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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X	
In re	:
	:
	:
FAIRWAY GROUP HOLDINGS	:
CORP., et al.,	:
	:
Debtors.¹	:
-----X	

Chapter 11

Case No. 20-[_____] (___)

(Joint Administration Pending)

**MOTION OF DEBTORS FOR (I) AUTHORITY TO PAY
CERTAIN PREPETITION OBLIGATIONS TO CRITICAL VENDORS;
(II) APPROVAL OF RELATED PROCEDURES; AND (III) RELATED RELIEF**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Fairway Group Holdings Corp. and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “**Debtors**” or “**Fairway**”), respectfully represent as follows in support of this motion (the “**Motion**”):

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are as follows: Fairway Group Holdings Corp. (2788); Fairway Group Acquisition Company (2860); Fairway Bakery LLC (4129); Fairway Broadway LLC (8591); Fairway Chelsea LLC (0288); Fairway Construction Group, LLC (2741); Fairway Douglaston LLC (2650); Fairway East 86th Street LLC (3822); Fairway eCommerce LLC (3081); Fairway Georgetowne LLC (9609); Fairway Greenwich Street LLC (6422); Fairway Group Central Services LLC (7843); Fairway Group Plainview LLC (8643); Fairway Hudson Yards LLC (9331); Fairway Kips Bay LLC (0791); FN Store LLC (9240); Fairway Paramus LLC (3338); Fairway Pelham LLC (3119); Fairway Pelham Wines & Spirits LLC (3141); Fairway Red Hook LLC (8813); Fairway Stamford LLC (0738); Fairway Stamford Wines & Spirits LLC (3021); Fairway Staten Island LLC (1732); Fairway Uptown LLC (8719); Fairway Westbury LLC (6240); and Fairway Woodland Park LLC (9544). The location of the Debtors’ corporate headquarters is 2284 12th Avenue, New York, New York 10027. Fairway Community Foundation Inc., a charitable organization, owned by Fairway Group Holdings Corp., is not a debtor in these proceedings.

Preliminary Statement

1. The lifeline of the Debtors' business is their access to, and relationship with, their network of vendors and suppliers that deliver essential goods to the Debtors' stores and other facilities. As an operator of retail grocery stores, Fairway's ability to generate income is dependent on sales, the volume of which, in large part, is dependent upon customer traffic and satisfaction. If the quality and volume of Fairway's inventory goes down, so too will its sales. Even minor disruptions in Fairway's supply chain would have far-reaching economic and operational impacts on the enterprise and irreparably harm the goodwill the Debtors have garnered with their customers.

2. The Debtors rely on a network of vendors to provide a consistent stock of essential goods that customers expect to find in the Debtors' well-known grocery stores. Most of these goods are high-turnover, perishable inventory, such as eggs, bread, butter, and milk—all of which must be replaced frequently and quickly to ensure that the Debtors' shelves do not suddenly go barren. Thus, the Debtors' business and cash flow are dependent on a carefully-designed inventory system that ensures the efficient delivery and sale of goods on a daily basis. It is absolutely essential to the Debtors' business and the success of these chapter 11 cases that the Debtors' inventory and supply chain remain uninterrupted.

3. The vast majority of the Debtors' inventory is provided by a broad network of over 1,000 vendors who, for the most part, conduct business with the Debtors on an invoice-by-invoice or purchase order basis and not pursuant to long-term contracts. These vendors—nearly all of whom are referred to as “direct store delivery” vendors—historically supply the Debtors' stores with product on trade terms based on their relationship with the Debtors. In addition, the Debtors' beer, wine, and liquor distributors and milk suppliers are governed by unique state laws that may require them to impose immediate cash-on-delivery terms under certain circumstances.

To enable the Debtors to maintain access to necessary inventory on commercially reasonable terms, the Debtors request “critical vendor” relief to preserve the going-concern value of their business.

4. As described in further detail below, the Debtors have put into place detailed procedures for identifying and selecting certain vendors, suppliers, service providers, and other similar entities that the Debtors determine, in their sole discretion and based on their sound business judgment and subject to the procedures and conditions set forth in the Critical Vendor Payment Protocol (as defined below), are essential to their ongoing business operations and maximizing the value of their enterprise (the “**Critical Vendors**” whose prepetition claims shall be defined as the “**Critical Vendor Claims**”).

5. The relief requested is consistent with the relief granted by courts in this district to other distressed companies heavily reliant on supply chain continuity (*e.g.*, grocery stores, other retailers, and auto supply companies). The requested authority will enable the Debtors to pay the prepetition claims (up to a cap) of only those vendors verified as “critical” to the Debtors’ operations, pursuant to a carefully-designed protocol overseen by a core, centralized team consisting of senior members of the Debtors’ management and professional advisors. The *quid pro quo* for the Debtors’ payment of a vendor’s prepetition claim will be that vendor’s commitment to continue providing goods and services to the Debtors on trade terms at least as favorable as those terms in effect before the Commencement Date, unless otherwise agreed. The Debtors’ process to identify critical suppliers of goods and services and scrutinize their prepetition claims, coupled with the high level of senior control and oversight over all potential prepetition payments, is consistent with the view of courts in this district that a debtor should have discretion in ultimately selecting its “critical vendors,” provided the debtor also exercises a high degree of executive and

professional supervision as to how—or if—such payments are ultimately made. *See, e.g., In re The Reader's Digest Ass'n, Inc.*, Case No. 09-23529 (RDD) (Bankr. S.D.N.Y. Aug. 25, 2009), Hr'g Tr. at 35; *see also In re The Great Atlantic & Pacific Tea Co.*, Case No. 15-23007 (RDD) (Bankr. S.D.N.Y. July 20, 2015), Hr'g Tr. at 56 (approving interim critical vendor relief where the process was supervised by “senior people who understand the tension involved in paying prepetition debt as against the net benefit to the debtor of having critical supplies in essence for their stores”).

Background

6. On the date hereof (the “**Commencement Date**”), the Debtors each commenced a voluntary case under chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the Southern District of New York (the “**Court**”). The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or statutory committee of creditors has been appointed in these chapter 11 cases.

7. Contemporaneously herewith, the Debtors have filed a motion requesting joint administration of their chapter 11 cases pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

8. The Debtors commenced these chapter 11 cases with the support of an ad hoc group of Prepetition Lenders (the “**Ad Hoc Group**”) holding over 91% of all outstanding obligations of the Debtors under the Prepetition Credit Agreement (and in excess of 66.67% of each tranche of debt thereunder). On January 22, 2020, the Debtors executed a restructuring support agreement (the “**RSA**”) with members of the Ad Hoc Group, pursuant to which the members of the Ad Hoc Group agreed to support a chapter 11 plan. The Ad Hoc Group also

supports the Debtors' marketing and sale process for all or substantially all of their assets, and has committed to provide the Debtors with up to \$25 million of debtor-in-possession financing to finance these chapter 11 cases and the sale process.

9. Information regarding the Debtors' business, capital structure, and the circumstances leading to the commencement of these chapter 11 cases is set forth in the declarations of Michael Nowlan and Abel Porter pursuant to Rule 1007-2 of the Local Bankruptcy Rules for the Southern District of New York, sworn to on the date hereof (together, the "**First Day Declarations**"),² which have been filed with the Court contemporaneously herewith and are incorporated by reference herein.

Jurisdiction

10. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference M-431, dated January 31, 2012 (Preska, C.J.). This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Relief Requested

11. By this Motion, pursuant to sections 105(a), 363(b), and 503(b)(9) of the Bankruptcy Code, the Debtors request entry of interim and final orders (a) authorizing, but not directing, the Debtors to pay up to \$5.5 million on an interim basis and an additional \$1.0 million on a final basis (the aggregate amount, the "**Critical Vendor Cap**") in aggregate Critical Vendor Claims; (b) approving procedures to address those vendors who repudiate and refuse to honor their contractual obligations to the Debtors; and (c) granting related relief, in each case subject to the

² Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to such terms in the First Day Declarations.

Debtors' debtor-in-possession financing facility and the interim and final orders with respect thereto (the "**DIP Orders**").

12. The Debtors also seek approval of (a) their protocol for reviewing and approving requests for payment of Critical Vendor Claims (the "**Critical Vendor Payment Protocol**"); (b) the form of notice of the Critical Vendor Payment Protocol that will be provided to any vendors requesting Critical Vendor status and payment of Critical Vendor Claims, substantially in the form annexed hereto as **Exhibit B** (the "**Critical Vendor Notice**"); (c) the form of vendor agreement, annexed to the Critical Vendor Notice as **Exhibit 1** (the "**Vendor Agreement**"); (d) the form of notice to be sent to any contract counterparty that threatens or refuses to perform their postpetition contractual obligations unless the Debtors pay their prepetition claims, substantially in the form annexed hereto as **Exhibit C** (the "**Notice of Repudiating Vendor**"); and (e) the form of order to show cause for any Repudiating Vendor (as defined below), substantially in the form annexed hereto as **Exhibit D** (the "**Order to Show Cause**").

13. A proposed form of order granting the relief requested herein on an interim basis is annexed hereto as **Exhibit A** (the "**Proposed Interim Order**").

