debtors seek the entry of the Proposed Orders approving the Store Closing Plan and the Debtors' continued efforts in accordance therewith, including (a)(1) approving and authorizing, upon entry of the Final Order, the Debtors' assumption of the Store Closing Agreement and (2) confirming, upon entry of the Interim Order, that the Store Closing Agreement is operative and effective until the Court considers the relief requested by the Motion on a final basis, (b) approving the Sale Guidelines, (c) authorizing the Closing Sales in accordance with the Sale Guidelines, (d) authorizing the implementation of Store Closing Bonuses at the discretion of the Debtors; and (e) approving the Resolution Procedures related to any Liquidation Laws. The Debtors further request that the Court (a) set a deadline for filing objections to this Motion and entry of the Final Order, (b) set a final hearing

on the Motion, and (c) enter the Final Order on this Motion in connection with such final hearing.

BASIS FOR RELIEF REQUESTED

A. Assumption of the Store Closing Agreement (Upon Entry of the Final Order) Is Warranted Under Section 365 of the Bankruptcy Code

21. Section 365(a) of the Bankruptcy Code provides that a debtor, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease.” 11 U.S.C. § 365(a). A debtor’s determination to assume or reject an executory contract is governed by the “business judgment” standard.⁷ In applying the “business judgment” standard, courts show substantial deference to the debtor’s decision to assume or reject.⁸ “The business judgment rule ‘is a 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.’”⁹ The business judgment rule applies in chapter 11 cases.¹⁰

22. Here, the Debtors have satisfied the “business judgment” standard and have a sound business reason for seeking to assume the Store Closing Agreement and perform

⁷ *In re ANC Rental Corp., Inc.*, 277 B.R. 226, 238 (Bankr. D. Del. 2002) (“In order to assume . . . an executory contract . . . the debtor must establish that the decision is one made in its sound business judgment.”) (citing *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D.Del. 1999)).

⁸ *See Summit Land Co. v. Allen (In re Summit Land Co.)*, 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary circumstances, court approval of debtor’s decision to assume or reject executory contract “should be granted as a matter of course”).

⁹ *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)).

¹⁰ *See id.* at 656 (“Delaware business judgment rule principles have ‘vitality by analogy’ in Chapter 11.”); *see also Comm. of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) (“[T]he Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a debtor’s management decisions.”).

their obligations thereunder, which will include the reimbursement of prepetition and postpetition expenses and the payment of prepetition and postpetition obligations arising under the Store Closing Agreement, and continue the Closing Sales, which commenced prepetition, with the Consultant's assistance in accordance with the Sale Guidelines. As described in the First Day Declaration, the Debtors filed these Chapter 11 Cases to address significant prepetition liabilities, and to do so, they must maximize sources of liquidity and reduce unnecessary expense. The Closing Sales will further both of these goals: with the cooperation of their employees and the services of the Consultant, the Debtors will be able to liquidate Store Assets at the Closing Stores so that they can exit the Closing Stores quickly and efficiently, thereby monetizing certain assets and eliminating related expenses.

23. The Closing Sales are a significant component of the Debtors' efforts to maximize value because these sales enable the Debtors to sell Store Assets at the Closing Stores in a manner that is designed to maximize efficiency and increase overall profitability. Each Closing Store is either underperforming or unprofitable, and thereby constitutes a drain on liquidity. Allowing the Closing Sales—which commenced prepetition—to proceed in accordance with the Sale Guidelines will allow the Debtors to most efficiently and quickly monetize the Store Assets in a uniform and orderly process with the assistance of an experienced agent.

24. Assumption of the Store Closing Agreement will allow the Debtors to engage the Consultant, on a postpetition basis, to manage the Closing Sales at the Closing Stores. The Consultant is experienced in facilitating processes such as the Closing Sales and will help the Debtors maximize their recovery on the Store Assets located at all Closing Stores for the benefit of the Debtors' estates and their creditors by, for example, sourcing and supplementing

the Debtors' inventory with the DSD Merchandise. The DSD Merchandise, which consists of staples such as milk, bread, eggs, and meat, is essential to ensuring that customers have a good shopping experience, which will in turn make them more likely to return, maximizing the value of the Debtors' existing inventory. This is imperative given the decision of the Debtors' largest supplier to discontinue providing the Debtors with new goods. In addition, the Consultant will assist the company bring down the inventory in a balanced way to ensure that all inventory is sold by, for example, more heavily discounting slower moving items earlier in the process to ensure that the Debtors are not left with stores full of pickles.

25. Given the complexity of the Closing Sales across various states and given the multitude of stores, the Consultant will provide invaluable strategic, managerial, and accounting services, allowing the Debtors to focus their efforts on other key aspects of their chapter 11 efforts. Therefore, efficient and effective liquidation sales and procedures, as contemplated the Sale Guidelines, and the services to be provided by the Consultant will allow the Debtors to more quickly vacate those locations and avoid the accrual of unnecessary administrative expenses.

26. On the other hand, if the Debtors do not assume the Store Closing Agreement and their obligations thereunder, the Debtors' estates will suffer significant and irreparable harm because they will likely lose the benefit of the Consultant's momentum initiated prior to the Petition Date. As a result, the Debtors and their advisors will likely need to suspend the Closing Sales, which would then require the Debtors to devote substantial time and effort preparing for and managing the Closing Sales internally, or to once again seek bids from other advisors who could prepare for and run the Closing Sales, a process the Debtors have already undertaken prior to the Petition Date in connection with the selection of Consultant and

commencement of the Closing Sales. Ultimately, such disruption and delay would materially increase the Debtors' administrative expenses and overall losses, without any associated benefits of such delays to their estates.

27. For the reasons stated above, the Debtors submit that they have exercised their reasonable business judgment in seeking to assume the Store Closing Agreement and thereby engaging and enabling the Consultant to proceed with the Closing Sales at the Closing Stores. As such, there is sufficient business justification for the assumption of the Store Closing Agreement and, on interim basis, the entry of an order that confirms that the Store Closing Agreement is operative and effective.

B. Continuing the Closing Sales Pursuant to the Sale Guidelines Is Authorized Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code

28. Section 105(a) of the Bankruptcy Code provides, in relevant part, that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Section 363(b) of the Bankruptcy Code permits a debtor to use, sell, or lease, estate property “other than in the ordinary course of business” after notice and a hearing. 11 U.S.C. § 363(b)(1). Courts have authorized relief under section 363(b) where a debtor demonstrated a sound business justification for such relief.¹¹

29. As noted above, once a debtor has articulated a valid business justification, the court accords great deference to such judgment, even in the context of

¹¹ See *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983) (“The rule we adopt requires that a judge determining a § 363(b) application expressly find from the evidence presented before him at the hearing a good business reason to grant such an application.”); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1985) (“[T]he debtor must articulate some business justification, other than mere appeasement of major creditors.”).

chapter 11 cases.¹² The benefit of the business judgment rule is equally applicable in the context of sales under section 363.¹³ The Third Circuit has explained that “under normal circumstances the court would defer to the trustee’s judgment so long as there is a legitimate business justification” with respect to sales under section 363.¹⁴

30. As discussed in the preceding section, the Debtors have determined, in the sound exercise of their business judgment, that continuing the Closing Sales at the Closing Stores on and after the Petition Date, or as soon thereafter as possible, is essential to their efforts to minimize administrative expenses and liquidate assets at the Closing Stores as efficiently and quickly as possible. The Sale Guidelines will allow the Debtors to move forward with a uniform and orderly process of monetizing the Store Assets at the Closing Stores. Along with the aid and efforts of an experienced agent to maximize value and efficiency, the Debtors anticipate that the Closing Sales will take less than one month to complete. Without the Sale Guidelines, the Debtors are unlikely to be able to liquidate such assets as effectively and efficiently, which will be to the detriment of all interested parties.

31. Accordingly, the Debtors submit that they have a compelling business justification for seeking approval to continue the Closing Sales pursuant to section 363(b) and in accordance with the Sale Guidelines.

¹² See *In re Integrated Res., Inc.*, 147 B.R. at 656; *In re Johns-Manville Corp.*, 60 B.R. at 615-16.

¹³ See, e.g., *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991) (“[D]ebtor in possession can sell property of the estate outside the ordinary course of business if . . . he has an ‘articulated business justification.’”); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) (authorizing sale of debtor’s assets pursuant to section 363 “when a sound business purpose dictates such action”) (citation omitted).

¹⁴ *Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996).

C. Sale of the Store Assets Free and Clear of Liens, Claims, and Encumbrances Is Authorized Under Section 363 of the Bankruptcy Code

32. A debtor in possession may sell property under section 363(b) and section 363(f) of the Bankruptcy Code “free and clear of any interest in such property of an entity other than the estate” if any one of the following conditions is satisfied:

- (a) applicable non-bankruptcy law permits sale of such property free and clear of such interest;
- (b) such entity consents;
- (c) 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;
- (d) such interest is in bona fide dispute; or
- (e) 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).

33. Although the term “any interest” is not defined in the Bankruptcy Code, the Third Circuit has noted the trend in modern cases toward a “broader interpretation which includes other obligations that may flow from ownership of the property.”¹⁵ The scope of section 363(f) is not limited to *in rem* interests in a debtor’s assets.¹⁶ A debtor can therefore sell its assets under section 363(f) free and clear of successor liability that otherwise would have arisen under federal statute.¹⁷

34. The Debtors request approval to sell the Store Assets on a final “as is” basis, free and clear of any Encumbrances in accordance with section 363(f) of the Bankruptcy

¹⁵ *Folger Adam Security, Inc. v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 258-59 (3d Cir. 2000).

¹⁶ *Id.* (citing *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 581-82 (4th Cir. 1996)).

¹⁷ *Id.*

Code. The Debtors anticipate that they will be able to satisfy one or more of the conditions set forth in section 363(f) in connection with any Encumbrance a party may assert against the Store Assets. Furthermore, the Debtors propose that any such liens, claims, and encumbrances be transferred and attached to the proceeds of the Closing Sales, as applicable, with the same force, effect, and priority as such liens currently have on the Store Assets, and subject to the same rights, claims, defenses, and objections, if any, of all parties with respect thereto.

D. Waiver of Contractual Restrictions in Leases Restricting the Closing Sales Is Authorized and Appropriate

35. The Debtors recognize that the Closing Sales and the Sale Guidelines may be inconsistent with certain contractual restrictions contained in leases, agreements, licenses, reciprocal easement agreements, recorded documents, or other obligations applicable to certain Closing Stores. However, the Debtors request that the Court override or invalidate any contractual restrictions that may impair the Debtors' ability to conduct the Closing Sales at the Closing Stores.

36. Store closing or liquidation sales have become a routine aspect of chapter 11 cases involving retail debtors. Such sales are consistently approved by courts despite provisions in various contractual and recorded documents that seek and purport to prohibit or restrict such sales.¹⁸ Here, for the reasons discussed in this Motion and the First Day Declaration, the Debtors believe that the Closing Sales are an essential and critical component of

¹⁸ See *In re R.H. Macy & Co.*, 170 B.R. 69, 77 (Bankr. S.D.N.Y. 1994) (restrictive lease provision is unenforceable against debtor seeking to conduct going-out-of-business sale "because it conflicts with the Debtor's fiduciary duty to maximize estate assets"); *In re Ames Dep't Stores, Inc.*, 136 B.R. 357, 359 (Bankr. S.D.N.Y. 1992) ("[T]o enforce the anti-[going out-of-business] sale clause of the Lease would contravene overriding federal policy requiring Debtor to maximize estate assets by imposing additional constraints never envisioned by Congress."); *In re Tobago Bay Trading Co.*, 112 B.R. 463, 467 (Bankr. N.D. Ga. 1990) (clause in lease prohibiting going-out-of-business sales is unenforceable).

the Debtors' strategy to maximize value for the benefit of the Debtors' estates, creditors, and parties in interest. Accordingly, the Debtors respectfully request that the Court waive the applicability of, or deem unenforceable, any contractual restrictions with respect to any Closing Stores that could otherwise inhibit the Debtors' ability to conduct the Closing Sales.

E. Exemption from Liquidation Laws Imposing Restrictions on the Closing Sales Is Warranted and Appropriate

37. To the extent that any Liquidation Laws purport to prohibit, restrict, or otherwise interfere with the Closing Sales at any Closing Stores, the Debtors request that the Court deem such Liquidation Laws to be waived with respect to the Closing Sales, which are under the supervision of the Court. The Debtors request that the Court retain exclusive jurisdiction to resolve any Reserve Disputes, and that the Court resolve any Dispute Resolution Motions at the next scheduled omnibus hearing.

38. The Debtors recognize that various Liquidation Laws, including but not limited to state and local rules, laws, ordinances, and regulations that relate to permitting, licensing, bonding, waiting periods, time limits, bulk sale restrictions, and other related laws governing the conduct of store closing, liquidation, or other inventory clearance sales, may exist in certain states in which the Closing Stores are located. Such Liquidation Laws often provide that court-ordered liquidation sales are exempt from compliance therewith.

39. In the event, however, that a Liquidation Law does not expressly waive compliance therewith of a court-supervised bankruptcy sale, the Debtors submit that such Liquidation Law should be deemed to be waived to the extent that it conflicts with section 363 of the Bankruptcy Code. Here, the Closing Sales are already subject to the Court's supervision.¹⁹ Therefore, the Court is able to supervise the Closing Sales and such supervision adequately

¹⁹ See 28 U.S.C. § 1334.

protects the public interest and the Debtors' creditors. Moreover, section 363 of the Bankruptcy Code requires the Debtors to operate their businesses in a way that maximizes recoveries for creditors, but compliance with Liquidation Laws could constrain the Debtors' ability to marshal and maximize assets for the benefit of creditors. The Closing Sales are a legitimate method by which the Debtors can maximize returns from the sale of the Store Assets for the benefit of their estates, their creditors, and their stakeholders, in accordance with the obligations under section 363 of the Bankruptcy Code.

40. Therefore, to the extent that any Liquidation Laws purport to interfere with the Closing Sales, the Debtors seek authority to nevertheless proceed with the Closing Sales without the necessity of, and the delay associated with, complying with such Liquidation Laws (except health and safety laws), which would otherwise require the Debtors to obtain various state licenses or permits, observe state and local waiting periods or time limits, or satisfy any additional requirements with respect to advertising or conducting the Closing Sales, or transferring merchandise among the Debtors' various stores and distribution centers. Specifically, the Debtors submit that such Liquidation Laws should be deemed inapplicable given the Court's supervision of the Closing Sales. The Debtors further request that no other person or entity, including (but not limited to) any Governmental Unit, including any federal, state, or local agency, department, or governmental authority, or any lessor be allowed to take any action to prevent, interfere with, or otherwise hinder the conduct of the Closing Sales, including the advertisement and promotion of the Closing Sales, as contemplated in the Store Closing Agreement and in accordance with the Sale Guidelines.