The Debtors' Business Model and Supply Chain

14. Fairway operates fourteen (14) grocery stores in New York, New Jersey, and Connecticut, including two (2) with freestanding wine and liquor stores and two (2) with in-store wine and liquor stores. Fairway's business model relies on providing customers with high-quality food products, including difficult to find specialty food products. This includes, among other items, daily-delivered produce, a significant kosher selection, fresh seafood, and premium meats. In addition, Fairway, like all supermarket operators, must also keep a large variety of goods readily available to satisfy customer demands. The goods sold by the Debtors are, in large part,

perishable in nature. For these reasons, the Debtors experience significantly higher rates of inventory turnover than retailers in other industries do. The Debtors must continuously re-stock as a function of both perishability and customer demand. Simply put, without a constant stream of goods, the Debtors' shelves would quickly run empty, directly affecting sales and revenue and undermining the Debtors' efforts to market and sell their stores to maximize value.

15. To keep their business running efficiently and seamlessly, the Debtors rely on a carefully-designed inventory system through which store locations receive daily deliveries of branded and non-branded products including baked goods, frozen foods and desserts, carbonated beverages and water, cookies and salty snacks, and beer, wine, and liquor via direct-store-delivery or similar supply processes. Direct-store delivery vendors also supply Fairway with fresh and perishable foodstuffs, including bread, milk, eggs, cheese, and other dairy and deli products. Many of these vendors are invaluable, as they are sole- or limited-source or high-volume suppliers for certain popular branded or otherwise "in-demand" goods. In addition, many of the Debtors' beer, wine, and liquor distributors hold exclusive distribution rights to the region in which Fairway operates—effectively requiring the Debtors to utilize these particular merchandisers. Importantly, Fairway's customers expect and rely upon Fairway's stores to stock ample unique and specialized products and brands.

16. As noted above, the Debtors do not have long-term supply agreements with many of their vendors and, instead, source goods on an order-by-order, week-by-week, and even day-by-day basis. Accordingly, despite their heavy reliance on direct-store-delivery vendors, the Debtors have limited leverage to compel performance on commercially reasonable terms. Additionally, in many instances, the Debtors simply cannot obtain the branded products supplied from direct-store delivery vendors from other third-party suppliers.

17. In addition, in certain jurisdictions, beer, wine, and liquor distributors also possess special rights under non-bankruptcy law. Specifically, the Debtors' failure to timely pay a single beer, wine, or liquor distributor in these jurisdictions may cause merchandisers to "post" the Debtors' account to an applicable regulatory agency, requiring all other beer, wine, or liquor distributors in that jurisdiction to put the Debtors on immediate, cash-on-delivery terms. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 9 § 68.6 ("Subsequent to the receipt of a notice of default from any wholesaler no retail licensee shall purchase or accept any delivery of alcoholic beverages except for cash until such time as he has received a release in writing from the Liquor Authority or his name is removed from the delinquent list."); *accord* Conn. Agencies Regs. § 30-6-A37a; N.J. Admin Code § 13:2-24.4(c)(2). Similar laws require milk suppliers to impose cash-on-delivery terms in the event a purchaser fails to timely pay a single vendor in the applicable jurisdiction. *See* N.Y. Agric. & Mkts. Law § 258-b(2)(e) ("No milk dealer or cooperative shall sell or deliver milk, except on a cash on delivery basis, to any wholesale purchaser who has failed to make full payment within the period prescribed in regulations promulgated by the commissioner pursuant to this paragraph."); *see also* Conn. Gen. Stat. § 22-242b ("All dealers . . . shall pay all accounts promptly and in full for milk or milk products purchased from one another but in no case later than ten days prior to the date on which final payments by dealers must be made to producers or an association of producers for milk," otherwise, "the Commissioner of Agriculture may hold a hearing, upon at least ten days' notice, on the revocation of the license of such dealer.").

Critical Vendor Pre-Screening Process

18. Prior to the Commencement Date, the Debtors and their advisors engaged in a process (the "**Critical Vendor Pre-Screening Process**") to (a) identify those vendors, suppliers, and/or service-providers that may be "critical" to the Debtors' businesses (the "**Potential**

Critical Vendors”) and (b) develop the Critical Vendor Cap based on an estimate of the aggregate amount of outstanding Critical Vendor Claims as of the Commencement Date.

19. More specifically, the Debtors and their advisors spent significant time and effort: (a) reviewing and analyzing the Debtors’ books and records, (b) consulting operations management and purchasing personnel, (c) reviewing contracts and supply agreements, and (d) analyzing applicable laws, regulations, and historical practices to identify business relationships which, if lost, could materially harm the Debtors’ businesses, shrink their market share, reduce their enterprise value, and/or impair their restructuring process. In this Critical Vendor Pre-Screening Process, the Debtors considered a variety of factors, including the following:

- General
 - the goods or services provided;
 - general terms of vendor performance;
 - the Debtors’ business needs for the goods or services provided;
 - the customers’ expectations of specific inventory;
- Consequences of Non-Payment
 - whether goods or services are provided pursuant to a contract or on a purchase order basis;
 - whether failure to pay all or part of a particular vendor’s claim could cause the vendor to refuse to ship inventory or provide critical services on a postpetition basis;
 - whether failure to pay a particular vendor could result in contraction of trade terms as a matter of applicable non-bankruptcy law or regulation;
- Potential to Move to Alternative Vendor
 - whether the vendor is a sole- or limited-source or high-volume supplier for branded and “in-demand” inventory due to particular local, regional, or national customer preferences;

- whether alternative vendors are available that could provide requisite volumes of similar goods or services on equal (or better) terms and, if so, whether the Debtors would be able to continue operating while transitioning business thereto;
- the degree to which replacement costs (including pricing, transition expenses, professional fees, and lost sales or future revenue) would exceed the amount of a vendor's prepetition claim; and
- whether the Debtors' inability to pay all or part of the vendor's prepetition claim could trigger financial distress for the applicable vendor.

The Debtors also considered whether and the extent to which all or a portion of any Potential Critical Vendor's claim may be entitled to administrative priority under section 503(b)(9) of the Bankruptcy Code.

20. Through the Critical Vendor Pre-Screening Process, the Debtors reviewed a universe of over 85,000 individual items (SKU's) in the inventory system and approximately 2,350 separate accounts in their accounts payable system. The Debtors identified approximately 220 active accounts that may be subject to the Shippers, Lienholders, and PACA/PASA Motion.³ Of the remaining accounts, the Debtors identified approximately 225 Potential Critical Vendors, and approximately 135 additional active accounts with beer, wine, liquor, and milk suppliers.⁴ A substantial majority of the Potential Critical Vendors are vendors that (a) are critical to the

³ Contemporaneously herewith, the Debtors have sought authority, but not direction, to pay certain claims held by potential lien holders, and vendors providing fresh fruits or vegetables (who have certain rights under the Perishable Agricultural Commodities Act) or livestock, poultry or meat products (who have certain rights under the Packers and Stockyards Act) pursuant to the *Motion of Debtors for Interim and Final Authority to (I) Pay Prepetition Claims of Shippers and Miscellaneous Lien Claimants, (II) Confirm Administrative Expense Priority of Undisputed Commencement Date Orders and Satisfy Such Obligations in the Ordinary Course of Business, and (III) Pay PACA/PASA Claims* (the "**Shippers, Lienholders, and PACA/PASA Motion**"). By this Motion, the Debtors do not seek authority to pay prepetition claims that may be paid pursuant to the Shippers, Lienholders, and PACA/PASA Motion.

⁴ A schedule of the Potential Critical Vendors will be provided on a confidential basis to the Office of the United States Trustee for Region 2 (the "**U.S. Trustee**") upon request. The Debtors reserve all rights to revise, remove, update, or supplement those parties identified as Potential Critical Vendors during the pendency of these chapter 11 cases.

Debtors' operations because they provide key brands customers expect to find in the Debtors' stores, (b) do not have a long-term contractual relationship with the Debtors, and (c) are either (i) sole-source providers or (ii) cannot be replaced in a cost-efficient manner or without causing irreparable harm to the Debtors' operations.⁵ The Debtors do not intend to afford any contract counterparties Critical Vendor status unless absolutely necessary for the preservation of the Debtors' business and otherwise consistent with business judgment.

21. The Debtors estimate that they owe the Potential Critical Vendors and milk and alcohol suppliers an aggregate amount of approximately \$6.5 million as of the Commencement Date, including claims totaling approximately \$4.5 million that may be entitled to priority pursuant to section 503(b)(9) of the Bankruptcy Code. Approximately \$1.1 million of the requested Critical Vendor Cap relates to prepetition claims for milk or alcohol. The \$6.5 million aggregate Critical Vendor Cap is approximately twenty-one percent (21%) of the Debtors' total accrued payables of approximately \$30.5 million, and the Debtors anticipate that approximately seventy-four percent (74%) of the Critical Vendor Claims, other than those of alcohol and milk vendors, may be entitled to priority pursuant to 503(b)(9) of the Bankruptcy Code. Moreover, any payment made by the Debtors on account of a Critical Vendor Claim shall first apply to reduce the amount of any such claim that is entitled to priority pursuant to section 503(b)(9) of the Bankruptcy Code.

Critical Vendor Payment Protocol

22. Given the size, scope, and nature of their operations, it is essential that the Debtors implement a process for assessing each request for treatment as a Critical Vendor and

⁵ To minimize the amount of Critical Vendor Claims paid pursuant to the Critical Vendor Protocol, the Debtors have taken steps to identify alternative vendors that may be able to provide essential goods in the event a vendor refuses to ship to the Debtors on Customary Trade Terms (as defined herein) postpetition.

payment of a Critical Vendor Claim on a case-by-case basis. To that end, the Debtors request approval of the Critical Vendor Payment Protocol.

23. The Critical Vendor Payment Protocol will ensure that the Debtors make payments with respect to Critical Vendor Claims only to the extent necessary to preserve business stability during these chapter 11 cases and maintain liquidity or access to essential goods or services. Payments made pursuant to the relief requested herein will be made in the ordinary course of business when due, and not on an accelerated basis.⁶

24. The Critical Vendor Payment Protocol can be generally summarized as follows:⁷

- The Debtors will establish a centralized, high-level team (the “**Vendor Contingency Team**”) consisting of Fairway’s Chief Restructuring Officer (the “**CRO**”) and the executives and other employees of the Debtors and professionals from Mackinac Partners and Weil, Gotshal & Manges LLP.
- All requests for treatment as a Critical Vendor and payment of a Critical Vendor Claim will be emailed to and reviewed by the Vendor Contingency Team.
- The Vendor Contingency Team will evaluate whether a requesting vendor is eligible for Critical Vendor status based on the Critical Vendor Pre-Screening Process and the factors identified in Paragraph 19 above.
- If the Vendor Contingency Team determines that a requesting vendor is eligible for treatment as a Critical Vendor, all proposed payments to such Critical Vendor will be documented pursuant to an executed Vendor Agreement (as defined and explained in greater detail below), subject to Paragraph 28 below.
- Any proposed payment of Critical Vendor Claims in excess of \$100,000 requires the express authorization of the CRO.

⁶ Nothing in this Motion should be construed as a waiver of any of the Debtors’ rights to contest any invoices or amounts otherwise claimed as owed by any Critical Vendor under applicable law.

⁷ The Debtors reserve all rights to amend, supplement, revise, or modify the Critical Vendor Payment Protocol in their reasonable business judgment.

- Once a Vendor Agreement is finalized, payment may only be physically executed by designated members of the Debtors' accounts payable and treasury departments, upon presentation of completed documentation.
- The Debtors will maintain a "**Critical Vendor Matrix**" summarizing (i) the name of each vendor requesting Critical Vendor status; (ii) the amount and timing of any Critical Vendor payment; (iii) the amount of the Critical Vendor's claim satisfied by the Critical Vendor payment, including any amount entitled to priority under section 503(b)(9) of the Bankruptcy Code; and (iv) a summary of the material payment terms. For the first forty-five (45) days after entry of an order approving this Motion, the Critical Vendor Matrix will be provided on a weekly basis, and, thereafter, on a monthly basis (or such other agreed-upon time period), to (a) the U.S. Trustee; (b) counsel to the Ad Hoc Group and DIP Lenders, King & Spalding LLP, 1185 Avenue of the Americas, New York, NY 10036 (Attn: W. Austin Jowers, Esq., Michael Rupe, Esq., and Michael R. Handler, Esq.); and (c) the professionals retained by any official committee of unsecured creditors appointed in these chapter 11 cases, provided that all such parties shall keep the Critical Vendor Matrix confidential and shall not disclose any of the information to anyone without prior written consent of the Debtors.

25. The Debtors have already taken steps to ensure a seamless implementation of the Critical Vendor Payment Protocol, subject to the Court's approval. Specifically, the Debtors have established the Vendor Contingency Team and educated members of the team on the Critical Vendor Payment Protocol. The Debtors have also begun educating the Debtors' personnel on Critical Vendor issues to ensure compliance with the Critical Vendor Payment Protocol. Finally, the Debtors have created a template for the Critical Vendor Matrix and will use the schedule of Potential Critical Vendors to facilitate their review of requests as they are received.

A. Critical Vendor Notice

26. To timely implement the Critical Vendor Payment Protocol, the Debtors also seek approval of the Critical Vendor Notice. The Critical Vendor Notice, along with a copy of the Proposed Interim Order or the final order approving the relief requested herein (the "**Final Order**"), as applicable, will be provided to any vendors requesting treatment as a Critical Vendor and payment of Critical Vendor Claims and will also be available on the website maintained by

the Debtors' claims and noticing agent for these chapter 11 cases, located at www.omniagentsolutions.com/Fairway. The Critical Vendor Notice summarizes key aspects of the Critical Vendor Payment Protocol and key terms of the proposed Interim Order and/or the Final Order, and includes as an exhibit a copy of the Vendor Agreement.

B. Vendor Agreement

27. As explained above, as the *quid pro quo* for payment of Critical Vendor Claims, the Debtors will use commercially reasonable efforts to require Critical Vendors to continue to provide trade terms in line with historical practice. Thus, in accordance with the Critical Vendor Payment Protocol, the Debtors seek authority to require as a condition to payment of a Critical Vendor Claim that the applicable Critical Vendor (including a Critical Vendor whose Critical Vendor Claim may be entitled to priority under section 503(b)(9) of the Bankruptcy Code) enter into a Vendor Agreement. The Vendor Agreement requires a Critical Vendor to continue to supply goods or services to the Debtors with whom the Critical Vendor conducts business on "Customary Trade Terms" until the earlier of (a) the effective date of a chapter 11 plan for the Debtors and (b) two (2) years from the date of such agreement. As defined in the Vendor Agreement, "Customary Trade Terms" means trade terms at least as favorable to the Debtors as those terms governing the Debtors' practices and programs (including, without limitation, credit limits, pricing, cash discounts, timing of payments, allowances, coupon reconciliation, product mix, availability, processing of vendor receivables, such as rebates and volume credits, and other programs), with respect to that particular Critical Vendor, within the twelve (12) months prior to the Commencement Date, or such other trade terms that are acceptable to the Debtors in their sole discretion. The Vendor Agreement, once agreed to and accepted by a Critical Vendor, shall be the legally binding contractual relationship between the parties governing the commercial trade relationship as provided therein.

28. The Debtors also seek the authority, subject to the terms of the Debtors' debtor-in-possession financing facility in accordance with the DIP Orders, including, without limitation, the Budget under, and as defined in, the DIP Orders, to be exercised in rare circumstances, to pay a Critical Vendor Claim in the event that no Vendor Agreement has been executed, only if the Debtors' determine, in their reasonable business judgment, that a Vendor Agreement is unnecessary to ensure the applicable Critical Vendor's continued performance on Customary Trade Terms, subject to the express authorization of the CRO.

C. Additional Payment Terms and Conditions

29. Certain of the Critical Vendors may possess mechanics' liens, possessory liens, or similar state law trade liens (the "**Trade Liens**") on the Debtors' assets based upon the Critical Vendor Claims. The Debtors propose that, as a further condition to receiving payment of a Critical Vendor Claim, a Critical Vendor must agree to take all necessary actions to remove any such Trade Lien at the Critical Vendor's sole expense.

30. In the event that (a) a Critical Vendor breaches the terms or conditions of a Vendor Agreement or (b) regardless of whether a Vendor Agreement has been executed, a Critical Vendor accepts payment with respect to a Critical Vendor Claim and does not continue supplying goods or services to the Debtors on Customary Trade Terms, the Debtors request authority, in their discretion, to (i) declare that the payment of the Critical Vendor Claim is a voidable postpetition transfer pursuant to section 549(a) of the Bankruptcy Code that the Debtors may recover in cash or in goods from such Critical Vendor (including by setoff against postpetition obligations), (ii) declare that the Critical Vendor shall immediately return the payment of its Critical Vendor Claim to the Debtors without giving effect to any alleged setoff rights, recoupment rights, adjustments, or other offsets of any type whatsoever, and the Critical Vendor Claim shall be reinstated to such amount so as to restore the Debtors and the Critical Vendor to their original

positions as if the Vendor Agreement had never been entered into and no payment of the Critical Vendor Claim had been made, and/or (iii) if there exists an outstanding postpetition balance due from the Debtors to such Critical Vendor, recharacterize and apply any payment made pursuant to the relief requested in the Motion to such outstanding postpetition balance and such Critical Vendor shall be required to repay to the Debtors such paid amounts that exceed the postpetition obligations then outstanding without the right of any setoffs, claims, provisions for payment of any claims, or otherwise.