41. The Debtors propose that, to the extent that any Governmental Unit seeks to dispute a Closing Sale at a Closing Store on the basis of one or more Liquidation Laws, such

party may serve a Reserve Dispute Notice on the Debtors, in accordance with the Resolution Procedures described in this Motion and set forth in the Interim Order and the Final Order.

42. Accordingly, the Debtors submit that they have a compelling business justification for seeking approval of the (i) exemption from the Liquidation Laws, (ii) Resolution Procedures, and (iii) relief from Fast Pay Laws.

F. Abandonment of Certain Property in Connection with the Closing Sales and in Accordance with the Sale Guidelines Is Warranted Under Section 554 of the Bankruptcy Code

43. Section 554 of the Bankruptcy Code provides that after notice and a hearing, a debtor “may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.”²⁰ Here, in accordance with the Sale Guidelines and with the aid of the Consultant, the Debtors will make every reasonable effort to sell all Store Assets at the Closing Stores as quickly and efficiently as possible for the purpose of monetizing such assets and vacating the Closing Stores as soon as possible. As noted above, the Debtors are seeking to liquidate Merchandise and Non-Inventory, as well as Offered FF&E (which the Debtors have determined is in their best interest to sell) located at each of the Closing Stores or elsewhere, in consultation with the Consultant. However, during the course of the Closing Sales, the Debtors may determine that the costs associated with the continued storage and sale efforts respecting certain Offered FF&E is likely to exceed the projected proceeds that could be realized from the sale thereof, or that certain Offered FF&E may have low prospects for resale. In such event, any remaining Offered FF&E would likely impose a financial burden on

²⁰ 11 U.S.C. § 554(a); *see also Hanover Ins. Co. v. Tyco Indus., Inc.*, 500 F.2d 654, 657 (3d Cir. 1974) (“[A trustee] may abandon his claim to any asset, including a cause of action, he deems less valuable than the cost of asserting that claim or administering the property.”); *In re Contract Research Sols., Inc.*, Case No. 12-11004 (KJC), 2013 WL 1910286, at *4 (Bankr. D. Del. May 1, 2013) (“[A debtor] need only demonstrate that [it] has exercised sound business judgment in making the determination to abandon.”).

the estates, in the form of storage and removal costs, but are unlikely to provide much, if any, value in return to the estates (such remaining Offered FF&E, the “**Remaining Property**”).

44. To maximize the value of the Debtors’ assets and to minimize unnecessary costs to the estates, the Debtors respectfully request authority to designate any property located at the Closing Stores as Remaining Property and to abandon such Remaining Property located at any of the Closing Stores without incurring liability to any person or entity. Before designating any assets as Remaining Property or abandoning any Remaining Property at any Closing Store, the Debtors will have determined in the exercise of their sound business judgment that such Remaining Property to be abandoned by the Debtors is either (a) burdensome to the estates because removal and storage costs for the Remaining Property are likely to exceed any net proceeds therefrom or (b) of inconsequential value and benefit to the estates.

45. The Debtors will use all commercially reasonable efforts to remove, or cause to be removed, any confidential or personal identifying information (which alone or in conjunction with other information identifies an individual, including, but not limited to, an individual’s name, social security number, date of birth, government-issued identification number, account number, and credit or debit card number) in any of the Debtors’ hardware, software, computers, or cash registers or similar equipment that constitute any Offered FF&E or any Remaining Property before any such property is sold or abandoned.

46. Accordingly, the Debtors respectfully request Court authority to designate and thereafter abandon Remaining Property if they determine that the benefits of retaining such property for storage or resale are greater than the costs of such retention.

G. The Store Closing Bonus Plan Is a Sound Exercise of the Debtors' Business Judgment and Should Be Approved

47. Section 363 of the Bankruptcy Code provides, in relevant part, that “[t]he [debtor], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). Under this section, a court may authorize a debtor to use property of the estate when such use has a “sound business purpose” and when the use of the property is proposed in good faith.²¹

48. Courts generally require a debtor to demonstrate that a valid business purpose exists for the use of estate property in a manner that is not in the ordinary course of business.²² Once the debtor has articulated a valid business justification, a presumption arises that the debtor’s decision was made on an informed basis, in good faith, and in the honest belief the action was in the best interest of the company.²³ Furthermore, once “the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.”²⁴ The business judgment rule shields a debtor’s management from judicial second-guessing.²⁵ Thus, if a debtor’s actions satisfy the business judgment rule, then the actions in question should be approved under section 363(b)(1) of the Bankruptcy Code.

²¹ See *In re W.A. Mallory Co.*, 214 B.R. 834, 836 (Bankr. E.D. Va. 1997); *In re WBQ P’ship*, 189 B.R. 97, 102 (Bankr. E.D. Va. 1995).

²² See *In re Lionel Corp.*, 722 F.2d at 1070-71.

²³ See *In re Integrated Res., Inc.*, 147 B.R. at 656.

²⁴ *In re Johns-Manville Corp.*, 60 B.R. at 616.

²⁵ See *Integrated Res.*, 147 B.R. at 656; *Johns-Manville*, 60 B.R. at 615–16 (noting that “the Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a debtor’s management decisions”).

49. In this case, the implementation of the Store Closing Bonus Plan is a sound exercise of the Debtors' business judgment and is in the best interests of the Debtors and all their estates' stakeholders. The store employees and the corporate employees deemed essential to the Closing Sales process—along with their skills, knowledge, and hard work—are more critical now than ever and none are “insiders” as that term is defined by the Bankruptcy Code. Through their commitment and performance, they can ensure that the Debtors continue to maximize stakeholder value in a challenging economic environment and at a time when those employees' positions will soon be terminated. Additionally, the total maximum cost of the Store Closing Bonus Plan is reasonable in light of competitive market practice and involves compensation structures often used in other restructuring situations to incentivize employees to continue optimal performance despite the added stress inherent in the chapter 11 process.

50. The Store Closing Bonus Plan is comparable to employee incentive plans regularly paid as “expenses of sale” by liquidating agents in other “store closing” and similar-themed sales. As in those other instances, the specific Store Closing Bonus Plan here was devised by the Debtors with input from Malfitano and the Consultant based upon their view of maximizing the sale process and recoveries for creditors.²⁶

51. Accordingly, the Debtors submit that the relief requested with respect to the Store Closing Bonus Plan is a valid exercise of the Debtors' business judgment, and the approval of the Store Closing Bonus Plan is appropriate under section 363 of the Bankruptcy

²⁶ Courts have approved incentive payments similar to those contemplated by the Store Closing Bonus Plan. See e.g. *In re Golfsmith Int'l Holdings, Inc.*, No. 16-12033 (LSS) (Bankr. D. Del. Oct. 13, 2016) (authorizing store closing retention bonus program on a final basis); *In re Sports Auth. Holdings, Inc.*, No. 16-10527 (MFW) (Bankr. D. Del. May 3, 2016) (same); *In re rue21, inc.*, No. 17-22045 (GLT) (Bankr. W.D. Pa. June 12, 2017) (same); *In re Payless Holdings LLC*, No. 17-42267 (KAS) (Bankr. E.D. Mo. May 9, 2017) (same).

Code and is in the best interests of the Debtors, their estates, and all parties in interest in these Chapter 11 Cases.

H. Appointment of a Consumer Privacy Ombudsman Is Not Required by Sections 332 and 363(b)(1) of the Bankruptcy Code

52. Section 363(b)(1) of the Bankruptcy Code provides that a debtor may not sell or lease personally identifiable information unless such sale or lease is consistent with its policies or upon appointment of a consumer privacy ombudsman (a “CPO”) pursuant to section 332 of the Bankruptcy Code. Section 332 requires the appointment of a CPO no less than seven (7) days in advance of a hearing on a sale under section 363(b)(1) so that such CPO can assist the Court in its consideration of a “proposed sale or lease of personally identifiable information under section 363(b).”

53. Here, pursuant to the Store Closing Agreement, the Consultant will not be purchasing any assets from the Debtors, much less personally identifiable information from the Debtors (*e.g.*, customer lists). The Debtors also do not intend to sell any personally identifiable information in the course of the Closing Sales, and indeed, intend to scrub all Store Assets to ensure that no confidential and personally identifiable information is transferred in connection with the sale of any such assets.

54. Accordingly, the Debtors submit that the appointment of a CPO is not necessary in connection with the Closing Sales.²⁷

SATISFACTION OF BANKRUPTCY RULE 6003(B)

55. Pursuant to Bankruptcy Rule 6003(b), any motion seeking to use property of the estate pursuant to section 363 of the Bankruptcy Code within twenty-one (21) days of the

²⁷ To the extent it is determined that the appointment of a CPO may be necessary or advisable in connection with any other proposed sale of the Debtors’ assets in these chapter 11 cases, the Debtors will work cooperatively with the U.S. Trustee in connection therewith.

Petition Date requires the Debtors to demonstrate that such relief “is necessary to avoid immediate and irreparable harm.” There is no question that the Debtors’ failure to continue conducting the Closing Sales would result in immediate and irreparable harm to the Debtors’ estates. Given that the vast majority of the products the Debtors sell are perishable, any unnecessary delay and expense will severely disrupt the Debtors’ efforts in these Chapter 11 Cases and decrease the recovery to the Debtors’ estates from the Closing Sales. For this reason and those set forth above, the Debtors respectfully submit that Bankruptcy Rule 6003(b) has been satisfied and the relief requested herein is necessary to avoid immediate and irreparable harm to the Debtors and their estates.

WAIVER OF STAY UNDER BANKRUPTCY RULE 6004(h)

56. The Debtors request that the Court waive the stay imposed by Bankruptcy Rule 6004(h), which provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of fourteen (14) days after entry of the order, unless the court orders otherwise.”²⁸ As described above, the relief sought herein is necessary for the Debtors to realize maximum return from the Closing Sales and, ultimately, to preserve value for their estates and creditors. Accordingly, the Debtors respectfully request that the Court waive the 14-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

57. To implement the foregoing immediately, the Debtors respectfully request a waiver of the notice requirements of Bankruptcy Rule 6004(a) to the extent such requirements are deemed to apply.

²⁸ Fed. R. Bankr. P. 6004(h).

NOTICE

58. The Debtors have provided notice of this Motion to: (i) the Office of the United States Trustee for the District of Delaware; (ii) the Office of the United States Attorney for the District of Delaware; (iii) the Internal Revenue Service; (iv) the Debtors' thirty (30) largest unsecured creditors (excluding insiders); (v) the Prepetition Revolving Loan Lenders; (vi) the Prepetition Term Loan Lender; (vii) all parties known to the Debtors who hold any liens or security interests in the Debtors' assets who have filed UCC-1 financing statements against the Debtors; (viii) the Debtors' banks; (ix) the applicable Governmental Units; (x) the Landlords; and (xi) sublessees, licensees, or concessionaires of the Merchant and consignors and bailors of goods included in Non-Inventory. Notice of this Motion and any order entered hereon will be served in accordance with Local Rule 9013-1(m). In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

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WHEREFORE, the Debtors respectfully request that the Court enter the Proposed Orders, substantially in the forms annexed hereto, granting the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: February 4, 2020
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Ian J. Bambrick

Pauline K. Morgan (No. 3650)

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*Proposed Counsel to the Debtors
and Debtors-in-Possession*

EXHIBIT I

PROPOSED INTERIM ORDER

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: EARTH FARE, INC. <i>et al.</i> , ¹ <div style="text-align: right;">Debtors.</div>)))))))	Chapter 11 Case No. 20-10256 (KBO) (Jointly Administered) Ref. Docket No. _____
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**INTERIM ORDER (A) CONFIRMING, ON AN INTERIM BASIS,
THAT THE STORE CLOSING AGREEMENT IS OPERATIVE AND
EFFECTIVE; (B) AUTHORIZING AND APPROVING STORE CLOSING
SALES FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES;
(C) APPROVING DISPUTE RESOLUTION PROCEDURES; (D) AUTHORIZING
CUSTOMARY BONUSES TO EMPLOYEES ESSENTIAL TO STORE CLOSINGS,
AND (E) APPROVING THE DEBTORS' STORE CLOSING PLAN**

Upon the Debtors' Emergency Motion for Interim and Final Orders (A)(1) Confirming, on an Interim Basis, that the Store Closing Agreement Is Operative and Effective and (2) Authorizing, on a Final Basis, the Debtors to Assume the Store Closing Agreement, (B) Authorizing and Approving Store Closing Sales Free and Clear of All Liens, Claims, and Encumbrances, (C) Approving Dispute Resolution Procedures, (D) Authorizing Customary Bonuses to Employees Essential to Store Closings, and (E) Approving the Debtors' Store Closing Plan (the "**Motion**")² filed by the above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**") and pursuant to sections 105(a), 363, 365, and 554 of the Bankruptcy Code and Bankruptcy Rules 6003, 6004, and 6007; and this Court having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b), and the

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Earth Fare, Inc. (3936) and EF Investment Holdings, Inc. (8084). The mailing address for each of the Debtors is 220 Continuum Drive, Fletcher, North Carolina 28732.

² All capitalized terms used and not defined herein shall have the meanings ascribed to them in the Motion.

Amended Standing Order of Reference from the United States District Court for the District of Delaware dated as of February 29, 2012; and this Court having found that venue of these cases and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and this Court having found that due and sufficient notice of the Motion has been given under the particular circumstances and that no other or further notice of the Motion need be given; and upon consideration of the First Day Declaration; and a hearing having been held to consider the relief requested in the Motion; and upon the record of the hearing and all of the proceedings had before this Court; and this Court having found and determined that the relief sought in the Motion is in the best interest of the Debtors, their estates, their creditors and all other parties in interest; and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

FOUND, CONCLUDED, AND DETERMINED that:³

A. The Debtors have advanced sound business reasons for the authorization of the Store Closing Agreement on an interim basis as set forth in the Motion and at the hearing, and the Debtors' operation under the Store Closing Agreement is a reasonable exercise of the Debtors' business judgment and is in the best interest of the Debtors and their estates.

B. The Store Closing Agreement was negotiated, proposed, and entered into without collusion, in good faith, and from arm's length bargaining positions.

³ The findings and conclusions set forth herein constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the following conclusions of law constitute findings of fact, they are adopted as such.

C. The Sale Guidelines, as described in the Motion and attached as Exhibit 1 hereto, are reasonable and will maximize the returns on the Store Assets for the benefit of the Debtors' estates and creditors.

D. The Closing Sales, in accordance with the Sale Guidelines and with the assistance of the Consultant, will provide an efficient means for the Debtors to liquidate and dispose of the Store Assets as quickly and effectively as possible, and are in the best interest of the Debtors' estates.

E. The Resolution Procedures are fair and reasonable and comply with applicable law.

F. The Debtors have represented that, pursuant to the Motion, they are not seeking to either sell or lease personally identifiable information during the course of the Closing Sales at the Closing Stores; *provided, however*, that the Consultant will be authorized to distribute emails and promotional materials to the Debtors' customers consistent with the Debtors' existing policies on the use of consumer information.