Repudiating Vendor Procedures

31. Although the Debtors primarily do business with their vendors pursuant to short-term purchase orders, certain of their suppliers and many of the Debtors' service-providers are parties to longer-term contracts with the Debtors. Section 365 of the Bankruptcy Code requires such parties to perform their postpetition contractual obligations to the Debtors. *See e.g. City of Covington v. Covington Landing Ltd.*, 71 F.3d 1221, 1226 (6th Cir. 1995) (citing *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 11303, 1310 (5th Cir. 1985)) ("Section 365 is intended to provide a means whereby a debtor can force another party to an executory contract to continue to perform under the contract This provision provides a means whereby a debtor can force others to continue to do business with it when the bankruptcy filing might otherwise make them reluctant to do so."); *see also CIT Commcn's Fin. Corp. v. Midway Airlines Cor. (In re Midway Airlines Corp.)*, 406 F.3d 229, 234 (4th Cir. 2005) ("the [debtor] can force the lessor to continue performing under the lease"); *Gwinnett Prado, L.P. v. Rhodes, Inc. (In re Rhodes, Inc.)*, 321 B.R. 80, 91 (Bankr. N.D. Ga. 2005) ("As a general proposition, the non-debtor party to an unexpired lease or other executory contract is obliged to perform it until it is assumed or rejected."); *In re Nat'l Steel Corp.*, 316 B.R. 287, 305 (Bankr. N.D. Ill. 2004) (stating that "before an executory contract is assumed or rejected under § 365(a), that contract continues to exist, enforceable by the

debtor-in-possession, but not enforceable against the debtor-in-possession”); *McLean Indus., Inc. v. Medical Lab. Automation, Inc. (In re McLean Indus., Inc.)*, 96 B.R. 440, 447–50 (Bankr. S.D.N.Y. 1989) (same). Further, section 362 of the Bankruptcy Code prohibits such vendors from ceasing performance or threatening to do so, based on the Debtors’ failure to pay prepetition claims. *See generally Collier on Bankruptcy* ¶ 362.03 (Alan N. Resnick and Henry J. Somme eds. 15th ed. Rev. 2008) (“As property of the estate, the debtor’s interests in . . . [executory] contracts or leases are protected against termination or other interference that would have the effect of removing or hindering the debtor’s rights in violation of section 362(a)(3)”).

32. The Debtors anticipate that, notwithstanding these clear Bankruptcy Code provisions, some contract counterparties may threaten or refuse to perform their postpetition contractual obligations unless the Debtors pay their prepetition claims (any such counterparty, a “**Repudiating Vendor**”). The Debtors intend to resist these threats and take actions to enforce their rights under the Bankruptcy Code to require any such Repudiating Vendors to continue providing goods and services to the Debtors in accordance with their contractual commitments. However, in light of the severity of disruptions to the Debtors’ businesses that could be caused by certain Repudiating Vendors, the Debtors seek the authority to implement the following procedures (the “**Repudiating Vendor Procedures**”):

- If, because the Debtors have not paid the prepetition claim of a Repudiating Vendor, such Repudiating Vendor refuses to perform its postpetition obligations pursuant to an executory contract with one or more of the Debtors, the Debtors are authorized, but not directed, to pay such claim provisionally (and such payment will not count against the Critical Vendor Cap); provided that such payment is expressly authorized by the CRO as necessary to preserve the Debtors’ business stability during the chapter 11 cases, maintain the Debtors’ liquidity, or maintain the Debtors’ access to essential goods or services.
- Regardless of whether a payment has been made, if a Repudiating Vendor refuses to perform its postpetition obligations pursuant to an

executory contract with one or more of the Debtors, the Debtors may (i) file a Notice of Repudiating Vendor, substantially in the form attached hereto as **Exhibit C**, setting forth (a) the name of the Repudiating Vendor, (b) the identity of the agreement governing the Debtors' relationship with the Repudiating Vendor, (c) the Debtors' belief that the Repudiating Vendor is in violation of the Bankruptcy Code, and (d) the amount(s) and date(s) of any prepetition amounts paid; and (ii) seek entry of an Order to Show Cause, substantially in the form attached hereto as **Exhibit D**, requiring the Repudiating Vendor to show cause at a hearing to be scheduled by the Court why it should not be found to have willfully violated sections 362 and 365 of the Bankruptcy Code and why it should not be required to return any payments made to it by the Debtors, plus accumulated interest.

33. To be clear, the Debtors may elect to pay a claim of a contract counterparty without regard to the Repudiating Vendor Procedures (but in compliance with the Critical Vendor Protocol, in which case, any such payment will apply against the Critical Vendor Cap). The Debtors only intend to do so if affording a contract counterparty Critical Vendor status is necessary for the preservation of the Debtors' business and where the Critical Vendor factors favor such treatment, including, among other things, (a) where the Debtors otherwise intend to assume such vendor's contract during these chapter 11 cases; (b) the contract counterparty is the Debtors' sole source supplier; or (c) the Debtors constitute a substantial portion of the applicable vendor's business.

34. The Repudiating Vendor Procedures are substantially similar to procedures previously approved by courts in this district with respect to repudiating vendors. *See, e.g., In re Sears Holdings Corp.*, Case No. 18-23538 (RDD) (Bankr. S.D.N.Y. Oct. 17, 2018 and Nov. 16, 2018) (ECF Nos. 137 and 793) (interim and final orders authorizing repudiating vendor procedures); *In re Tops Holding II Corp.*, Case No. 18-22279 (Bankr. S.D.N.Y. Feb. 26, 2018 and Mar. 12, 2018) (ECF Nos. 62 and 183) (same); *In re The Great Atl. & Pac. Tea Co.*, Case No. 15-23007 (Bankr. S.D.N.Y. July 21, 2015 and August 11, 2015) (ECF Nos. 95 and 503) (same); *In re Hostess Brands, Inc.*, Case No. 12-22052 (RDD) (Bankr. S.D.N.Y. Jan. 13, 2012 and Jan. 27,

2012) (ECF Nos. 76 and 196) (same); *In re Metaldyne Corp.*, Case No. 09-13412 (MG) (Bankr. S.D.N.Y. May 29, 2009 and June 22, 2009) (ECF Nos. 66 and 275) (same).

Relief Requested Should Be Granted

35. The Court has authority to grant the relief requested pursuant to sections 105(a), 363(b), and 503(b)(9) of the Bankruptcy Code.

A. Maintaining the Debtors' Critical Vendor Relationships and Payment of Obligations Related Thereto Is Warranted.

36. The Court may grant the relief requested herein pursuant to section 363 of the Bankruptcy Code. Section 363(b) 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 section 363 of the Bankruptcy Code, a court may authorize a debtor to pay certain prepetition claims if a sound business purpose exists for doing so. *See In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (finding that there must be a sound business justification to justify payment of prepetition wages); *Armstrong World Indus., Inc. v. James A. Phillips, Inc. (In re James A. Phillips, Inc.)*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying on section 363 of the Bankruptcy Code to allow contractor to pay prepetition claims of suppliers). The business judgment rule is satisfied where “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.” *See, e.g., 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)), *appeal dismissed*, 3 F.3d 49 (2d Cir. 1993). Moreover, if “the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.” *Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-*

Manville Corp.), 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) (citations omitted). Courts in this District consistently have declined to interfere with corporate decisions absent a showing of bad faith, self-interest, or gross negligence, and have upheld a board's decisions as long as such decisions are attributable to any "rational business purpose." *Integrated*, 147 B.R. at 656 (quoting *CRTF Corp. v. Federated Dep't Stores*, 683 F. Supp. 422, 436 (S.D.N.Y. 1988)).

37. In addition, the Court has the authority, pursuant to its equitable powers under section 105(a) of the Bankruptcy Code, to authorize the relief requested herein, because such relief is necessary for the Debtors to carry out their fiduciary duties under section 1107(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code empowers bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105. Section 1107(a) of the Bankruptcy Code "contains an implied duty of the debtor-in-possession" to act as a fiduciary to "protect and preserve the estate, including an operating business' going-concern value," on behalf of the debtor's creditors and other parties in interest. *In re CEI Roofing, Inc.*, 315 B.R. 50, 59 (Bankr. N.D. Tex. 2004) (quoting *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002)); *see also Unofficial Comm. of Equity Holders v. McManigle (In re Penick Pharm., Inc.)*, 227 B.R. 229, 233 (Bankr. S.D.N.Y. 1998) ("[U]pon filing its petition, the Debtor became debtor in possession and, through its management . . . was burdened with the duties and responsibilities of a bankruptcy trustee."). Payment of prepetition claims is authorized under section 105(a) of the Bankruptcy Code and the doctrine of necessity when such payment is essential to the continued operation of a debtor's business. *See, e.g., In re C.A.F. Bindery, Inc.*, 199 B.R. 828, 835 (Bankr. S.D.N.Y. 1996); *In re Fin. News Network Inc.*, 134 B.R. 732, 735–36 (Bankr. S.D.N.Y. 1991); *CoServ*, 273 B.R. at 497 ("[I]t is only logical that the bankruptcy court be able to use Section 105(a) of the Code to authorize satisfaction of the

prepetition claim in aid of preservation or enhancement of the estate.”); *In re Just for Feet, Inc.*, 242 B.R. 821, 824–25 (D. Del. 1999) (holding that section 105(a) of the Bankruptcy Code provides a statutory basis for payment of prepetition claims under the doctrine of necessity and noting that the bankruptcy court has “power to authorize payment of pre-petition claims when such payment is necessary for the debtor’s survival during chapter 11”).