G. The Debtors and the Consultant may sell the Store Assets free and clear of all liens, claims, and encumbrances as provided for herein because, in each case, one or more of the standards set forth in section 363(f)(1)-(5) of the Bankruptcy Code has been satisfied. Those holders of any such liens, claims, and encumbrances who did not object, or who withdrew their objections, to the entry of this Interim Order are deemed to have consented thereto pursuant to section 363(f)(2) of the Bankruptcy Code. Those holders of any such liens, claims, and encumbrances who did object fall within one or more of the other subsections of section 363(f) and are adequately protected by having such liens, claims, and encumbrances attaching to the proceeds of the sale of the applicable Store Assets with the same validity and priority and to the

same extent and amount that any such liens, claims, and encumbrances had with respect to such Store Assets.

H. The relief set forth herein is necessary to avoid immediate and irreparable harm to the Debtors and their estates, and the Debtors have demonstrated good, sufficient, and sound business purposes and justifications for the relief approved herein.

I. The entry of this Interim Order is in the best interest of the Debtors and their estates, creditors, and all other parties in interest herein.

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on an interim basis, as set forth herein.
2. On _____, 2020, at _____ (ET), a hearing (the “**Final Hearing**”) will be held before this Court to consider the relief requested in the Motion on a final basis. All objections, if any, to the Motion shall be in writing and filed with this Court and served on (i) proposed counsel to the Debtors, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801, Attn: M. Blake Cleary, Esq.; Sean T. Greecher, Esq., and Ian J. Bambrick, Esq. (mbcleary@ycst.com, sgreecher@ycst.com, and ibambrick@ycst.com), (ii) any duly appointed official committee of unsecured creditors (the “**Committee**”), (iii) the Office of the United States Trustee for the District of Delaware (the “**U.S. Trustee**”) J. Caleb Boggs Building, 844 King Street, Suite 2207, Lockbox 35, Wilmington, DE 19801, Attn: Jane M. Leamy, Esq. (Jane.M.Leamy@usdoj.gov), and (iv) counsel to the Consultant, Pepper Hamilton LLP, 1313 Market Street, Suite 5100, P.O. Box 1709, Wilmington, DE 19899-1709, Attn: Douglas D. Herrmann, Esq. and Marcy McLaughlin Smith, Esq. (herrmannd@pepperlaw.com and mclaughlinm@pepperlaw.com), so as to be received on or before _____, 2020, at 4:00 p.m. (ET).

3. The Debtors are authorized and empowered to take all actions necessary or appropriate to implement the relief granted in this Interim Order. The failure to specifically include any particular provision of the Store Closing Agreement in this Interim Order shall not diminish or impair the effectiveness of such provisions, it being the intent of this Court that the Store Closing Agreement and all of its provisions, payments, and transactions, be and hereby are authorized and approved as and to the extent provided for in this Interim Order. To the extent that there is any conflict between this Interim Order, the Sale Guidelines, and the Store Closing Agreement, the terms of this Interim Order shall control over all other documents (subject to Paragraph 24 of this Interim Order), and the Sale Guidelines (as modified by any Side Letter Agreement (as that term is defined in Paragraph 24 of this Interim Order) entered into by and between the Consultant and a Landlord of a Closing Store) shall control over the Store Closing Agreement.

A. Operation and Effectiveness of the Store Closing Agreement

4. The Store Closing Agreement, a copy of which is attached to this Interim Order as Exhibit 2, is operative and effective on an interim basis. The Debtors are authorized to act and perform in accordance with the terms of the Store Closing Agreement, including, making payments required by the Store Closing Agreement to the Consultant on a weekly basis as provided for in the Store Closing Agreement without the need for any application of the Consultant or a further order of this Court.

5. Notwithstanding any provision of this Interim Order, nothing shall prevent or be construed to prevent the Consultant (individually, as part of a joint venture, or otherwise) or any of its affiliates from providing additional services to or bidding on the Debtors' assets not subject to the Store Closing Agreement the ("**Additional Assets**") pursuant to a consulting agreement, agency agreement, or otherwise. The Consultant (individually, as part of a joint

venture, or otherwise) or any of its affiliates are hereby authorized to bid on, guarantee, or otherwise acquire such Additional Assets, or offer to provide additional services, notwithstanding anything to the contrary in the Bankruptcy Code or other applicable law, *provided* that such guarantee, transaction, or acquisition is approved by separate order of this Court.

B. Authority to Engage in the Closing Sales at the Closing Stores

6. The Debtors are authorized, on an interim basis pending the Final Hearing, pursuant to section 105(a) and section 363(b)(1) of the Bankruptcy Code, to immediately continue and conduct the Closing Sales at the Closing Stores in accordance with this Interim Order, the Sale Guidelines, the Store Closing Agreement, and any Side Letter Agreement. As part of the Closing Sales, the Debtors and Consultant are authorized to sell Non-Inventory. Subject to the restrictions set forth in this Interim Order and the Sale Guidelines, the Debtors and the Consultant are authorized to take any and all actions as may be necessary or desirable to implement the Store Closing Agreement and the Closing Sales; and each of the transactions contemplated by the Store Closing Agreement, and any actions taken by the Debtors and the Consultant necessary or desirable to implement the Store Closing Agreement or the Closing Sales prior to the date of this Interim Order, are approved and ratified.

7. The Sale Guidelines are approved on an interim basis.

8. The Debtors are authorized to discontinue operations at the Closing Stores in accordance with this Interim Order and the Sale Guidelines.

9. All entities that are presently in possession of some or all of the Store Assets in which the Debtors hold an interest that are or may be subject to the Store Closing Agreement or this Interim Order hereby are directed to surrender possession of such Store Assets to the Debtors or the Consultant.

10. Except as provided herein, neither the Debtors nor the Consultant nor any of their officers, employees, or agents shall be required to obtain the approval of any third party, including (without limitation) any governmental unit (as defined in section 101(27) of the Bankruptcy Code) or any Landlord, to conduct the Closing Sales at the Closing Stores and to take any related actions authorized herein.

C. Conducting the Closing Sales at the Closing Stores

11. All newspapers and other advertising media in which the Closing Sales may be advertised and all Landlords of the Closing Stores are directed to accept this Interim Order as binding authority authorizing the Debtors and the Consultant to conduct the Closing Sales and the sale of the Store Assets pursuant to the Store Closing Agreement and the Sale Guidelines, including, without limitation, to conduct and advertise the sale of the Store Assets in the manner contemplated by and in accordance with this Interim Order, the Sale Guidelines, the Store Closing Agreement, and any Side Letter Agreement.

12. The Debtors and the Consultant are hereby authorized to take such actions as may be necessary and appropriate to implement the Store Closing Agreement and, notwithstanding any applicable non-bankruptcy laws, to conduct the Closing Sales without the need for a further order of this Court as provided in this Interim Order, the Store Closing Agreement, or the Sale Guidelines, as may be modified by a Side Letter Agreement, including, but not limited to, advertising the sale as a “store closing,” “sale on everything,” “everything must go,” “liquidation sale,” “winter clearance outlet,” or similar themed sale through the posting of signs (including the use of exterior banners at non-enclosed mall closing locations, and at enclosed mall closing locations to the extent the applicable closing location entrance does not require entry into the enclosed mall common area), use of sign walkers, and street signage.

13. Except as expressly provided in the Store Closing Agreement or this Interim Order, the sale of the Store Assets shall be conducted by the Debtors and the Consultant notwithstanding any restrictive provision of any lease, sublease, license, reciprocal easement agreement, restrictive covenant, or other agreement relative to occupancy affecting or purporting to restrict the conduct of the Closing Sales (including the sale of the Store Assets), the necessity of obtaining any third party consents, the abandonment of assets, or “going dark” provisions, and such provisions shall not be enforceable in conjunction with the Closing Sales. Breach of any such provisions in these Chapter 11 Cases in conjunction with the Closing Sales shall not constitute a default under a lease or provide a basis to terminate the lease; *provided* that the Closing Sales are conducted in accordance with the terms of this Interim Order, any Side Letter Agreement, and the Sale Guidelines.

14. Notwithstanding anything herein to the contrary, and in view of the importance of the use of sign-walkers, banners, and other advertising to the sale of the Store Assets, to the extent that, prior to the Final Hearing, disputes arise during the course of such sale regarding laws regulating the use of sign-walkers, banners, or other advertising, and the Debtors and the Consultant are unable to resolve the matter with the disputing party consensually, any party may request a telephonic hearing with this Court pursuant to these provisions. Such hearing will, to the extent practicable, be scheduled initially no later than the earlier of (a) the Final Hearing and (b) within four (4) business days of such request. Until such a hearing, no party shall interfere with the Closing Sales’ conduct in accordance with this Interim Order. This scheduling shall not be deemed to preclude additional hearings for the presentation of evidence or arguments as necessary.

15. Except as provided in this Interim Order, the Sale Guidelines, or any Side Letter Agreement, and except with respect to any Governmental Unit (as to which the Resolution Procedures shall apply), no person or entity, including, but not limited to, any Landlord, licensor, property owner, property manager, service provider, utility provider, or creditor, shall take any action to directly or indirectly prevent, interfere with, or otherwise hinder the Closing Sales or the sale of the Store Assets, or the advertising and promotion (including the posting of signs and exterior banners or the use of sign walkers) of the Closing Sales, and all such parties and persons of every nature and description, including, but not limited to, any Landlord, licensor, service provider, utility, and creditor, as well as all those acting for or on behalf of such parties, are prohibited and enjoined from (a) interfering in any way with, obstructing, or otherwise impeding the conduct of the Closing Sales or (b) instituting any action or proceeding in any court (other than this Court) or administrative body seeking an order or judgment against, among others, the Debtors, the Consultant, or the Landlords at the Closing Stores that might in any way directly or indirectly obstruct or otherwise interfere with or adversely affect the conduct of the Closing Sales or other liquidation sales at the Closing Stores or seek to recover damages for breach(es) of covenants or provisions in any lease, sublease, license, or contract based upon any relief authorized herein.

16. In accordance with and subject to the terms and conditions of the Store Closing Agreement, the Consultant shall have the right to use the Closing Stores and all related Closing Store services, all FF&E (as defined in the Store Closing Agreement), and other assets of the Debtors for the purpose of conducting the Closing Sales free of any interference from any entity or person, subject to compliance with the Sale Guidelines and this Interim Order.

17. The Consultant shall accept the Debtors' validly-issued gift certificates and gift cards that were issued by the Debtors prior to the Sale Commencement Date (as defined in the Store Closing Agreement) in accordance with the Debtors' gift certificate and gift card policies and procedures as they existed on the Petition Date until the date of closing of each Closing Store.

18. All sales of Store Assets shall be by cash, the Debtors' validly-issued gift certificates and gift cards, government subsidiary programs, WIC, food stamps, and similar currencies, or nationally recognized bank credit cards (but, for the avoidance of doubt, will not include the Debtors' member or customer appreciation points, rewards, coupons, and other similar programs).

19. All sales of all Store Assets shall be "as is" and final. Conspicuous signs stating that "all sales are final" and "as is" will be posted at the cash register areas at all Closing Stores.

20. The Debtors remain responsible for the payment of any and all sales taxes. The Debtors are directed to remit all taxes accruing from the Closing Sales to the applicable Governmental Units as and when due, provided that in the case of a bona fide dispute, the Debtors are only directed to pay such taxes upon the resolution of the dispute, if and to the extent that the dispute is decided in favor of the applicable Governmental Unit. For the avoidance of doubt, sales taxes collected and held in trust by the Debtors shall not be used to pay any creditor or any other party, other than the applicable Governmental Unit for which the sales taxes are collected.

21. Pursuant to section 363(f) of the Bankruptcy Code, the Consultant, on behalf of the Debtors, is authorized to sell all Store Assets pursuant to the Store Closing

Agreement and in accordance with the Sale Guidelines and any Side Letter Agreement. All sales of Store Assets, whether by the Consultant or the Debtors, shall be free and clear of any and all liens, claims, encumbrances, and other interests; *provided, however*, that any liens, claims, encumbrances, and other interests shall attach to the proceeds of the sale of applicable Store Assets with the same validity and priority and to the same extent and in the same amount that any such liens, claims, encumbrances, and other interests had with respect to such Store Assets, subject to any claims and defenses that the Debtors may possess with respect thereto and subject to the Consultant's fees and expenses pursuant to the Store Closing Agreement.

22. To the extent that the Debtors propose to sell or abandon Offered FF&E that may contain any personal or confidential information about the Debtors' employees or customers (the "**Confidential Information**"), the Debtors shall use all commercially reasonable efforts to remove all such the Confidential Information from such Store Assets before they are sold or abandoned.

23. The Debtors and the Consultant are authorized and empowered to transfer Store Assets among the Closing Stores as well as among any of the Debtors' stores that have already closed. The Debtors and the Consultant are authorized to sell or abandon the Debtors' Offered FF&E and abandon all Retained FF&E (as defined in the Store Closing Agreement), in accordance with the terms of the Store Closing Agreement and the Sale Guidelines, including, but not limited to, Closing Store signage. The Store Closing Agreement is amended by this Interim Order such that the Offered FF&E includes furniture, fixtures, and equipment owned by the Debtors and to be sold by the Consultant in the Closing Sales wherever those items may be located including, for example, the Debtors' corporate office and stores that have already closed, and the Consultant's sale of these additional items of Offered FF&E are subject to the terms of

the Store Closing Agreement in all respects, including but not limited to the FF&E Commission and the reimbursement by the Debtors of Consultant's reasonable expenses associated with the sale of such Offered FF&E and any removal costs.

24. The Consultant and the Landlord of each Closing Store are authorized to enter into a side letter agreement (a "**Side Letter Agreement**") between themselves to modify the Sale Guidelines with respect to a Closing Store and to govern the conduct of the Closing Sales at the applicable Closing Store without further order of the Court, and such Side Letter Agreements shall be binding as among the Consultant and any Landlord; *provided* that nothing in such Side Letter Agreements affects the provisions of paragraphs 14, 25, and 26 of this Interim Order. In the event of a conflict between the Sale Guidelines and this Interim Order with respect to a Closing Store that is subject to a Side Letter Agreement, the terms of such Side Letter Agreement shall control.

D. Resolution Procedures for Disputes Regarding Liquidation Laws

25. Nothing in this Interim Order, the Store Closing Agreement, or the Sale Guidelines releases, nullifies, or enjoins the enforcement of any liability to a Governmental Unit under environmental laws or regulations (or any associated liabilities for penalties, damages, cost recovery, or injunctive relief) to which any entity would be subject as the owner, lessor, lessee, or operator of the property after the date of entry of this Interim Order. Nothing contained in this Interim Order, the Store Closing Agreement, or the Sale Guidelines shall in any way: (a) diminish the obligation of any entity to comply with environmental laws; or (b) diminish the obligations of the Debtors to comply with environmental laws consistent with their rights and obligations as debtor in possession under the Bankruptcy Code. Except as otherwise set forth herein, the Closing Sales shall not be exempt from laws of general applicability, including, without limitation, public health and safety, criminal, tax, labor, employment, environmental,

antitrust, fair competition, traffic, and consumer protection laws, including consumer laws regulating deceptive practices and false advertising (collectively, “General Laws”). Nothing in this Interim Order, the Store Closing Agreement, or the Sale Guidelines shall alter or affect obligations to comply with all applicable federal safety laws and regulations. Nothing in this Interim Order shall be deemed to bar any Governmental Unit (as such term is defined in section 101(47) of the Bankruptcy Code) from enforcing General Laws, subject to the Debtors’ rights to assert in that forum or before this Court that any such laws are not in fact General Laws or that such enforcement is impermissible under the Bankruptcy Code or this Interim Order. Notwithstanding any other provision in this Interim Order, no party waives any rights to argue any position with respect to whether the conduct was in compliance with this Interim Order or any applicable law, or that enforcement of such applicable law is preempted by the Bankruptcy Code. Nothing in this Interim Order shall be deemed to have made any rulings on any such issues.

26. To the extent that the Closing Sales of Store Assets are subject to any Liquidation Laws, including federal, state, or local statutes, ordinances, rules, or licensing requirements directed at regulating “store closing,” similar inventory liquidation sales, or bulk sale laws, laws restricting safe, professional, and non-deceptive, customary advertising such as signs, banners, posting of signage, and use of sign-walkers in connection with the sale and including ordinances establishing license or permit requirements, waiting periods, time limits, or bulk sale restrictions that would otherwise apply to the sale of the Store Assets, the Resolution Procedures in this section shall apply:

- a. Provided that the Closing Sales are conducted in accordance with the terms of this Interim Order or the Final Order, as applicable, and the Sale Guidelines, and in light of the provisions in the laws of many Governmental Units (as defined in the Bankruptcy Code) that exempt

court-ordered sales from their provisions, the Debtors and the Consultant will be presumed to be in compliance with any Liquidation Laws and are authorized to conduct the Sales in accordance with the terms of this Interim Order or the Final Order, as applicable, and the Sale Guidelines without the necessity of further showing compliance with any such Liquidation Laws.

- b. Within two (2) business days after entry of this Interim Order, the Debtors will serve by email, facsimile, or first-class mail, copies of the Motion and the as-entered Interim Order, on the following: (i) the Landlords; (ii) the Attorney General's office for each state in which the Closing Sales are being held; (iii) the county consumer protection agency or similar agency for each county in which the Closing Sales are being held; and (iv) the division of consumer protection for each state in which the Closing Sales are being held (collectively, the "**Dispute Notice Parties**"). Within two (2) business days after entry of the Final Order, the Debtors will likewise serve the Dispute Notice Parties with a copy of the Final Order.
- c. To the extent that there is a dispute arising from or relating to the Closing Sales, this Interim Order, or the proposed Final Order, as applicable, the Store Closing Agreement, or the Sale Guidelines, which dispute relates to any Liquidation Laws (a "**Reserved Dispute**"), the Court shall retain exclusive jurisdiction to resolve the Reserved Dispute. Any time within ten (10) days following entry of this Interim Order, any Governmental Unit may assert that a Reserved Dispute exists by sending a notice (the "**Dispute Notice**") explaining the nature of the dispute to: (i) Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801, Attn: M. Blake Cleary, Esq.; Sean T. Greecher, Esq., and Ian J. Bambrick, Esq. (mbcleary@ycst.com, sgreecher@ycst.com, and ibambrick@ycst.com); (ii) the Office of the United States Trustee for the District of Delaware, J. Caleb Boggs Building, 844 King Street, Suite 2207, Lockbox 35, Wilmington, DE 19801, Attn: Jane M. Leamy, Esq. (Jane.M.Leamy@usdoj.gov); (iii) counsel to any statutorily appointed committee; (iv) any affected Landlord; and (v) Pepper Hamilton LLP, 1313 Market Street, Suite 5100, P.O. Box 1709, Wilmington, DE 19899-1709, Attn: Douglas D. Herrmann, Esq. and Marcy McLaughlin Smith, Esq. (herrmannd@pepperlaw.com and mclaughlinm@pepperlaw.com).
- d. If the Debtors, the Consultant, and the Governmental Unit are unable to resolve the Reserved Dispute within fourteen (14) days after service of the Dispute Notice, the Governmental Unit may file a motion with the Court requesting that the Court resolve the Reserved Dispute (a "**Dispute Resolution Motion**").
- e. In the event that a Dispute Resolution Motion is filed, nothing in this Interim Order or the Final Order, as applicable, shall preclude the Debtors

or any other interested party from asserting (i) that the provisions of any Liquidation Laws are preempted by the Bankruptcy Code or (ii) that neither the terms of this Interim Order or the Final Order nor the conduct of the Debtors pursuant to this Interim Order or the Final Order violates such Liquidation Laws. Filing a Dispute Resolution Motion as set forth herein shall not be deemed to affect the finality of this Interim Order or the Final Order or to limit or interfere with the Debtors' or the Consultant's ability to conduct or to continue to conduct the Closing Sales pursuant to this Interim Order or the Final Order, absent further order of the Court. Upon the entry of this Interim Order or the Final Order, as applicable, the Court grants authority for the Debtors and the Consultant to conduct the Closing Sales pursuant to the terms of this Interim Order or the Final Order, as applicable, the Store Closing Agreement, and the Sale Guidelines and to take all actions reasonably related thereto or arising in connection therewith. The Governmental Unit will be entitled to assert any jurisdictional, procedural, or substantive arguments it wishes with respect to the requirements of its Liquidation Laws or the lack of any preemption of such Liquidation Laws by the Bankruptcy Code. Nothing in this Interim Order or the Final Order will constitute a ruling with respect to any issues to be raised in any Dispute Resolution Motion.

- f. If, at any time, a dispute arises between the Debtors or the Consultant and a Governmental Unit as to whether a particular law is a Liquidation Law, and subject to any provisions contained in this Interim Order or the Final Order related to the Liquidation Laws, then any party to that dispute may utilize the provisions of subparagraphs (c) and (d) above by serving a notice to the other party and proceeding thereunder in accordance with those subparagraphs. Any determination with respect to whether a particular law is a Liquidation Law shall be made *de novo*.

27. Subject to paragraphs 25 and 26 above, each and every federal, state, or local agency, departmental unit, or governmental unit with regulatory authority over the Closing Sales, and all newspapers and other advertising media in which the Closing Sales are advertised, shall consider this Interim Order as binding authority that no further approval, license, or permit of any Governmental Unit shall be required, nor shall the Debtors or the Consultant be required to post any bond, to conduct the Closing Sales.

E. Miscellaneous

28. This Interim Order and the terms and provisions of the Store Closing Agreement shall be binding on all of the Debtors' creditors (whether known or unknown), the

Debtors, the Consultant, and their respective affiliates, successors, and assigns, and any affected third parties including, but not limited to, all persons asserting an interest in the Store Assets, notwithstanding any subsequent appointment of any trustee, party, entity, or other fiduciary under any section of the Bankruptcy Code with respect to the forgoing parties, and as to such trustee, party, entity, or other fiduciary, such terms and provisions likewise shall be binding. The provisions of this Interim Order and the terms and provisions of the Store Closing Agreement, and any actions taken pursuant hereto or thereto shall survive the entry of any order that may be entered confirming or consummating any plan(s) of the Debtors or converting the Debtors' cases from chapter 11 to chapter 7, and the terms and provisions of the Store Closing Agreement, as well as the rights and interests granted pursuant to this Interim Order and the Store Closing Agreement, shall continue in these or any superseding cases and shall be binding upon the Debtors, the Consultant, and their respective successors and permitted assigns, including any trustee or other fiduciary hereafter appointed as a legal representative of the Debtors under chapter 7 or chapter 11 of the Bankruptcy Code. Any trustee appointed in these Chapter 11 Cases shall be and hereby is authorized, but not required, to operate the business of the Debtors to the fullest extent necessary to permit compliance with the terms of this Interim Order and the Store Closing Agreement, and Consultant and the trustee shall be and hereby are authorized to perform under the Store Closing Agreement upon the appointment of the trustee without the need for further order of this Court.

29. No later than seven (7) business days prior to the Final Hearing, the Consultant shall file a declaration disclosing connections to the Debtors, their creditors, and other parties in interest in these Chapter 11 Cases.

30. The Consultant shall not be liable for any claims against the Debtors, and the Debtors shall not be liable for any claims against Consultant, in each case, other than as expressly provided for in the Store Closing Agreement.

31. All amounts due to the Consultant under the Store Closing Agreement shall be earmarked and paid by the Debtors from the proceeds of the Closing Sales (including from the sale of Merchandise, DSD Merchandise, Non-Inventory, and Offered FF&E) and shall not be reduced or capped by the terms or conditions of any pre- or post-petition financing facilities, restrictions on the use of cash collateral, or orders related thereto.

32. On a confidential basis and for professionals' "eyes only" and upon the written (including email) request of the U.S. Trustee or the official committee of unsecured creditors, if any, the Debtors shall provide such requesting party, if any, with copies of periodic reports concerning the Closing Sales that are prepared by the Debtors, their professionals, or the Consultant, provided that the foregoing shall not require the Debtors, their professionals, or the Consultant to prepare or undertake to prepare any additional or new reporting not otherwise being prepared by the Debtors, their professionals, or the Consultant in connection with the Closing Sales.

33. To the extent that the Debtors are subject to any state "fast pay" laws in connection with the Closing Sales, the Debtors shall be presumed to be in compliance with such laws to the extent, in applicable states, such payroll payments are made by the later of: (a) the Debtors' next regularly scheduled payroll and (b) seven (7) calendar days following the termination date of the relevant employee, and in all such cases consistent with, and subject to, any previous orders of this Court regarding payment of same.

34. The Debtors are authorized, but not directed, to implement and make payments under the Store Closing Bonus Plan.

35. Except with respect to the Store Closing Agreement, nothing in this Interim Order or the Motion shall be deemed to constitute a postpetition assumption of any agreement under section 365 of the Bankruptcy Code.

36. The Store Closing Agreement and related documents may be modified, amended, or supplemented by the parties thereto in accordance with the terms thereof without further order of this Court.

37. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests in respect of payments made in accordance with this Interim Order that are dishonored or rejected.

38. The Banks are authorized, when requested by the Debtors, in the Debtors' discretion, to honor and process checks or electronic fund transfers drawn on the Debtors' bank accounts to pay prepetition obligations authorized to be paid hereunder, whether such checks or other requests were submitted prior to, or after, the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments. The Banks may rely on the representations of the Debtors with respect to whether any check or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Interim Order, and any such Bank shall not have any liability to any party for relying on such representations by the Debtors, as provided for in this Interim Order.

39. Except as relates to the Consultant under the terms of the Store Closing Agreement, notwithstanding the relief granted herein and any actions taken hereunder, nothing

contained herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any person.

40. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied.

41. The requirements of Bankruptcy Rule 6007(a) are waived, to the extent applicable to the relief provided for herein.

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

43. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Interim Order shall be immediately effective and enforceable upon its entry.

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44. This Court shall retain exclusive jurisdiction with regard to all issues or disputes arising from or relating to the implementation, interpretation, or enforcement of this Interim Order or the Store Closing Agreement, including, but not limited to, any claim or issue relating to any efforts by any party or person to prohibit, restrict, or in any way limit the Closing Sales in accordance with the Sale Guidelines, or any other disputes related to the Closing Sales. No parties or person shall take any action against the Debtors, the Consultant, the Closing Sales, or any Landlord, as applicable, until this Court has resolved such dispute. This Court shall hear the request of such parties or persons with respect to any such disputes on an expedited basis, as may be appropriate under the circumstances.

EXHIBIT 1

SALE GUIDELINES

(To be attached to as-entered order)

EXHIBIT 2

STORE CLOSING AGREEMENT

(To be attached to as-entered order)

EXHIBIT II

PROPOSED FINAL ORDER

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: EARTH FARE, INC. <i>et al.</i> , ¹ <div style="text-align: right;">Debtors.</div>)))))))	Chapter 11 Case No. 20-10256 (KBO) (Jointly Administered) Ref. Docket Nos. _____
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**FINAL ORDER (A) AUTHORIZING THE DEBTORS TO ASSUME THE STORE
CLOSING AGREEMENT, (B) AUTHORIZING AND APPROVING STORE CLOSING
SALES FREE AND CLEAR OF ALL LIENS, CLAIMS, AND ENCUMBRANCES,
(C) APPROVING DISPUTE RESOLUTION PROCEDURES, (D) AUTHORIZING
CUSTOMARY BONUSES TO EMPLOYEES ESSENTIAL TO STORE CLOSINGS,
AND (E) APPROVING THE DEBTORS' STORE CLOSING PLAN**

Upon the *Debtors' Emergency Motion for Interim and Final Orders (A)(1) Confirming, on an Interim Basis, that the Store Closing Agreement Is Operative and Effective and (2) Authorizing, on a Final Basis, the Debtors to Assume the Store Closing Agreement, (B) Authorizing and Approving Store Closing Sales Free and Clear of All Liens, Claims, and Encumbrances, (C) Approving Dispute Resolution Procedures, (D) Authorizing Customary Bonuses to Employees Essential to Store Closings, and (E) Approving the Debtors' Store Closing Plan* (the "**Motion**")² filed by the above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**") and pursuant to sections 105(a), 363, 365, and 554 of the Bankruptcy Code and Bankruptcy Rules 6003, 6004, and 6007; and this Court having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b), and the *Amended Standing Order of Reference* from the United States District Court for the District of

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Earth Fare, Inc. (3936) and EF Investment Holdings, Inc. (8084). The mailing address for each of the Debtors is 220 Continuum Drive, Fletcher, North Carolina 28732.

² All capitalized terms used and not defined herein shall have the meanings ascribed to them in the Motion or the Interim Order, as applicable.

Delaware dated as of February 29, 2012; and this Court having found that venue of these cases and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and this Court having previously entered that certain *Interim Order (A) Confirming, on an Interim Basis, that the Store Closing Agreement Is Operative and Effective; (B) Authorizing and Approving Closing Sales Free and Clear of All Liens, Claims and Encumbrances; (C) Approving Dispute Resolution Procedures; and (D) Approving the Debtors' Store Closing Plan* [Docket No. {●}] (the “**Interim Order**”); and this Court having found that due and sufficient notice of the Motion has been given under the particular circumstances and that no other or further notice of the Motion need be given; and this Court having determined that it may enter a final order consistent with Article III of the United States Constitution; and upon consideration of the First Day Declaration; and a hearing having been held to consider the relief requested in the Motion; and upon the record of the hearing and all of the proceedings had before this Court; and this Court having found and determined that the relief sought in the Motion is in the best interest of the Debtors, their estates, their creditors and all other parties in interest; and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

FOUND, CONCLUDED, AND DETERMINED that:³

A. The Debtors have advanced sound business reasons for assumption of the Store Closing Agreement as set forth in the Motion and at the hearing, and assumption of the

³ The findings and conclusions set forth herein constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the following conclusions of law constitute findings of fact, they are adopted as such.