38. Furthermore, section 503(b)(9) of the Bankruptcy Code provides administrative priority for the “value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which goods have been sold to the debtor in the ordinary course of such debtor’s business.” 11 U.S.C. § 503(b)(9). Claims subject to section 503(b)(9) of the Bankruptcy Code must be paid in full for the Debtors to confirm a chapter 11 plan. *See* 11 U.S.C. § 1129(a)(9)(A). Consequently, payment now only provides such creditors what they would otherwise be entitled to receive under a chapter 11 plan. The Debtors’ estimate that approximately seventy-eight percent (78%) of the Potential Critical Vendor Claims, other than those of alcohol and milk vendors, will be entitled to priority pursuant to section 503(b)(9) of the Bankruptcy Code.

39. The Bankruptcy Code does not prohibit a debtor from paying such claims prior to confirmation. As administrative claims incurred in the ordinary course of business, the Debtors submit that they may pay such claims in accordance with their business judgment pursuant to section 363(c)(1) of the Bankruptcy Code. Courts in this district and others have regularly authorized the payment of claims arising under section 503(b)(9) of the Bankruptcy Code in the ordinary course of business. *See, e.g., In re Westinghouse Elec. Co., LLC*, Case No. 17-10751 (MEW) (Bankr. S.D.N.Y. June 1, 2017) (ECF No. 640) (authorizing debtors to pay vendors’ claims entitled to priority under section 503(b)(9) of the Bankruptcy Code); *In re Angelica Corp.*,

Case No. 17-10870 (JLG) (Bankr. S.D.N.Y. May 12, 2017) (ECF No. 177) (same); *In re Aéropostale, Inc.*, Case No. 16-11275 (SHL) (Bankr. S.D.N.Y. June 3, 2016) (ECF No. 244) (authorizing payment of claims entitled to administrative priority pursuant to section 503(b)(9) up to \$4 million); *In re The Great Atl. & Pac. Tea Co.*, Case No. 15-23007 (RDD) (Bankr. S.D.N.Y. Aug. 11, 2015) (ECF No. 503) (authorizing payment of claims entitled to administrative priority pursuant to section 503(b)(9) up to \$28.3 million); *In re Chassix Holdings, Inc.*, Case No. 15-10578 (MEW) (Bankr. S.D.N.Y. Apr. 14, 2015) (ECF No. 275) (authorizing debtors to pay vendors' claims entitled to priority under section 503(b)(9) of the Bankruptcy Code "in the ordinary course if the Debtors determine it is in the estates' best interests to do so"); *In re The Great Atl. & Pac. Tea Co.*, Case No. 10-24549 (RDD) (Bankr. S.D.N.Y. Dec. 14, 2010 and Jan. 13, 2011) (ECF Nos. 55 and 504) (interim and final orders authorizing payment of claims entitled to administrative priority pursuant to section 503(b)(9) up to \$5 million); *In re Lear Corp.*, No. 09-14326 (ALG) (Bankr. S.D.N.Y. July 8, 2009 and July 31, 2009) (ECF Nos. 68 and 245) (interim and final orders authorizing payment of claims entitled to administrative priority pursuant to section 503(b)(9) up to \$23.15 million and \$46.3 million, respectively); *In re Chrysler LLC*, No. 09-50002 (AJG) (Bankr. S.D.N.Y. May 20, 2009) (ECF No. 1318) (authorizing debtors to pay uncapped "claims of any creditors or claimants entitled to administrative priority pursuant to section 503(b)(9) . . . in the ordinary course of the Debtors' businesses and on such terms and conditions as the Debtors deem appropriate," subject to the terms of debtors' DIP facility); *see also In re Dura Auto. Sys. Inc.*, Case No. 06-11202 (KJC), Hr'g Tr. 49:21–23 (Bankr. D. Del. Oct. 31, 2006) ("I think arguably the [D]ebtor could pay its 503(b)(9) claimants without court approval.").

40. Allowing a debtor to honor prepetition obligations under this authority is appropriate where, as here, doing so is consistent with the “two recognized policies” of chapter 11 of the Bankruptcy Code—preserving going concern value and maximizing property available to satisfy creditors. *See Bank of Am. Nat’l Trust & Sav. Assoc. v. 203 N. LaSalle St. P’Ship*, 526 U.S. 434, 453 (1999). Recognizing that, as here, payment of certain prepetition claims may be required to achieve these goals, courts in this district have granted relief consistent with the relief requested herein for similarly-situated debtors. *See, e.g., In re Windstream Holdings, Inc.*, Case No. 19-22312 (RDD) Bankr. S.D.N.Y. Feb. 28, 2019 and Apr. 22, 2019) (ECF Nos. 61 and 377) (interim and final orders authorizing payment of up to \$80 million on account of claims held by critical vendors); *In re Sears Holdings Corp.*, Case No. 18-23538 (RDD) (Bankr. S.D.N.Y. Oct. 17, 2018 and Nov. 16, 2018) (ECF Nos. 137 and 793) (interim and final orders authorizing payment of up to \$70 million on an interim basis and up to \$90 million on a final basis on account of claims held by critical vendors); *In re Tops Holding II Corp.*, Case No. 18-22279 (RDD) (Bankr. S.D.N.Y. Feb. 26, 2018 and Mar. 22, 2018) (ECF Nos. 62 and 183) (interim and final orders authorizing payment of up to \$36 million on account of claims held by critical vendors); *In re Avaya Inc.*, Case No. 17-10089 (SMB) (Bankr. S.D.N.Y. Jan. 24, 2017 and Feb. 10, 2017) (ECF Nos. 65 and 139) (interim and final orders authorizing payment of up to \$9.8 million on an interim basis and up to \$39.5 million on a final basis on account of claims held by critical vendors); *In re The Great Atlantic & Pacific Tea Co.*, Case No. 15-23007 (RDD) (Bankr. S.D.N.Y. July 21, 2015 and Aug. 11, 2015) (ECF Nos. 59 and 503) (interim and final orders authorizing payment of up to \$28.3 million on account of claims held by critical vendors); *In re The Great Atlantic & Pacific Tea Co.*, Case No. 10-24549 (RDD) (Bankr. S.D.N.Y. Dec. 14, 2010 and Jan. 13, 2011) (ECF Nos. 55 and 504) (interim and final orders authorizing payment of up to \$62 million on account of claims held

by critical vendors); *In re Chassix Holdings, Inc.*, Case No. 15-10578 (MEW) (Bankr. S.D.N.Y. Mar. 13, 2015 and Apr. 14, 2015) (ECF Nos. 85 and 275) (interim and final orders authorizing payment of up to \$5 million and \$40 million, respectively, on account of claims held by critical vendors); *In re Hostess Brands, Inc.*, Case No. 12-22052 (RDD) (Jan. 13, 2012 and Jan. 27, 2012) (ECF Nos. 76 and 196) (interim and final orders authorizing payment of up to \$14 million on account of claims held by critical vendors); *In re The Readers Digest Ass'n, Inc.*, Case No. 09-23529 (RDD) (Bankr. S.D.N.Y. Sept. 17, 2009) (authorizing payment of up to \$25 million on account of claims held by critical vendors).

B. Payment of the Critical Vendor Claims as Provided Herein Is Necessary and Appropriate to Ensure the Success of these Chapter 11 Cases.

41. The Debtors' ongoing ability to obtain goods and services from their Critical Vendors as provided herein is necessary to preserve the value of their estates. Absent payment of the Critical Vendor Claims the Debtors could be unable to maintain sufficient levels of inventory with the variety, freshness, and quality their customers have come to expect. Similarly, a Repudiating Vendor's refusal to provide goods or services to the Debtors could be devastating to the Debtors' business. The Debtors must be able to continue to operate their stores in the ordinary course of business in order to maximize the value available for distribution to creditors, which requires cooperation from certain key vendors. And, as noted above, the Debtors' failure to timely pay certain vendors could accelerate payment terms as a matter of law or regulation.⁸ Consequently, the Debtors' requests for authority to honor the Critical Vendor Claims

⁸The unique rights available to alcoholic beverage vendors and milk vendors, in particular, have justified payment of such vendors' prepetition claims in comparable supermarket bankruptcies. *See, e.g., In re Tops Holding II Corp.*, Case No. 18-22279 (RDD) (Bankr. S.D.N.Y. Feb. 26, 2018 and Mar. 22, 2018) (ECF Nos. 62 and 183) (granting debtors' motion to pay prepetition claims of alcoholic beverage and milk vendors); *In re The Great Atlantic & Pacific Tea Company, Inc.*, Case No. 15-23007 (RDD) (Bankr. S.D.N.Y. July 20, 2015 and Aug. 11, 2015) (ECF Nos. 61 and 503) (same); *In re The Great Atlantic & Pacific Tea Company, Inc.*, Case No. 10-24549 (RDD) (Bankr. S.D.N.Y. Dec. 14, 2010 and Jan. 13, 2011) (ECF Nos. 5 and 504) (same); *In re Bi-Lo, LLC*, Case No. 09-02140 (Bankr. D.S.C. Mar. 3, 2009) (ECF No. 47) (granting debtors' motion to pay prepetition claims of alcoholic beverage vendors); *In re*

pursuant to the Critical Vendor Payment Protocol, and implement the Repudiating Vendor Procedures, are both consistent with the priorities established by the Bankruptcy Code and necessary to preserve the value of their business.