Store Closing Agreement is a reasonable exercise of the Debtors' business judgment and is in the best interest of the Debtors and their estates.

B. The Store Closing Agreement was negotiated, proposed, and entered into without collusion, in good faith, and from arm's length bargaining positions.

C. The Sale Guidelines, as described in the Motion and attached as Exhibit 1 hereto, are reasonable and will maximize the returns on the Store Assets for the benefit of the Debtors' estates and creditors.

D. The Closing Sales, in accordance with the Sale Guidelines and with the assistance of the Consultant, will provide an efficient means for the Debtors to liquidate and dispose of the Store Assets as quickly and effectively as possible, and are in the best interest of the Debtors' estates.

E. The Resolution Procedures are fair and reasonable, and comply with applicable law.

F. The Debtors have represented that, pursuant to the Motion, they are not seeking to either sell or lease personally identifiable information during the course of the Closing Sales at the Closing Stores; *provided, however*, that the Consultant will be authorized to distribute emails and promotional materials to the Debtors' customers consistent with the Debtors' existing policies on the use of consumer information.

G. The Debtors and the Consultant may sell the Store Assets free and clear of all liens, claims, and encumbrances as provided for herein because, in each case, one or more of the standards set forth in section 363(f)(1)-(5) of the Bankruptcy Code has been satisfied. Those holders of any such liens, claims, and encumbrances who did not object, or who withdrew their objections, to the entry of this Final Order are deemed to have consented thereto pursuant to

section 363(f)(2) of the Bankruptcy Code. Those holders of any such liens, claims, and encumbrances who did object fall within one or more of the other subsections of section 363(f) and are adequately protected by having such liens, claims, and encumbrances attaching to the proceeds of the sale of the applicable Store Assets with the same validity and priority and to the same extent and amount that any such liens, claims, and encumbrances had with respect to such Store Assets.

H. The Debtors have demonstrated good, sufficient, and sound business purposes and justifications for the relief approved herein.

I. The entry of this Final Order is in the best interest of the Debtors and their estates, creditors, and all other parties in interest herein.

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis, as set forth herein.
2. The Debtors are authorized and empowered to take all actions necessary or appropriate to implement the relief granted in this Final Order. The failure to specifically include any particular provision of the Store Closing Agreement in this Final Order shall not diminish or impair the effectiveness of such provisions, it being the intent of this Court that the Store Closing Agreement and all of its provisions, payments, and transactions, be and hereby are authorized and approved as and to the extent provided for in this Final Order. To the extent that there is any conflict between this Final Order, the Sale Guidelines, and the Store Closing Agreement, the terms of this Final Order shall control over all other documents (subject to Paragraph 23 of this Final Order), and the Sale Guidelines (as modified by any Side Letter Agreement (as that term is defined in Paragraph 23 of this Final Order) entered into by and between the Consultant and a Landlord of a Closing Store) shall control over the Store Closing Agreement.

A. Assumption of the Store Closing Agreement by the Debtors

3. The Store Closing Agreement, a copy of which is attached to this Final Order as Exhibit 2, is hereby assumed pursuant to section 365 of the Bankruptcy Code. The Debtors are authorized to act and perform in accordance with the terms of the Store Closing Agreement, including, making payments required by the Store Closing Agreement to the Consultant on a weekly basis as provided for in the Store Closing Agreement without the need for any application of the Consultant or a further order of this Court.

4. Notwithstanding any provision of this Final Order, nothing shall prevent or be construed to prevent the Consultant (individually, as part of a joint venture, or otherwise) or any of its affiliates from providing additional services to or bidding on the Debtors' assets not subject to the Store Closing Agreement ("**Additional Assets**") pursuant to a consulting agreement, agency agreement, or otherwise. The Consultant (individually, as part of a joint venture, or otherwise) or any of its affiliates are hereby authorized to bid on, guarantee or otherwise acquire such Additional Assets, or offer to provide additional services, notwithstanding anything to the contrary in the Bankruptcy Code or other applicable law, *provided* that such guarantee, transaction, or acquisition is approved by separate order of this Court.

B. Authority to Engage in the Closing Sales at the Closing Stores

5. The Debtors are authorized, pursuant to section 105(a) and section 363(b)(1) of the Bankruptcy Code, to continue to conduct the Closing Sales at the Closing Stores in accordance with this Final Order, the Sale Guidelines, the Store Closing Agreement, and any Side Letter Agreement. As part of the Closing Sales, the Debtors and Consultant are authorized to sell Non-Inventory. Subject to the restrictions set forth in this Final Order and the Sale Guidelines, the Debtors and the Consultant are authorized to take any and all actions as may be

necessary or desirable to implement the Store Closing Agreement and the Closing Sales; and each of the transactions contemplated by the Store Closing Agreement, and any actions taken by the Debtors and the Consultant necessary or desirable to implement the Store Closing Agreement or the Closing Sales prior to the date of this Final Order, are approved and ratified.

6. The Sale Guidelines are approved.

7. The Debtors are authorized to discontinue operations at the Closing Stores in accordance with this Final Order and the Sale Guidelines.

8. All entities that are presently in possession of some or all of the Store Assets in which the Debtors hold an interest that are or may be subject to the Store Closing Agreement or this Final Order hereby are directed to surrender possession of such Store Assets to the Debtors or the Consultant.

9. Except as provided herein, neither the Debtors nor the Consultant nor any of their officers, employees, or agents shall be required to obtain the approval of any third party, including (without limitation) any governmental unit (as defined in section 101(27) of the Bankruptcy Code) or any Landlord, to conduct the Closing Sales at the Closing Stores and to any related actions authorized herein.

C. Conducting the Closing Sales at the Closing Stores

10. All newspapers and other advertising media in which the Closing Sales may be advertised and all Landlords of the Closing Stores are directed to accept this Final Order as binding authority authorizing the Debtors and the Consultant to conduct the Closing Sales and the sale of the Store Assets pursuant to the Store Closing Agreement and the Sale Guidelines, including, without limitation, to conduct and advertise the sale of the Store Assets in the manner contemplated by and in accordance with this Final Order, the Sale Guidelines, the Store Closing Agreement, and any Side Letter Agreement.

11. The Debtors and the Consultant are hereby authorized to take such actions as may be necessary and appropriate to implement the Store Closing Agreement and, notwithstanding any applicable non-bankruptcy laws, to conduct the Closing Sales without the need for a further order of this Court as provided in this Final Order, the Store Closing Agreement, or the Sale Guidelines, as may be modified by a Side Letter Agreement, including, but not limited to, advertising the sale as a “store closing,” “sale on everything,” “everything must go,” “liquidation sale,” “winter clearance outlet,” or similar themed sale through the posting of signs (including the use of exterior banners at non-enclosed mall closing locations, and at enclosed mall closing locations to the extent the applicable closing location entrance does not require entry into the enclosed mall common area), use of sign walkers, and street signage.

12. Except as expressly provided in the Store Closing Agreement or this Final Order, the sale of the Store Assets shall be conducted by the Debtors and the Consultant notwithstanding any restrictive provision of any lease, sublease, license, reciprocal easement agreement, restrictive covenant, or other agreement relative to occupancy affecting or purporting to restrict the conduct of the Closing Sales (including the sale of the Store Assets), the necessity of obtaining any third party consents, the abandonment of assets, or “going dark” provisions, and such provisions shall not be enforceable in conjunction with the Closing Sales. Breach of any such provisions in these Chapter 11 Cases in conjunction with the Closing Sales shall not constitute a default under a lease or provide a basis to terminate the lease; *provided* that the Closing Sales are conducted in accordance with the terms of this Final Order, any Side Letter Agreement, and the Sale Guidelines.

13. Notwithstanding anything herein to the contrary, and in view of the importance of the use of sign-walkers, banners, and other advertising to the sale of the Store

Assets, to the extent that disputes arise during the course of such sale regarding laws regulating the use of sign-walkers, banners, or other advertising, and the Debtors and the Consultant are unable to resolve the matter with the disputing party consensually, any party may request a telephonic hearing with this Court pursuant to these provisions. Such hearing will, to the extent practicable, be scheduled initially no later than the earlier of (a) the next regularly scheduled omnibus hearing and (b) within four (4) business days of such request. Until such a hearing, no party shall interfere with the Closing Sales' conduct in accordance with this Final Order. This scheduling shall not be deemed to preclude additional hearings for the presentation of evidence or arguments as necessary.

14. Except as provided in this Final Order, the Sale Guidelines, or any Side Letter Agreement, and except with respect to any Governmental Unit (as to which the Resolution Procedures shall apply), no person or entity, including, but not limited to, any Landlord, licensor, property owner, property manager, service provider, utility provider, or creditor, shall take any action to directly or indirectly prevent, interfere with, or otherwise hinder the Closing Sales or the sale of the Store Assets, or the advertising and promotion (including the posting of signs and exterior banners or the use of sign walkers) of the Closing Sales, and all such parties and persons of every nature and description, including, but not limited to, any Landlord, licensor, service provider, utility, and creditor, as well as all those acting for or on behalf of such parties, are prohibited and enjoined from (a) interfering in any way with, obstructing, or otherwise impeding the conduct of the Closing Sales or (b) instituting any action or proceeding in any court (other than this Court) or administrative body seeking an order or judgment against, among others, the Debtors, the Consultant, or the Landlords at the Closing Stores that might in any way directly or indirectly obstruct or otherwise interfere with or adversely affect the conduct of the Closing

Sales or other liquidation sales at the Closing Stores or seek to recover damages for breach(es) of covenants or provisions in any lease, sublease, license, or contract based upon any relief authorized herein.

15. In accordance with and subject to the terms and conditions of the Store Closing Agreement, the Consultant shall have the right to use the Closing Stores and all related Closing Store services, all FF&E (as defined in the Store Closing Agreement), and other assets of the Debtors for the purpose of conducting the Closing Sales free of any interference from any entity or person, subject to compliance with the Sale Guidelines and this Final Order.

16. The Consultant shall accept the Debtors' validly-issued gift certificates and gift cards that were issued by the Debtors prior to the Sale Commencement Date (as defined in the Store Closing Agreement) in accordance with the Debtors' gift certificate and gift card policies and procedures as they existed on the Petition Date until the date of closing of each Closing Store.

17. All sales of Store Assets shall be by cash, the Debtors' validly-issued gift certificates and gift cards, government subsidiary programs, WIC, food stamps, and similar currencies, or nationally recognized bank credit cards (but, for the avoidance of doubt, will not include the Debtors' member or customer appreciation points, rewards, coupons, and other similar programs).

18. All sales of all Store Assets shall be "as is" and final. Conspicuous signs stating that "all sales are final" and "as is" will be posted at the cash register areas at all Closing Stores.

19. The Debtors remain responsible for the payment of any and all sales taxes. The Debtors are directed to remit all taxes accruing from the Closing Sales to the applicable

Governmental Units as and when due, provided that in the case of a bona fide dispute, the Debtors are only directed to pay such taxes upon the resolution of the dispute, if and to the extent that the dispute is decided in favor of the applicable Governmental Unit. For the avoidance of doubt, sales taxes collected and held in trust by the Debtors shall not be used to pay any creditor or any other party, other than the applicable Governmental Unit for which the sales taxes are collected.

20. Pursuant to section 363(f) of the Bankruptcy Code, the Consultant, on behalf of the Debtors, is authorized to sell all Store Assets pursuant to the Store Closing Agreement and in accordance with the Sale Guidelines and any Side Letter Agreement. All sales of Store Assets, whether by the Consultant or the Debtors, shall be free and clear of any and all liens, claims, encumbrances, and other interests; *provided, however*, that any liens, claims, encumbrances, and other interests shall attach to the proceeds of the sale of applicable Store Assets with the same validity and priority and to the same extent and in the same amount that any such liens, claims, encumbrances, and other interests had with respect to such Store Assets, subject to any claims and defenses that the Debtors may possess with respect thereto and subject to the Consultant's fees and expenses pursuant to the Store Closing Agreement.

21. To the extent that the Debtors propose to sell or abandon Offered FF&E that may contain any personal or confidential information about the Debtors' employees or customers (the "**Confidential Information**"), the Debtors shall use all commercially reasonable efforts to remove all such the Confidential Information from such Store Assets before they are sold or abandoned.

22. The Debtors and the Consultant are authorized and empowered to transfer Store Assets among the Closing Stores as well as among any of the Debtors' stores that have

already closed. The Debtors and the Consultant are authorized to sell or abandon the Debtors' Offered FF&E and abandon all Retained FF&E (as defined in the Store Closing Agreement), in accordance with the terms of the Store Closing Agreement and the Sale Guidelines, including, but not limited to, Closing Store signage. The Store Closing Agreement is amended by this Final Order such that the Offered FF&E includes furniture, fixtures, and equipment owned by the Debtors and to be sold by the Consultant in the Closing Sales wherever those items may be located including, for example, the Debtors' corporate office and stores that have already closed, and the Consultant's sale of these additional items of Offered FF&E are subject to the terms of the Store Closing Agreement in all respects, including but not limited to the FF&E Commission and the reimbursement by the Debtors of Consultant's reasonable expenses associated with the sale of such Offered FF&E and any removal costs.

23. The Consultant and the Landlord of each Closing Store are authorized to enter into a side letter agreement (a "**Side Letter Agreement**") between themselves to modify the Sale Guidelines with respect to a Closing Store and to govern the conduct of the Closing Sales at the applicable Closing Store without further order of the Court, and such Side Letter Agreements shall be binding as among the Consultant and any Landlord; *provided* that nothing in such Side Letter Agreements affects the provisions of paragraphs 13, 24, and 25 of this Final Order. In the event of a conflict between the Sale Guidelines and this Final Order with respect to a Closing Store that is subject to a Side Letter Agreement, the terms of such Side Letter Agreement shall control.

D. Resolution Procedures for Disputes Regarding Liquidation Laws

24. Nothing in this Final Order, the Store Closing Agreement, or the Sale Guidelines releases, nullifies, or enjoins the enforcement of any liability to a Governmental Unit under environmental laws or regulations (or any associated liabilities for penalties, damages, cost

recovery, or injunctive relief) to which any entity would be subject as the owner, lessor, lessee, or operator of the property after the date of entry of this Final Order. Nothing contained in this Final Order, the Store Closing Agreement, or the Sale Guidelines shall in any way: (a) diminish the obligation of any entity to comply with environmental laws; or (b) diminish the obligations of the Debtors to comply with environmental laws consistent with their rights and obligations as debtor in possession under the Bankruptcy Code. Except as otherwise set forth herein, the Closing Sales shall not be exempt from laws of general applicability, including, without limitation, public health and safety, criminal, tax, labor, employment, environmental, antitrust, fair competition, traffic, and consumer protection laws, including consumer laws regulating deceptive practices and false advertising (collectively, “**General Laws**”). Nothing in this Final Order, the Store Closing Agreement, or the Sale Guidelines shall alter or affect obligations to comply with all applicable federal safety laws and regulations. Nothing in this Final Order shall be deemed to bar any Governmental Unit (as such term is defined in section 101(47) of the Bankruptcy Code) from enforcing General Laws, subject to the Debtors’ rights to assert in that forum or before this Court that any such laws are not in fact General Laws or that such enforcement is impermissible under the Bankruptcy Code or this Final Order. Notwithstanding any other provision in this Final Order, no party waives any rights to argue any position with respect to whether the conduct was in compliance with this Final Order or any applicable law, or that enforcement of such applicable law is preempted by the Bankruptcy Code. Nothing in this Final Order shall be deemed to have made any rulings on any such issues.

25. To the extent that the Closing Sales of Store Assets are subject to any Liquidation Laws, including federal, state, or local statutes, ordinances, rules, or licensing requirements directed at regulating “store closing,” similar inventory liquidation sales, or bulk

sale laws, laws restricting safe, professional, and non-deceptive, customary advertising such as signs, banners, posting of signage, and use of sign-walkers in connection with the sale and including ordinances establishing license or permit requirements, waiting periods, time limits, or bulk sale restrictions that would otherwise apply to the sale of the Store Assets, the Resolution Procedures in this section shall apply:

- a. Provided that the Closing Sales are conducted in accordance with the terms of this Final Order and the Sale Guidelines, and in light of the provisions in the laws of many Governmental Units (as defined in the Bankruptcy Code) that exempt court-ordered sales from their provisions, the Debtors and the Consultant will be presumed to be in compliance with any Liquidation Laws and are authorized to conduct the Sales in accordance with the terms of this Final Order and the Sale Guidelines without the necessity of further showing compliance with any such Liquidation Laws.
- b. Within two (2) business days after entry of the Final Order, the Debtors will serve by email, facsimile, or first-class mail, copies of the Final Order on the following: (i) the Landlords; (ii) the Attorney General's office for each state in which the Closing Sales are being held; (iii) the county consumer protection agency or similar agency for each county in which the Closing Sales are being held; and (iv) the division of consumer protection for each state in which the Closing Sales are being held (collectively, the "**Dispute Notice Parties**").
- c. To the extent that there is a dispute arising from or relating to the Closing Sales, the Interim Order, or this Final Order, as applicable, the Store Closing Agreement, or the Sale Guidelines, which dispute relates to any Liquidation Laws (a "**Reserved Dispute**"), the Court shall retain exclusive jurisdiction to resolve the Reserved Dispute. If a governmental unit filed a Dispute Notice (as defined in the Interim Order) within ten (10) days of service of the Interim Order and sent such Dispute Notice to the Dispute Notice Parties as required by the Interim Order, and the Debtors, the Consultant, and the Governmental Unit are unable to resolve the Reserved Dispute within fourteen (14) days after service of the Dispute Notice, the Governmental Unit may file a motion with the Court requesting that the Court resolve the Reserved Dispute (a "**Dispute Resolution Motion**").
- d. In the event that a Dispute Resolution Motion is filed, nothing in this Final Order shall preclude the Debtors or any other interested party from asserting (i) that the provisions of any Liquidation Laws are preempted by the Bankruptcy Code or (ii) that neither the terms of the Interim Order or this Final Order, as applicable, nor the conduct of the Debtors pursuant to

the Interim Order or this Final Order, as applicable, violates such Liquidation Laws. Filing a Dispute Resolution Motion as set forth herein shall not be deemed to affect the finality of this Final Order or to limit or interfere with the Debtors' or the Consultant's ability to conduct or to continue to conduct the Closing Sales pursuant to this Final Order, absent further order of the Court. Upon the entry of this Final Order the Court grants authority for the Debtors and the Consultant to conduct the Closing Sales pursuant to the terms of this Final Order the Store Closing Agreement, and the Sale Guidelines and to take all actions reasonably related thereto or arising in connection therewith. The Governmental Unit will be entitled to assert any jurisdictional, procedural, or substantive arguments it wishes with respect to the requirements of its Liquidation Laws or the lack of any preemption of such Liquidation Laws by the Bankruptcy Code. Nothing in this Final Order will constitute a ruling with respect to any issues to be raised in any Dispute Resolution Motion.

- e. If, at any time, a dispute arises between the Debtors or the Consultant and a Governmental Unit as to whether a particular law is a Liquidation Law, and subject to any provisions contained in this Final Order related to the Liquidation Laws, then any party to that dispute may utilize the provisions of subparagraphs (c) and (d) above by serving a notice to the other party and proceeding thereunder in accordance with those subparagraphs. Any determination with respect to whether a particular law is a Liquidation Law shall be made *de novo*.

26. Subject to paragraphs 24 and 25 above, each and every federal, state, or local agency, departmental unit, or governmental unit with regulatory authority over the Closing Sales, and all newspapers and other advertising media in which the Closing Sales are advertised, shall consider this Final Order as binding authority that no further approval, license, or permit of any Governmental Unit shall be required, nor shall the Debtors or the Consultant be required to post any bond, to conduct the Closing Sales.

E. Miscellaneous

27. This Final Order and the terms and provisions of the Store Closing Agreement shall be binding on all of the Debtors' creditors (whether known or unknown), the Debtors, the Consultant, and their respective affiliates, successors, and assigns, and any affected third parties including, but not limited to, all persons asserting an interest in the Store Assets,

notwithstanding any subsequent appointment of any trustee, party, entity, or other fiduciary under any section of the Bankruptcy Code with respect to the forgoing parties, and as to such trustee, party, entity, or other fiduciary, such terms and provisions likewise shall be binding. The provisions of this Final Order and the terms and provisions of the Store Closing Agreement, and any actions taken pursuant hereto or thereto shall survive the entry of any order that may be entered confirming or consummating any plan(s) of the Debtors or converting the Debtors' cases from chapter 11 to chapter 7, and the terms and provisions of the Store Closing Agreement, as well as the rights and interests granted pursuant to this Final Order and the Store Closing Agreement, shall continue in these or any superseding cases and shall be binding upon the Debtors, the Consultant, and their respective successors and permitted assigns, including any trustee or other fiduciary hereafter appointed as a legal representative of the Debtors under chapter 7 or chapter 11 of the Bankruptcy Code. Any trustee appointed in these Chapter 11 Cases shall be and hereby is authorized, but not required, to operate the business of the Debtors to the fullest extent necessary to permit compliance with the terms of this Final Order and the Store Closing Agreement, and Consultant and the trustee shall be and hereby are authorized to perform under the Store Closing Agreement upon the appointment of the trustee without the need for further order of this Court.

28. The Consultant shall not be liable for any claims against the Debtors, and the Debtors shall not be liable for any claims against Consultant, in each case, other than as expressly provided for in the Store Closing Agreement.

29. All amounts due to the Consultant under the Store Closing Agreement shall be earmarked and paid by the Debtors from the proceeds of the Closing Sales (including from the sale of Merchandise, DSD Merchandise, Non-Inventory, and Offered FF&E) and shall

not be reduced or capped by the terms or conditions of any pre- or post-petition financing facilities, restrictions on the use of cash collateral, or orders related thereto.

30. On a confidential basis and for professionals' "eyes only" and upon the written (including email) request of the U.S. Trustee or the official committee of unsecured creditors, if any, the Debtors shall provide such requesting party, if any, with copies of periodic reports concerning the Closing Sales that are prepared by the Debtors, their professionals, or the Consultant, provided that the foregoing shall not require the Debtors, their professionals, or the Consultant to prepare or undertake to prepare any additional or new reporting not otherwise being prepared by the Debtors, their professionals, or the Consultant in connection with the Closing Sales.

31. To the extent that the Debtors are subject to any state "fast pay" laws in connection with the Closing Sales, the Debtors shall be presumed to be in compliance with such laws to the extent, in applicable states, such payroll payments are made by the later of: (a) the Debtors' next regularly scheduled payroll and (b) seven (7) calendar days following the termination date of the relevant employee, and in all such cases consistent with, and subject to, any previous orders of this Court regarding payment of same.

32. The Debtors are authorized, but not directed, to implement and make payments under the Store Closing Bonus Plan.

33. Except with respect to the Store Closing Agreement, nothing in this Final Order or the Motion shall be deemed to constitute a postpetition assumption of any agreement under section 365 of the Bankruptcy Code.

34. The Store Closing Agreement and related documents may be modified, amended, or supplemented by the parties thereto in accordance with the terms thereof without further order of this Court.

35. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests in respect of payments made in accordance with this Final Order that are dishonored or rejected.

36. The Banks are authorized, when requested by the Debtors, in the Debtors' discretion, to honor and process checks or electronic fund transfers drawn on the Debtors' bank accounts to pay prepetition obligations authorized to be paid hereunder, whether such checks or other requests were submitted prior to, or after, the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments. The Banks may rely on the representations of the Debtors with respect to whether any check or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Final Order, and any such Bank shall not have any liability to any party for relying on such representations by the Debtors, as provided for in this Final Order.

37. Except as relates to the Consultant under the terms of the Store Closing Agreement, notwithstanding the relief granted herein and any actions taken hereunder, nothing contained herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any person.

38. The requirements of Bankruptcy Rule 6007(a) are waived, to the extent applicable to the relief provided for herein.

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

40. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Final Order shall be immediately effective and enforceable upon its entry.

41. This Court shall retain exclusive jurisdiction with regard to all issues or disputes arising from or relating to the implementation, interpretation, or enforcement of this Final Order or the Store Closing Agreement, including, but not limited to, any claim or issue relating to any efforts by any party or person to prohibit, restrict, or in any way limit the Closing Sales in accordance with the Sale Guidelines, or any other disputes related to the Closing Sales. No parties or person shall take any action against the Debtors, the Consultant, the Closing Sales, or any Landlord, as applicable, until this Court has resolved such dispute. This Court shall hear the request of such parties or persons with respect to any such disputes on an expedited basis, as may be appropriate under the circumstances.

EXHIBIT 1

SALE GUIDELINES

(To be attached to as-entered order)

EXHIBIT 2

STORE CLOSING AGREEMENT

(To be attached to as-entered order)

EXHIBIT III
STORE CLOSING AGREEMENT



January 30, 2020

To: Earth Fare, Inc. ("Merchant")
220 Continuum Drive
Fletcher, North Carolina 28732
Attn: Mindy Harvey

From: Gordon Brothers Retail Partners, LLC
800 Boylston Street
27th Floor
Boston, MA 02199

-and

Hilco Merchant Resources, LLC
5 Revere Drive
Suite 206
Northbrook, IL 60062

Attn: Ian Fredericks

Re: Store Closing Program – Consulting Agreement

Ladies and Gentlemen:

This letter shall serve as the agreement (the "Agreement") of a contractual joint venture comprised of Hilco Merchant Resources, LLC and Gordon Brothers Retail Partners, LLC (together, "Consultant") and Merchant pursuant to which Consultant shall serve as the consultant to Merchant to conduct a "going out of business," "store closing," "everything must go," "sale on everything," or other mutually agreed upon themed sale (the "Sale") at Merchant's retail stores identified on Exhibit A attached hereto (each a "Store" and collectively the "Stores"), subject to the terms and conditions set forth herein.

On or about February 3, 2020, the Merchant intends to file for protection under chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 by commencing a chapter 11 case (the "Chapter 11 Case") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). Pending approval of the Sale by the Bankruptcy Court,

the Sale shall only be conducted using a "sale on everything," or other mutually agreed upon theme at the Stores.

1. **RETENTION**

(A) Merchant hereby retains Consultant as its independent consultant to conduct the Sale at the Stores during the Sale Term, and in connection therewith, Consultant shall, throughout the Sale Term:

- (i) Recommend appropriate discounting to effectively sell all of Merchant's goods located at or to be delivered to the Stores in accordance with a "going out of business," "store closing," "everything must go," "sale on everything," or other mutually agreed upon themed sale, and recommend appropriate point-of-purchase, point-of-sale, and other internal and external advertising in connection therewith.
- (ii) Provide qualified supervision to oversee the conduct of the Sale, which supervisors, once identified to Merchant, shall not be removed from the Sale event unless Merchant otherwise agrees or requests removal.
- (iii) Maintain focused and constant communication with Store-level employees and managers to keep them abreast of strategy and timing and to properly effect Store-level communication by Merchant's employees to customers and others about the Sale.
- (iv) Establish and monitor accounting functions for the Sale, including evaluation of sales of Merchant's goods located at the Stores by category, sales reporting and expense monitoring, all of which shall be shared with the Merchant's advisors monitoring the Sale.
- (v) Meet with the Merchant and its advisors, on at least a weekly basis, to review sales, sales reporting and expenses in an effort to minimize expenses and maximize overall net recovery of the Sale.
- (vi) Recommend loss prevention strategies.
- (vii) Coordinate with Merchant so that the operation of the Stores are being properly maintained including ongoing customer service and housekeeping activities.
- (viii) Recommend appropriate staffing levels for the Stores and appropriate bonus and/or incentive programs (to be funded by Merchant) for Store employees.
- (ix) Recommend loss prevention strategies.
- (x) Recommend appropriate levels of DSD Merchandise (hereinafter defined) to be included in the Sale.

- (xi) Subject to the approval of the Bankruptcy Court, assist Merchant to commence the Sale as a "going out of business," "store closing," "sale on everything," "everything must go," or such other themed sale.

2. **SALE TERM: VACATING STORES**

(A) The term "Sale Term" with respect to each Store shall commence on February 3, 2020 (the "Sale Commencement Date") and shall end with respect to each respective Store no later than February 29, 2020 (the "Sale Termination Date"); provided, however, that Merchant may decide on an earlier or later "Sale Commencement Date" or "Sale Termination Date" with respect to any one or more Stores (on a Store-by-Store basis).

(B) Upon the conclusion of the Sale Term at each Store, Consultant shall leave such Store in broom clean condition, subject to Consultant's right pursuant to Section 6 below to abandon in a neat and orderly manner all unsold Offered FF&E and all Retained FF&E.

3. **EXPENSES**

(A) All expenses incident to the conduct of the Sale and the operation of the Stores during the Sale Term (including without limitation all Consultant Controlled Expenses and all other Store-level and corporate expenses associated with the Sale) shall be borne by Merchant; except solely for any of the specifically enumerated "Consultant Controlled Expenses" that exceed the aggregate budgeted amount (as provided in Section 3(B) below) for such Consultant Controlled Expenses.