42. The Debtors' authority to address their Critical Vendor Claims and implement the Repudiating Vendor Procedures in the initial days of these cases will send a clear signal to their suppliers and customers that the Debtors are both willing and, importantly, able to conduct business as usual after the Commencement Date. The Debtors will also use this authority to secure Customary Trade Terms from their vendors. Absent such relief, Critical Vendors may have no incentive to continue to provide the Debtors with trade credit or, in some cases, may be legally prohibited from providing trade credit, as discussed above. In fact, many vendors have already begun demanding accelerated payment, cash-in-advance or cash-on-delivery. Further contractions could be catastrophic for the Debtors, their estates, and all stakeholders. In contrast, the preservation of working capital through the retention or reinstatement of trade credit in sufficient amounts and on favorable terms will conserve liquidity, stabilize the Debtors' business operations, and facilitate their ability to maximize value.

Reservation of Rights

43. Nothing contained herein is intended or shall be construed as (a) an admission as to the validity of any claim against the Debtors; (b) a waiver of the Debtors' or any appropriate party in interest's rights to dispute the amount of, basis for, or validity of any claim against the Debtors; (c) an agreement or obligation to pay any claims; (d) a waiver of any claims or causes of action which may exist against any creditor or interest holder; (e) an admission as to

Bruno's Supermarkets, LLC, Case No. 09-00634 (Bankr. N.D. Ala. Feb. 13, 2009) (ECF No. 117) (same); *In re Parmalat USA Corp.*, Case No. 04-1139 (Bankr. S.D.N.Y. Feb. 24, 2004 and Mar. 12, 2004) (ECF Nos. 30 and 133) (authorizing payment of prepetition milk supplier and milk shipper claims). The Debtors reserve all rights to contest the application of such laws or regulations given their status as debtors in possession or for any other reason.

the validity of any liens satisfied pursuant to this Motion; or (f) an approval, assumption, adoption, or rejection of any agreement, contract, lease, program, or policy between the Debtors and any third party under section 365 of the Bankruptcy Code. Likewise, if the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended to be and should not be construed as an admission to the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

Debtors Have Satisfied Bankruptcy Rule 6003(b)

44. Bankruptcy Rule 6003(b) provides that, to the extent relief is necessary to avoid immediate and irreparable harm, a bankruptcy court may issue an order granting "a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition" before twenty-one (21) days after filing of the petition. Fed. R. Bankr. P. 6003(b). The Debtors require smooth coordination across their supply chain to provide customers with the quality and quantity of goods they have come to expect from the Debtors. To do so, the Debtors depend heavily on the goods and services provided by the Critical Vendors. Non-payment of Critical Vendor Claims could jeopardize these chapter 11 cases before they even begin, exposing the Debtors to immediate and irreparable harm far in excess of the relief requested herein. Accordingly, the Debtors submit that the relief requested herein is necessary to avoid immediate and irreparable harm, and, therefore, Bankruptcy Rule 6003(b) is satisfied.

Bankruptcy Rules 6004(a) and (h)

45. To implement the foregoing successfully, the Debtors request that the Court find that notice of the Motion is adequate under Bankruptcy Rule 6004(a) under the circumstances, and waive the fourteen (14) day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h). As explained above and in the First Day Declarations, the relief

requested herein is necessary to avoid immediate and irreparable harm to the Debtors. Accordingly, ample cause exists to justify finding that the notice requirements under Bankruptcy Rule 6004(a) have been satisfied and to grant a waiver of the fourteen (14) day stay imposed by Bankruptcy Rule 6004(h), to the extent such notice requirements and such stay apply.

Notice

46. Notice of this Motion has been provided to (i) the U.S. Trustee, 201 Varick Street, Suite 1006, New York, NY 10014 (Attn: Greg Zipes, Esq. and Paul Schwartzberg, Esq.); (ii) the holders of the forty (40) largest unsecured claims against the Debtors (on a consolidated basis); (iii) counsel to the Ad Hoc Group and DIP Lenders, King & Spalding LLP, 1185 Avenue of the Americas, New York, NY 10036 (Attn: W. Austin Jowers, Esq., Michael Rupe, Esq., and Michael R. Handler, Esq.); (iv) counsel to Ankura Trust Company, LLC, as the Prepetition Agent under the Prepetition Credit Agreement, Davis Polk & Wardwell LLP, 450 Lexington Avenue, New York, NY 10017 (Attn: Christian Fischer, Esq.); (v) Citizens Bank, N.A., 437 Madison Avenue, 18th Floor, New York, NY 10022 (Attn: Jamie Salas); (vi) the Internal Revenue Service; and (vii) the United States Attorney's Office for the Southern District of New York (collectively, the "**Notice Parties**"). The Debtors respectfully submit that no further notice is required.

47. No previous request for the relief sought herein has been made by the Debtors to this or any other Court.

WHEREFORE the Debtors respectfully request entry of interim and final orders granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: January 23, 2020
New York, New York

/s/ Sunny Singh
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
Ray C. Schrock, P.C.
Sunny Singh

*Proposed Attorneys for Debtors
and Debtors in Possession*

Exhibit A

Proposed Interim Order

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
In re :
: **Chapter 11**
FAIRWAY GROUP HOLDINGS :
CORP., et al., : **Case No. 20-[] ()**
: **(Jointly Administered)**
Debtors.¹ :
-----X

**INTERIM ORDER (I) AUTHORIZING DEBTORS TO PAY CERTAIN
PREPETITION OBLIGATIONS TO CRITICAL VENDORS; (II) APPROVING
RELATED PROCEDURES; AND (III) GRANTING RELATED RELIEF**

Upon the motion (the “**Motion**”)² of Fairway Group Holdings Corp. and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “**Debtors**”), pursuant to sections 105(a), 363(b), and 503(b)(9) of title 11 of the United States Code (the “**Bankruptcy Code**”) for entry of interim and final orders (i) authorizing, but not directing, the Debtors to pay up to \$5.5 million on an interim basis (the “**Interim Critical Vendor Cap**”) and an additional \$1.0 million on a final basis (the aggregate amount, the “**Critical Vendor Cap**”) in prepetition claims of certain vendors, suppliers, service providers, and other similar entities that the Debtors determine, in their sole discretion and based on their sound business judgment, are essential to their ongoing business operations and maximizing the value of

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are as follows: Fairway Group Holdings Corp. (2788); Fairway Group Acquisition Company (2860); Fairway Bakery LLC (4129); Fairway Broadway LLC (8591); Fairway Chelsea LLC (0288); Fairway Construction Group, LLC (2741); Fairway Douglaston LLC (2650); Fairway East 86th Street LLC (3822); Fairway eCommerce LLC (3081); Fairway Georgetowne LLC (9609); Fairway Greenwich Street LLC (6422); Fairway Group Central Services LLC (7843); Fairway Group Plainview LLC (8643); Fairway Hudson Yards LLC (9331); Fairway Kips Bay LLC (0791); FN Store LLC (9240); Fairway Paramus LLC (3338); Fairway Pelham LLC (3119); Fairway Pelham Wines & Spirits LLC (3141); Fairway Red Hook LLC (8813); Fairway Stamford LLC (0738); Fairway Stamford Wines & Spirits LLC (3021); Fairway Staten Island LLC (1732); Fairway Uptown LLC (8719); Fairway Westbury LLC (6240); and Fairway Woodland Park LLC (9544). The location of the Debtors’ corporate headquarters is 2284 12th Avenue, New York, New York 10027.

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

their enterprise (the “**Critical Vendors**” whose prepetition claims shall be defined as the “**Critical Vendor Claims**”), subject to the procedures and conditions described in the Motion; (ii) approving (a) the Critical Vendor Payment Protocol, (b) the form of Critical Vendor Notice, substantially in the form attached to the Motion as **Exhibit B**, (c) the form of Vendor Agreement, substantially in the form attached to the Critical Vendor Notice as **Exhibit 1**, (d) the Repudiating Vendor Procedures, (e) the form of Notice of Repudiating Vendor, substantially in the form attached to the Motion as **Exhibit C**, and (f) the form of Order to Show Cause, substantially in the form attached to the Motion as **Exhibit D**; and (iii) granting related relief, all as more fully set forth in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference M-431, dated January 31, 2012 (Preska, C.J.); and consideration of the Motion and the requested relief being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to the Notice Parties, and such notice having been adequate and appropriate under the circumstances, and it appearing that no other notice need be provided; and the Court having reviewed the Motion; and the Court having held a hearing to consider the relief requested in the Motion on an interim basis (the “**Hearing**”); and upon the First Day Declarations, filed contemporaneously with the Motion, and the record of the Hearing; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and it appearing that the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtors and their estates as contemplated by Bankruptcy Rule 6003, and is in the best interests of the Debtors, their estates, creditors, and all parties in

interest; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is granted on an interim basis to the extent set forth herein.
2. The Critical Vendor Payment Protocol is approved in its entirety.
3. The form of Critical Vendor Notice is approved in its entirety.
4. The form of Vendor Agreement is approved in its entirety.
5. The Repudiating Vendor Procedures are approved in their entirety.
6. The form of Notice of Repudiating Vendor is approved in its entirety.
7. The form of Order to Show Cause is approved in its entirety.
8. The Debtors are authorized, but not directed, pursuant to sections 105(a), 363(b), and 503(b)(9) of the Bankruptcy Code, to pay Critical Vendor Claims in accordance with the Critical Vendor Payment Protocol up to the Interim Critical Vendor Cap, upon such terms and in the manner provided in this Interim Order and the Motion.
9. The Debtors shall condition payment of Critical Vendor Claims pursuant to this Interim Order upon the execution of a Vendor Agreement. The Debtors are authorized, but not directed, to enter into such Vendor Agreements when and if the Debtors determine, in the exercise of their sole reasonable business judgment, that it is appropriate to do so. A Vendor Agreement, once agreed to and accepted by a Critical Vendor, shall be the legally binding contractual relationship between the parties governing the commercial trade relationship as provided therein; provided that the Debtors may agree to implement such modifications to the form of Vendor Agreement the Debtors deem necessary or advisable in the reasonable exercise of their business judgment to obtain Customary Trade Terms (as defined below) from the applicable

Critical Vendor; provided, further, that the Debtors may pay a Critical Vendor Claim without the applicable Critical Vendor having executed a Vendor Agreement only if the Debtors determine, in their reasonable business judgment that a Vendor Agreement is unnecessary to ensure the applicable Critical Vendor's continued performance on Customary Trade Terms, subject to the express authorization of the CRO.

10. Any party who accepts payment from the Debtors of a Critical Vendor Claim (regardless of whether a Vendor Agreement has been executed) shall take all actions necessary to remove any mechanics' liens, possessory liens, or similar state law trade liens on the Debtors' assets such party may have based upon such Critical Vendor Claim at such party's sole expense.

11. Any party who accepts payment from the Debtors of a Critical Vendor Claim (regardless of whether a Vendor Agreement has been executed) shall be deemed to have agreed to the terms and provisions of this Interim Order and shall be deemed to have waived, to the extent so paid, any and all prepetition claims, of whatever type, kind or priority, against the Debtors, their properties and estates, their directors, officers and employee up to the amount paid.

12. In the event (a) a Critical Vendor breaches the terms or conditions of a Vendor Agreement or (b) regardless of whether a Vendor Agreement has been executed, a Critical Vendor accepts payment from the Debtors of a Critical Vendor Claim and does not continue supplying goods or services to the Debtors on trade terms at least as favorable to the Debtors as those terms governing the Debtors' practices and programs (including, without limitation, credit limits, pricing, cash discounts, timing of payments, allowances, coupon reconciliation, product mix, availability, processing of vendor receivables, such as rebates and volume credits, and other programs), with respect to that particular Critical Vendor, within the twelve (12) months prior to

the Commencement Date, or such other trade terms that are acceptable to the Debtors in their sole discretion (collectively, the “**Customary Trade Terms**”), the Debtors may, in their discretion, (a) declare that the payment of the Critical Vendor Claim is a voidable postpetition transfer pursuant to section 549(a) of the Bankruptcy Code that the Debtors may recover in cash or in goods from such Critical Vendor (including by setoff against postpetition obligations), (b) declare that the Critical Vendor shall immediately return the payment of its Critical Vendor Claim to the Debtors without giving effect to any alleged setoff rights, recoupment rights, adjustments, or other offsets of any type whatsoever, and the Critical Vendor Claim shall be reinstated to such amount as so to restore the Debtors and the Critical Vendor to their original positions as if the Vendor Agreement had never been entered into and no payment of the Critical Vendor Claim had been made, and/or (c) if there exists an outstanding postpetition balance due from the Debtors to such Critical Vendor, recharacterize and apply any payment made pursuant to the relief requested in the Motion to such outstanding postpetition balance and such Critical Vendor shall be required to repay to the Debtors such paid amounts that exceed the postpetition obligations then outstanding without the right of any setoffs, claims, provisions for payment of any claims, or otherwise.

13. All Vendor Agreements will terminate upon entry of an order converting the Debtors’ chapter 11 cases to cases under chapter 7 of the Bankruptcy Code.

14. In the event a Critical Vendor breaches the terms or conditions of its Vendor Agreement, the Debtors may, in their discretion, declare that such Vendor Agreement has terminated; provided that the Vendor Agreement may be reinstated if:

- (a) after notice and a hearing (following a motion filed by the respective Critical Vendor), the Bankruptcy Court reverses the Debtors’ decision to terminate the Vendor Agreement for good cause shown that the Debtors’ determination was materially incorrect;

- (b) the Critical Vendor fully cures the underlying default of the Vendor Agreement within five (5) business days from the date of receipt of notice of termination of the Vendor Agreement; or
- (c) the Debtors, in their sole discretion, reach a commercially acceptable agreement with the breaching party.

15. Nothing herein shall impair or prejudice the Debtors' ability to contest, in their sole discretion, the extent, perfection, priority, validity, or amounts of any claims or liens held by any Critical Vendor and the Debtors' rights to contest the extent, validity, or perfection or seek the avoidance of all such liens or the priority of such claims are fully preserved.

16. The Debtors shall maintain a "**Critical Vendor Matrix**" summarizing (a) the name of each vendor requesting Critical Vendor status; (b) the amount and timing of any Critical Vendor payment; (c) the amount of the Critical Vendor's claim satisfied by the Critical Vendor payment, including any amount entitled to priority under section 503(b)(9) of the Bankruptcy Code; and (d) a summary of the material payment terms. For the first forty-five (45) days after entry of this Interim Order, the Critical Vendor Matrix will be provided on a weekly basis, and, thereafter, on a monthly basis, to (a) the U.S. Trustee; (b) counsel to the Ad Hoc Group and DIP Lenders, King & Spalding LLP, 1185 Avenue of the Americas, New York, NY 10036 (Attn: W. Austin Jowers, Esq., Michael Rupe, Esq., and Michael R. Handler, Esq.); and (c) the professionals retained by any official committee of unsecured creditors appointed in these chapter 11 cases; provided that all such parties shall keep the Critical Vendor Matrix confidential and shall not disclose any of the information to anyone without prior written consent of the Debtors.

17. If a Repudiating Vendor refuses to perform its postpetition obligations pursuant to an executory contract with one or more of the Debtors, the Debtors are authorized, but not directed, to pay such claim provisionally (and such payment shall not count against the Critical Vendor Cap); provided that such payment is expressly authorized by the CRO as necessary to

preserve the Debtors' business stability during the chapter 11 cases, maintain the Debtors' liquidity, or maintain the Debtors' access to essential goods and services.

18. Regardless of whether a payment has been made, if a Repudiating Vendor refuses to perform its postpetition obligations pursuant to an executory contract with one or more of the Debtors, the Debtors may (a) file a Notice of Repudiating Vendor setting forth (i) the name of the Repudiating Vendor, (ii) the identity of the agreement governing the Debtors' relationship with the Repudiating Vendor, (iii) the Debtors' belief that the Repudiating Vendor is in violation of the Bankruptcy Code, and (iv) the amount(s) and date(s) of any prepetition amounts paid; and (b) seek entry of an Order to Show Cause requiring the Repudiating Vendor to show why it should not be found to have willfully violated sections 362 and 365 of the Bankruptcy Code and why it should not be required to return any payments made to it by the Debtors, plus any accumulated interest.

19. Nothing in the Motion or this Interim Order shall be deemed to authorize the Debtors to accelerate any payments not otherwise due prior to the date of the hearing to consider the relief requested in the Motion on a final basis (the "**Final Hearing**").

20. Notwithstanding anything to the contrary contained herein, any payments made or to be made by the Debtors under this Interim Order, and any authorization contained in this Interim Order, shall be in compliance with, and shall be subject to, the DIP Orders approving the Debtors' debtor-in-possession financing facility and/or use of cash collateral, and the documentation in respect of any such debtor-in-possession financing facility, including, without limitation, the Budget under, and as defined in, the DIP Orders.

21. Nothing contained in the Motion or this Interim Order, nor any payment made pursuant to the authority granted by this Interim Order, is intended to be or shall be construed

as (a) an admission as to the validity of any claim against the Debtors; (b) a waiver of the Debtors' or any appropriate party in interest's rights to dispute the amount of, basis for, or validity of any claim against the Debtors; (c) an agreement or obligation to pay any claims; (d) a waiver of any claims or causes of action which may exist against any creditor or interest holder; (e) an admission as to the validity of any liens satisfied pursuant to this Motion; or (f) an approval, assumption, adoption, or rejection of any agreement, contract, lease, program, or policy between the Debtors and any third party under section 365 of the Bankruptcy Code.

22. Except as otherwise set forth herein, nothing herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any party.

23. The requirements of Bankruptcy Rule 6003(b) have been satisfied.

24. Under the circumstances of these chapter 11 cases, notice of the Motion is adequate under Bankruptcy Rule 6004(a).

25. Notwithstanding Bankruptcy Rule 6004(h), this Interim Order shall be immediately effective and enforceable upon its entry.

26. The Debtors are authorized to take all action necessary to effectuate the relief granted in this Interim Order.

27. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, and/or enforcement of this Interim Order.