(B) Attached hereto as Exhibit B is an expense budget for the "Consultant Controlled Expenses." Upon approval of the assumption of this Agreement by the Bankruptcy Court, after taking the Advance (as defined herein) into account, Consultant will advance funds for the Consultant Controlled Expenses, and Merchant shall reimburse Consultant therefor (up to the aggregate budgeted amount) in connection with each weekly reconciliation contemplated by Section 5(B) upon presentation of reasonable documentation for such actually-incurred expenses. Upon execution of this Agreement, Merchant shall advance Consultant the sum of \$350,000 for Consultant Controlled Expenses that may be incurred from the Sale Commencement Date through the approval of the assumption of this Agreement by the Bankruptcy Court (the "Advance"). All Consultant Controlled Expenses shall be billed at cost, without markup, and evidence of incurrence shall be provided, if requested. The parties may from time to time mutually agree in writing to increase or decrease the budget of Consultant Controlled Expenses based upon circumstances of the Sale and the removal of any Stores from the Sale. The expense incident to acquiring and selling the DSD Merchandise shall be an expense of Merchant, including DSD Merchandise sourced by Consultant for inclusion in the Sale, regardless of whether the costs and expenses incurred by Consultant to source such DSD Merchandise are included in the budget.

4. **CONSULTANT COMPENSATION**

(A) As used herein, the following terms shall have the following meanings:

- (i) "Cost Value" shall be agreed upon by the Consultant and Merchant based on the Merchant's books and records.
- (ii) "DSD Merchandise" shall mean the "direct store delivery" inventory that Consultant may include, subject to Merchant's consent, to maximize the return on the Merchandise.
- (iii) "Gross Proceeds" shall mean the sum of gross proceeds of all sales of Merchandise and DSD Merchandise made in the Stores (including, as a result of the redemption of any gift card, gift certificate, or merchandise credit as provided for in the Approval Order) during the Sale Term, net only of sales taxes. All sales will be made only for cash, government subsidiary programs, WIC, food stamps and similar currencies, or nationally recognized bank credit cards.
- (iv) "Merchandise" shall mean all goods, saleable in the ordinary course, located in the Stores on the Sale Commencement Date or delivered thereto after the Sale Commencement Date. "Merchandise" does not mean and shall not include: (1) goods that belong to sublessees, licensees or concessionaires of Merchant; (2) owned furnishings, trade fixtures, equipment and improvements to real property that are located in the Stores (collectively, "FF&E"); (3) damaged or defective merchandise that cannot be sold for any price; (4) goods held by Merchant on memo, on consignment, or as bailee; (1)-(4), collectively without the FF&E, the "Non-Inventory"; or (5) gift cards (third party and Merchant branded).
- (v) "Recovery Percentage" shall mean the Gross Proceeds, calculated using the "gross rings" method, divided by the Cost Value of the Merchandise sold, calculated using the "gross rings" method.

(B) In consideration of its services hereunder, Merchant shall pay Consultant a "Base Fee" equal to one percent (1.0%) of Gross Proceeds. In addition to the "Base Fee", Consultant may also earn an "Incentive Fee" (together with the Base Fee, the "Consulting Fee") equal to the aggregate sum of the percentages shown in the following table, based upon the following thresholds of Recovery Percentage (e.g., in each case, as calculated back to first dollar):

Gross Recovery Percentage on Cost	Consulting Fee
Up to 95.0%	1.0% of Gross Proceeds
95.1% to 98.0%	1.25% of Gross Proceeds
98.1% to 101.0%	1.50% of Gross Proceeds
Above 101%	1.75% of Gross Proceeds

(C) Subject to Bankruptcy Court approval, Consultant shall sell Non-Inventory during the Sale at the Stores, and in consideration of such services, Consultant shall earn a fee equal to the Consulting Fee percentage earned on sales of Merchandise as set forth above multiplied by the aggregate gross receipts, net only of sales taxes, from the sale of Non-Inventory at the Stores.

(D) Gross Rings. For purposes of calculating Gross Proceeds, Recovery Percentages, and the Consulting Fee, the parties shall use the "Gross Rings" method, wherein Consultant and Merchant shall jointly keep (i) a strict count of gross register receipts less applicable sales taxes, and (ii) cash reports of sales within each Store. Register receipts shall show for each item sold the retail price (as reflected on Merchant's books and records) for such item, and the markdown or other discount granted in connection with such sale. All such records and reports shall be made available to Consultant and Merchant during regular business hours upon reasonable notice.

(E) On a weekly basis in connection with each weekly reconciliation contemplated by Section 5(B) below, Merchant shall pay Consultant an amount equal to the sum of one percent (1.0%) of Gross Proceeds on account of the prior week's sales as an advance on account of the fees payable hereunder; and (2) any FF&E Commission earned during the prior week. The parties shall determine the definitive Consulting Fee (including the applicable Incentive Fee) in connection with the Final Reconciliation. Immediately thereafter (and as part of the Final Reconciliation), Merchant shall pay any additional amount owed on account of such fee.

5. CONDUCT OF SALE: OTHER SALE MATTERS

(A) Unless otherwise agreed to by Merchant and Consultant, Merchant shall have control over the personnel in the Stores and shall handle the cash, debit and charge card payments for all Merchandise in accordance with Merchant's normal cash management procedures, subject to Consultant's right to audit any such items in the event of a good faith dispute as to the amount thereof. Merchant (and not Consultant) shall be responsible for ensuring that the Sale, and the operation of the Stores (before, during, and after the Sale Term) shall be conducted in compliance with all applicable laws and regulations.

(B) The parties will meet on each Wednesday during the Sale Term to review any Sale matters reasonably requested by either party; and all amounts payable or reimbursable to Consultant for the prior week (or the partial week in the case of the first and last weeks) shall be reconciled and paid immediately thereafter. No later than twenty (20) days following the end of the Sale, the parties shall complete a final reconciliation and settlement of all amounts contemplated by this Agreement (the "Final Reconciliation"). From time to time upon request, each party shall prepare and deliver to the other party such other reports as either party may reasonably request. Each party to this Agreement shall, at all times during the Sale Term and during the one (1) year period thereafter, provide the other with access to all information, books and records reasonably relating to the Sale and to this Agreement. All

records and reports shall be made available to Consultant and Merchant during regular business hours upon reasonable notice.

(C) Merchant shall be solely responsible for computing, collecting, holding, reporting, and paying all sales taxes associated with the sale of Merchandise during the Sale Term, and Consultant shall have no responsibilities or liabilities therefor.

(D) Although Consultant shall undertake its obligations under this Agreement in a manner designed to achieve the desired results of the Sale and to maximize the recovery to the Merchant, Merchant expressly acknowledges that Consultant is not guaranteeing the results of the Sale.

(E) Merchant acknowledges that (i) the parties are not conducting an inventory of Merchant's goods located at the Stores; (ii) Consultant has made no independent assessment of the beginning levels of such goods; and (iii) Consultant shall not bear any liability for shrink or other loss to Merchant's goods located at the Stores unless such shrink or loss is primarily attributed to the actions of Consultant. Merchant may, at its election, conduct an inventory at some or all of the Stores and Consultant agrees to cooperate with such inventory taking if and when done.

(F) All sales of Merchandise and DSD Merchandise during the Sale shall be made in the name, and on behalf, of Merchant.

(G) All sales of Merchandise during the Sale Term shall be "final sales" and "as is," and all advertisements and sales receipts will reflect the same.

(H) Consultant shall, during the Sale Term, cooperate with Merchant in respect of Merchant's procedures governing returns of goods otherwise sold by Merchant (e.g., not in the Stores during the Sale Term).

(I) Subject to compliance with any applicable laws and, from and after any insolvency proceedings, any order of the Bankruptcy Court, as applicable, Merchant hereby permits the Sale to be, and shall ensure that the Sale otherwise may be, advertised as a "going out of business," "store closing" or other mutually agreed upon handle throughout the term of the Sale.

6. **FF&E**

(A) Following the Sale Commencement Date, Merchant shall inform Consultant of those items of FF&E located at the Stores which are not to be sold (because Merchant does not have the right to sell such items, because Merchant wishes to retain such items for itself, or otherwise) (collectively, "Retained FF&E").

(B) With respect to all FF&E located at the Stores as of the Sale Commencement Date which is not Retained FF&E (collectively the "Offered FF&E"), Consultant shall have the right to sell such Offered FF&E during the Sale Term on a commission basis equal to thirteen and

one-half percent (13.5%) of the gross sales of Offered FF&E, net only of sales tax ("FF&E Commission").

(C) Merchant shall reimburse Consultant for its reasonable expenses associated with the sale of the Offered FF&E and any removal costs based upon a mutually agreed upon budget.

(D) Consultant shall have the right to abandon any unsold Offered FF&E (and all Retained FF&E) at the Stores at the conclusion of the Sale Term without liability to Merchant or any third party.

7. INSURANCE; RISK OF LOSS

During the Sale Term: (a) Merchant shall maintain (at its expense) insurance with respect to the Merchandise in amounts and on such terms and conditions as are consistent with Merchant's ordinary course operations, and (b) each of Merchant and Consultant shall maintain (at each party's respective expense) comprehensive auto liability for owned and non-owned autos and general liability insurance covering injuries to persons and property in or in connection with the Stores, in such amounts as are reasonable and consistent with its ordinary practices, for bodily injury, personal injury and/or property damage. Consultant shall add Merchant as an additional insured with respect to its insurance policies covering Consultant and its supervisors, and (c) each of Merchant and Consultant shall maintain statutory worker's compensation, statutory disability and Employer's Liability coverage of at least \$500,000 covering its own employees. Consultants shall produce evidence of such by the Sale Commencement Date.

Notwithstanding any other provision of this Agreement, Merchant and Consultant agree that Consultant shall not be deemed to be in possession or control of the Stores or the Merchandise or other assets located therein or associated therewith, or of Merchant's employees located at the Stores; and Consultant does not assume any of Merchant's obligations or liabilities with respect thereto.

Notwithstanding any other provision of this Agreement, Merchant and Consultant agree that Merchant shall bear all responsibility for product liability relating to the products sold under this Agreement, before, during and after the Sale Term.

8. INDEMNIFICATION

(A) Consultant shall indemnify and hold Merchant and its affiliates, and their respective officers, directors, employees, consultants, and independent contractors (collectively, the "Merchant Indemnified Parties") harmless from and against all third-party claims, demands, penalties, losses, liabilities and damages, including, without limitation, reasonable and documented attorneys' fees and expenses, directly or indirectly asserted against, resulting from or related to:

- (i) Consultant's material breach of or failure to comply with any of its agreements, covenants, representations or warranties contained herein or in any written agreement entered into in connection herewith;

- (ii) any harassment or any other unlawful, tortious or otherwise actionable treatment of any employees or agents of Merchant by Consultant, its affiliates or their respective officers, directors, employees, agents, independent contractors or representatives (including without limitation any supervisors);
- (iii) any claims by any party engaged by Consultant as an employee or independent contractor (including without limitation any non-Merchant employee supervisor) arising out of such employment or engagement; or
- (iv) the negligence, willful misconduct or unlawful acts of Consultant, its affiliates or their respective officers, directors, employees, Consultants, independent contractors or representatives, *provided that* Consultant shall not be obligated to indemnify any Merchant Indemnified Party from or against any claims, demands, penalties, losses, liabilities or damages arising primarily from any Merchant Indemnified Party's gross negligence, willful misconduct, or unlawful act.

(B) Merchant shall indemnify and hold Consultant, its affiliates and their respective officers, directors, employees, consultants, and independent contractors (collectively, "Consultant Indemnified Parties") harmless from and against all third-party claims, demands, penalties, losses, liabilities and damages, including, without limitation, reasonable attorneys' fees and expenses, directly or indirectly asserted against, resulting from or related to:

- (i) Merchant's material breach of or failure to comply with any of its agreements, covenants, representations or warranties contained herein or in any written agreement entered into in connection herewith;
- (ii) any claims by any party engaged by Merchant as an employee or independent contractor arising out of such engagement;
- (iii) any consumer warranty or products liability claims relating to any Merchandise; and/or
- (iv) the negligence, willful misconduct or unlawful acts of Merchant, its affiliates or their respective officers, directors, employees, agents, independent contractors or representatives, *provided that* Merchant shall not be obligated to indemnify any Consultant Indemnified Party from or against any claims, demands, penalties, losses, liabilities or damages arising primarily from any Consultant Indemnified Party's gross negligence, willful misconduct, or unlawful act.

9. **MISCELLANEOUS**

(A) This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, without giving effect to conflict of law's provisions.

(B) After the commencement of the Chapter 11 Case, this Agreement, including engagement of Consultant and conduct of the Sale set forth herein, is subject to the approval of the Bankruptcy Court. Merchant shall promptly seek to have this Agreement, and the transactions contemplated by this Agreement, approved and assumed by the Bankruptcy Court pursuant to an order and terms acceptable to both Merchant and Consultant (the "Approval Order"), which Approval Order shall be in form and substance reasonably acceptable to Consultant and shall provide, among other things, for commercially reasonable protections for the payment of Consultant's fees and expenses contemplated by this Agreement notwithstanding the liens or claims of the Merchant's secured lenders, including any debtor in possession financing lender. The Bankruptcy Court shall have exclusive jurisdiction to resolve any issues arising under this Agreement.

(C) This Agreement constitutes the entire agreement between the parties with respect to the matters contemplated hereby and supersedes and cancels all prior agreements, including, but not limited to, all proposals, letters of intent or representations, written or oral, with respect thereto. This Agreement may not be modified except in a written instrument executed by each of the parties hereto. No consent or waiver by any party, express or implied, to or of any breach or default by the other in the performance of its obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by such other party of the same or any other obligation of such party. The failure on the part of any party to complain of any act or failure to act by the other party or to declare the other party in default, irrespective of how long such failure continues, shall not constitute a waiver by such party of its rights hereunder. Nothing contained in this Agreement shall be deemed to create any relationship between Merchant and Consultant other than that of Consultant as an independent contractor of Merchant, and it is stipulated that the parties are not partners or joint venturers in any way. Unless expressly set forth herein to the contrary, to the extent that either party's consent is required/requested hereunder, such consent shall not be unreasonably withheld or delayed. This Agreement shall inure to the benefit of and be binding upon the parties and their respective successors and assigns; *provided however*, that this Agreement may not be assigned by either party without the prior written consent of the other. Written notices contemplated by this Agreement shall be sent by email (i) if to Merchant at the address set forth above with a copy to Malfitano Advisors, LLC, 747 Third Ave. 2nd Floor, New York, NY 10017, Attention: Joseph Malfitano; and (ii) if to Consultant at the address set forth above.

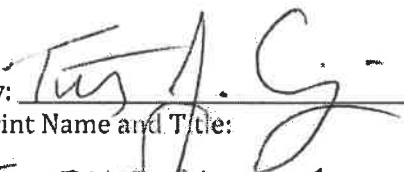
Very truly yours,

Hilco Merchant Resources, LLC


By: 
Print Name and Title: VP & AGC, Managing Member

-and-

Gordon Brothers Retail Partners, LLC

By: 
Print Name and Title:
TIMOTHY J. SHILLING
MANAGING DIRECTOR

Agreed and Accepted:
Earth Fare, Inc.

By: 
Print Name and Title:
Mindy Harvey, CFO

Exhibits:

- A Stores
- B Budget of Consultant Controlled Expenses

Exhibit A

Stores

Earth Fare
Exhibit A

Store List

Store #	Name	Address	City	State	Zip	Gross Sq. Ft.	Selling Sq. Ft.
Stores							
100	Asheville	66 Westgate Parkway	Asheville	NC	28806	28,880	18,017
105	Asheville-South	1856 Hendersonville Rd.	Asheville	NC	28803	38,000	23,118
110	Greensboro	2965 Battleground Avenue	Greensboro	NC	27408	27,887	18,599
115	High Point	4105 Brian Jordan Place	High Point	NC	27265	24,046	14,663
120	Charlotte	12235 N. Community House Road	Charlotte	NC	28277	26,072	17,240
125	Charlotte	721 Governor Morrison Ste 110	Charlotte	NC	28211	25,200	17,329
130	Boone	178 West King Street	Boone	NC	28607	21,240	13,888
140	Raleigh	10341 Moncreiffe Rd	Raleigh	NC	27617	26,196	17,258
145	Cary	951 Morrisville Parkway	Morrisville	NC	27560	24,151	15,042
160	Huntersville	14021 Boren St.	Huntersville	NC	28078	24,989	17,327
165	Concord	8885 Christenbury Pkwy	Concord	NC	28027	24,110	16,180
167	Steele Creek	14124 Steele Creek Road	Charlotte	NC	28273	24,250	14,338
180	Wilmington	943 Military Cutoff Rd	Wilmington	NC	28405	23,340	14,638
200	Charleston	74 Folly Road Blvd	Charleston	SC	29407	25,480	18,582
205	Summerville	1101 North Main St	Summerville	SC	29483	23,961	14,979
220	Columbia	3312-B Devine Street	Columbia	SC	29205	22,394	15,213
240	Greenville	3620 Pelham Road	Greenville	SC	29615	30,793	20,352
250	Rock Hill	725 Cherry Rd Suite 110	Rock Hill	SC	29732	25,538	17,527
257	Fort Mill, SC (Baxter)	2351-103 Len Patterson Rd	Fort Mill	SC	29708	23,598	14,921
300	Athens	1689 South Lumpkin Street	Athens	GA	30606	16,965	11,805
310	Augusta	368 Fury's Ferry Road	Martinez	GA	30907	34,469	20,344
325	Cumming	3140 Ronald Reagan Blvd	Cumming	GA	30041	23,800	15,710
400	Knoxville	10903 Parkside Drive	Knoxville	TN	37922	25,642	17,603
405	Knoxville	140 N Forest Park Blvd.	Knoxville	TN	37919	28,191	18,951
410	Johnson City	1735 W State of Franklin Road	Johnson City	TN	37604	27,935	19,497
420	Chattanooga	1814 Gunbarrel Road, Ste 100	Chattanooga	TN	37421	26,841	18,257
425	Hixson Pike	5414 Hixson Pike	Hixson	TN	37343	32,370	19,109
500	Auburn	1550 Opelika Road, Ste 14	Auburn	AL	36830	32,000	19,254
510	Huntsville	5900 - C University Dr NW	Huntsville	AL	35806	26,998	18,816
550	Tallahassee	2425 Apalachee Parkway	Tallahassee	FL	32301	25,000	16,501
555	Jacksonville	11901 Atlantic Blvd Suite 250	Jacksonville	FL	32225	23,800	14,894
557	Mandarin	11700 San Jose Blvd - Unit 12	Jacksonville	FL	32223	27,638	19,442
559	St Johns	120 Shops Bvd	St Johns	FL	32259	-	-
562	Ocala	2405 SW 27th Avenue	Ocala	FL	34474	28,264	17,568
565	Tampa-Seminole	7774 113th Street N	Seminole	FL	33772	24,026	15,809
567	Tampa-OldsMar, FL	3136 Tampa Road	Oldsmar	FL	34677	24,232	15,873
568	Lutz (Outlet)	25535 Sierra Center Blvd	Lutz	FL	33559	24,254	15,628
569	Lakewood Ranch, FL	11525 SR70 E	Lakewood Ranch	FL	34202	24,034	14,938
570	Palm Beach Gardens	4925 PGA Boulevard	Palm Beach Gardens	FL	33418	24,034	15,440
572	Boynton Beach	8855 Boynton Beach Blvd, Ste 310	Boynton Beach	FL	33472	-	-
580	Orlando Health	9 W Gore St	Orlando	FL	32801	-	-
582	Orlando-Lake Nona	13024 Narcoosee Rd	Orlando	FL	32832	23,598	14,921
583	Viera (Mural)	5410 Murrell Road, Suite 135	Rockledge	FL	32955	27,153	16,243
600	Akron	3737 West Market Street, Unit N	Fairlawn	OH	44333	27,196	19,451
605	Canton	3939 Everhard Road NW	North Canton	OH	44709	23,800	15,710
620	Cleveland	3450 Westgate	Fairview Park	OH	44126	27,246	16,214
680	Ft. Wayne	704 East Dupont Road	Fort Wayne	IN	46825	27,146	15,626
700	Kalamazoo	5070 S. Westnedge Ave.	Portage	MI	49002	23,828	13,399
770	Roanoke	2203 Franklin Rd SW	Roanoke	VA	24014-1109	24,124	14,839
780	Williamsburg	208 Monticello Avenue	Williamsburg	VA	23185	23,885	16,899
50						25,928	16,765

Exhibit B

Consultant Controlled Expenses

**Earth Fare
Exhibit B**

Expense Budget (1)

Advertising (6)

Media	25,000
Signs (2)	246,732
Sign Walkers	136,875
Subtotal Advertising	408,607

Supervision (5)

Fees / Wages / Expenses (3)	408,632
Subtotal Supervision	408,632

Miscellaneous/Corporate Travel	25,000
Legal (4)	15,000
Total Expenses	857,240

Note(s):

1. *This Expense Budget contemplates a sale term of February, 3, 2020 through February 25, 2020. The Expense Budget remains subject to modification in the event that this term is extended, or as otherwise agreed to by the parties.*
2. *Includes Sales Tax.*
3. *includes Deferred Compensation and Insurance.*
4. *Legal includes expenses associated with issues raised by or disputes with landlords, including (without limitation) negotiations in respect of landlord side letters.*
5. *Supervision includes one operations lead, one financial lead, and sixteen full time field supervisors.*
6. *Any media expenditures are subject to the approval and consent of the Merchant.*

EXHIBIT IV
SALE GUIDELINES

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	Chapter 11
EARTH FARE, INC., <i>et al.</i> , ¹)	Case No. 20-10256 (KBO)
)	
Debtors.)	(Jointly Administered)
)	
)	

SALE GUIDELINES²

1. The Closing Sales shall be conducted so that the Closing Stores will remain open no longer than during the normal hours of operation maintained at each Closing Store by the Earth Fare, Inc. (“**Earth Fare**”) prior to the filing of their bankruptcy petitions.

2. The Closing Sales shall be conducted in accordance with applicable state and local “Blue Laws,” where applicable, so that no Closing Sale shall be conducted on Sunday unless Earth Fare had been operating such Closing Store on a Sunday prior to the commencement of the Closing Sales.

3. On “shopping center” property, the Consultant shall not distribute handbills, leaflets, or other written materials to customers outside of any Closing Stores’ premises, unless permitted by the lease or if distribution is customary in the “shopping center” in which such Closing Store is located; *provided* that the Consultant may solicit customers in the Closing Stores themselves. On “shopping center” property, the Consultant shall not use any flashing lights or amplified sound to advertise the Closing Sales or solicit customers, except as permitted under the applicable lease or agreed to by the landlord.

4. At the conclusion of the Closing Sales, the Consultant shall, subject to the Store Closing Agreement, vacate the Closing Stores in broom clean condition; *provided* that Earth Fare and the Consultant may abandon any furniture, fixtures, and equipment (including, but not limited to, machinery, rolling stock, office equipment, and personal property, and conveyor systems and racking) (“**FF&E**”) not sold in the Closing Sales at the conclusion of the Closing Sales, without cost or liability

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Earth Fare, Inc. (3936) and EF Investment Holdings, Inc. (8084). The mailing address for each of the Debtors is 220 Continuum Drive, Fletcher, North Carolina 28732.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the *Debtors’ Emergency Motion for Interim and Final Orders (A)(1) Confirming, on an Interim Basis, that the Store Closing Agreement Is Operative and Effective and (2) Authorizing, on a Final Basis, the Debtors to Assume the Store Closing Agreement, (B) Authorizing and Approving Store Closing Sales Free and Clear of All Liens, Claims, and Encumbrances, (C) Approving Dispute Resolution Procedures, and (D) Approving the Debtors’ Store Closing Plan*, filed contemporaneously herewith.

of any kind to the Consultant. The Consultant shall notify Earth Fare of its intention to abandon any FF&E at least two (2) days prior to the Sale Termination Date. Earth Fare will have the option to remove the FF&E at its own cost prior to the Sale Termination Date. Any abandoned FF&E left in a Closing Store after a lease is rejected shall be deemed abandoned by Earth Fare with the landlord having a right to dispose of the same as the landlord chooses without any liability whatsoever on the part of the landlord to any party and without waiver of any damage claims against Earth Fare. For the avoidance of doubt, as of the Sale Termination Date, Earth Fare and the Consultant may abandon, in place and without further responsibility or liability of any kind, any FF&E.

5. The Consultant and Earth Fare may advertise each Closing Sale as a “store closing,” “sale on everything,” “everything must go,” “liquidation sale,” “winter clearance outlet,” “winter clearance entire store on sale,” or similar themed sale. The Consultant and Earth Fare may also have “countdown to closing” signs prominently displayed in a manner consistent with these Sale Guidelines. All signs, banners, ads, and other advertising collateral, promotions, and campaigns will be approved by Earth Fare in accordance with these Sale Guidelines.

6. The Consultant shall be permitted to utilize sign walkers, display, hanging signs, and interior banners in connection with the Closing Sales; *provided* that such sign walkers, display, hanging signs, and interior banners shall be professionally produced and hung in a professional manner. Earth Fare and Consultant shall not use neon or day-glo on its sign walkers, display, hanging signs, or interior banners if prohibited by the applicable lease or applicable law. Furthermore, with respect to enclosed mall locations, no exterior signs or signs in common areas of a mall shall be used unless otherwise expressly permitted in these Sale Guidelines. In addition, Earth Fare and Consultant shall be permitted to utilize exterior banners at (i) non-enclosed mall Closing Stores and (ii) enclosed mall Closing Stores to the extent the entrance to the applicable Closing Store does not require entry into the enclosed mall common area; *provided*, however, that such banners shall be located or hung so as to make clear that the Closing Sales are being conducted only at the affected Closing Store, and shall not be wider than the storefront of the Closing Store. In addition, Earth Fare and Consultants shall be permitted to utilize sign walkers in a safe and professional manner and in accordance with the terms of the Interim Order or the Final Order, as applicable. Nothing contained in these Sale Guidelines shall be construed to create or impose upon Earth Fare or the Consultant any additional restrictions not contained in the applicable lease agreement.

7. Conspicuous signs shall be posted in the cash register areas of each of the affected Closing Stores to effect that “all sales are final.”

8. Except with respect to the hanging of exterior banners, the Consultant shall not make any alterations to the storefront or exterior walls of any Closing Stores, except as authorized by the applicable lease.

9. The Consultant shall not make any alterations to interior or exterior Closing Store lighting, except as authorized by the applicable lease. No property of the landlord of a Closing Store shall be removed or sold during the Closing Sales. The hanging of exterior banners or in-Closing Store signage and banners shall not constitute an alteration to a Closing Store.

10. The Consultant shall keep Closing Store premises and surrounding areas clean and orderly consistent with present practices.

11. Subject to the provisions of the Store Closing Agreement, the Consultant shall have the right to use all FF&E and sell all Offered FF&E. The Consultant may advertise the sale of the Offered FF&E in a manner consistent with these guidelines. The purchasers of any Offered FF&E sold during the Closing Sales shall be permitted to remove the Offered FF&E through the delivery entrances, services areas, or alternative shipping areas at any time, or through other areas after applicable business hours, *provided, however* that the foregoing shall not apply to *de minimis* Offered FF&E sales made whereby the item can be carried out of the Closing Store in a shopping bag or shopping cart. For the avoidance of doubt, as of the Sale Termination Date, the Consultant and Earth Fare may abandon, in place and without further responsibility, any Offered FF&E and all Retained FF&E.

12. At the conclusion of the Closing Sales at each Closing Store, pending assumption or rejection of applicable leases, the landlords of the Closing Stores shall have reasonable access to the Closing Stores' premises as set forth in the applicable leases. Earth Fare, the Consultant, and their agents and representatives shall continue to have access to the Closing Stores as provided for in the Store Closing Agreement.

13. The rights of landlords against Earth Fare for any damages to a Closing Store shall be reserved in accordance with the provisions of the applicable lease.

14. If and to the extent that the landlord of any Closing Store affected hereby contends that the Earth Fare or the Consultant is in breach of or default under these Sale Guidelines, such landlord shall email or deliver written notice by overnight delivery to Earth Fare and the Consultant as follows:

If to Earth Fare:

- (a) Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801, Attn: M. Blake Cleary, Esq.; Sean T. Greecher, Esq., and Ian J. Bambrick, Esq. (mbcleary@ycst.com, sgreecher@ycst.com, and ibambrick@ycst.com); and
- (b) Malfitano Partners, Joseph A. Malfitano, PLLC, 747 Third Ave. 2nd Floor, New York, NY 10017, Attn: Joseph Malfitano (jm@malfitanopartners.com).

If to the Consultant:

- (a) Gordon Brothers Retail Partners, LLC, 800 Boylston Street, 27th Floor, Boston, MA 02199, Attn: Mackenzie Shea (mshea@gordonbrothers.com); and
- (b) Hilco Merchant Resources, LLC, 5 Revere Drive, Suite 206, Northbrook, IL 60062, Attn: Ian Fredericks (ifredericks@hilcoglobal.com).

With copies to Consultant's counsel (which shall not constitute notice):

- (a) Pepper Hamilton LLP, 1313 Market Street, Suite 5100, P.O. Box. 1709, Wilmington, DE 19899-1709, Attn: Douglas Herrmann, Esq. and Marcy McLaughlin Smith, Esq. (herrmann@pepperlaw.com, mclaughlin@pepperlaw.com).