28. The Final Hearing shall be held on _____, **2020**, at _____ **(Prevailing Eastern Time)** and any objections or responses to the Motion shall be in writing, filed with the Court, and served upon (i) the proposed attorneys for the Debtors, Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153 (Attn: Ray C. Schrock, P.C. and Sunny Singh, Esq.); (ii) the U.S. Trustee, 201 Varick Street, Suite 1006, New York, NY 10014

(Attn: Greg Zipes, Esq. and Paul Schwartzberg, Esq.); (iii) counsel to the Ad Hoc Group and DIP Lenders, King & Spalding LLP, 1185 Avenue of the Americas, New York, NY 10036 (Attn: W. Austin Jowers, Esq., Michael Rupe, Esq., and Michael R. Handler, Esq.); and (iv) counsel to Ankura Trust Company, LLC, as the Prepetition Agent under the Prepetition Credit Agreement, Davis Polk & Wardwell LLP, 450 Lexington Avenue, New York, NY 10017 (Christian Fischer, Esq.), in each case, so as to be received no later than **4:00 p.m. (Prevailing Eastern Time)** on _____, 2020.

Dated: _____, 2020
New York, New York

UNITED STATES BANKRUPTCY JUDGE

Exhibit B

Form of Critical Vendor Notice

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
In re :
: **Chapter 11**
FAIRWAY GROUP HOLDINGS :
CORP., et al., : **Case No. 20-[] ()**
: **(Joint Administration Pending)**
Debtors.¹ :
-----X

Notice of Critical Vendor Payment Protocol

On January 23, 2020 (the “**Commencement Date**”), Fairway Group Holdings Corp. and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “**Debtors**”), filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the Southern District of New York (the “**Bankruptcy Court**”).

On the Commencement Date, the Debtors filed the *Motion of Debtors for (I) Authority to Pay Certain Prepetition Obligations to Critical Vendors; (II) Approval of Related Procedures; and (III) Related Relief* (ECF No. []) (the “**Motion**”).²

On [], 2020, the Court entered an order (ECF No. []) granting the relief requested in the Motion on [**an interim/ a final**] basis (the “**Order**”).

To ensure the continued postpetition delivery of goods and services to the Debtors on market terms following the Commencement Date, including credit terms, and facilitate orderly negotiations relating thereto, pursuant to the Order, among other things, the Bankruptcy Court approved certain procedures for the Debtors’ review and authorization to pay certain prepetition claims of certain vendors, suppliers, service providers, and other similar entities that the Debtors determine, in their sole discretion and based on their sound business judgment, are essential to their ongoing business operations and maximizing the value of their enterprise (the “**Critical Vendors**” whose prepetition claims shall be referred to as the “**Critical Vendor Claims**”) who

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are as follows: Fairway Group Holdings Corp. (2788); Fairway Group Acquisition Company (2860); Fairway Bakery LLC (4129); Fairway Broadway LLC (8591); Fairway Chelsea LLC (0288); Fairway Construction Group, LLC (2741); Fairway Douglaston LLC (2650); Fairway East 86th Street LLC (3822); Fairway eCommerce LLC (3081); Fairway Georgetowne LLC (9609); Fairway Greenwich Street LLC (6422); Fairway Group Central Services LLC (7843); Fairway Group Plainview LLC (8643); Fairway Hudson Yards LLC (9331); Fairway Kips Bay LLC (0791); FN Store LLC (9240); Fairway Paramus LLC (3338); Fairway Pelham LLC (3119); Fairway Pelham Wines & Spirits LLC (3141); Fairway Red Hook LLC (8813); Fairway Stamford LLC (0738); Fairway Stamford Wines & Spirits LLC (3021); Fairway Staten Island LLC (1732); Fairway Uptown LLC (8719); Fairway Westbury LLC (6240); and Fairway Woodland Park LLC (9544). The location of the Debtors’ corporate headquarters is 2284 12th Avenue, New York, New York 10027.

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

agree to, among other things, provide postpetition goods and/or services to the Debtors on Customary Trade Terms (as defined below).

This Notice summarizes certain key provisions of the Order and the Critical Vendor Payment Protocol. In the event of any inconsistency between this Notice and the Order, the Order shall control in all respects.

1. Payment Requests. All requests for payment of a Critical Vendor Claim must be emailed to FairwayVendorInfo@Fairwaymarket.com.

2. Vendor Agreement. The Debtors will condition the payment of Critical Vendor Claims on the execution by each Critical Vendor of a vendor agreement substantially in the form attached hereto as **Exhibit 1** (each, a “**Vendor Agreement**”), which agreement shall constitute a legally binding contractual relationship between the parties.

3. Customary Trade Terms. Pursuant to the Vendor Agreement, in order to receive payment of a Critical Vendor Claim, a Critical Vendor must agree to continue supplying goods or services to the Debtors on trade terms at least as favorable to the Debtors as those terms governing practices and programs (including, without limitation, credit limits, pricing, cash discounts, timing of payments, allowances, coupon reconciliation, product mix, availability, processing of vendor receivables, such as rebates and volume credits, and other programs) within the twelve (12) months prior to the Commencement Date, or such other trade terms that are acceptable to the Debtors in their sole discretion (collectively, the “**Customary Trade Terms**”).

4. Debtors’ Remedies. If a Critical Vendor breaches its Vendor Agreement or otherwise accepts payment from the Debtors of a Critical Vendor Claim and does not continue supplying goods or services to the Debtors on Customary Trade Terms, the Debtors may, in their discretion, (a) declare that any payment of the Critical Vendor Claim is a voidable postpetition transfer pursuant to section 549(a) of the Bankruptcy Code that the Debtors may recover in cash or in goods from such Critical Vendor (including by setoff against postpetition obligations); (b) declare that the Critical Vendor shall immediately return the payment of its Critical Vendor Claim to the Debtors without giving effect to any alleged setoff rights, recoupment rights, adjustments, or other offsets of any type whatsoever, and the Critical Vendor Claim shall be reinstated to such amount as so to restore the Debtors and the Critical Vendor to their original positions as if the Vendor Agreement had never been entered into and no payment of the Critical Vendor Claim had been made; and/or (c) if there exists an outstanding postpetition balance due from the Debtors to such Critical Vendor, recharacterize and apply any payment of a Critical Vendor Claim to such outstanding postpetition balance and such Critical Vendor shall be required to repay to the Debtors such paid amounts that exceed the postpetition obligations then outstanding without the right of any setoffs, claims, provisions for payment of any claims, or otherwise.

5. Termination and Reinstatement. All Vendor Agreements will terminate upon entry of an order converting the Debtors’ chapter 11 cases to cases under chapter 7 of the Bankruptcy Code. In addition, if a Critical Vendor breaches its Vendor Agreement, the Debtors may, in their discretion, declare that such Vendor Agreement has terminated. To the extent a Vendor Agreement is terminated on account of breach of the terms or conditions thereof by a Critical Vendor, such terminated Vendor Agreement may nevertheless be reinstated as the result of one or more of the

following: (a) after notice and a hearing (following a motion filed by the applicable Critical Vendor), the Bankruptcy Court reverses the Debtors' decision to terminate the Vendor Agreement for good cause shown that the Debtors' determination was materially incorrect; (b) the Critical Vendor fully cures the underlying default of the Vendor Agreement within five (5) business days from the date of receipt of notice of termination of the Vendor Agreement; or (c) the Debtors, in their sole discretion, reach a commercially acceptable agreement with the breaching party.

6. Effect of Acceptance. Any party who accepts a payment from the Debtors on account of a Critical Vendor Claim (regardless of whether a Vendor Agreement has been executed) shall be deemed to have agreed to the terms and provisions of the Order and shall be deemed to have waived, to the extent so paid, any and all prepetition claims, of whatever type, kind, or priority, against the Debtors, their properties and estates, their directors, officers and employee up to the amount paid.

7. Reservation of Rights. Nothing contained herein, in the Order, or as a result of any payment made pursuant thereto is intended to or should be construed as (a) an admission as to the validity of any claim against the Debtors; (b) a waiver of the Debtors' or any appropriate party in interest's rights to dispute the amount of, basis for, or validity of any claim against the Debtors; (c) an agreement or obligation to pay any claims; (d) a waiver of any claims or causes of action which may exist against any creditor or interest holder; (e) an admission as to the validity of any liens satisfied pursuant to the Motion; or (f) an approval or assumption of any agreement, contract, program, policy, or lease under section 365 of the Bankruptcy Code. The Debtors expressly reserve the right to contest any demand for payment made with respect to Critical Vendor Claims pursuant to the Bankruptcy Code, any order of the Court, or applicable non-bankruptcy law.

Dated: [____], 2020
New York, New York

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
Ray C. Schrock, P.C.
Sunny Singh

*Proposed Attorneys for Debtors
and Debtors in Possession*

Exhibit 1

Form of Vendor Agreement

Vendor Agreement

The Debtors (as defined below) and [_____] (“**Vendor**”) hereby enter into the following vendor agreement (this “**Vendor Agreement**”) dated as of this [___], 2020.

Recitals

WHEREAS on January 23, 2020 (the “**Commencement Date**”), Fairway Group Holdings Corp. and certain affiliated entities (collectively, the “**Debtors**”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”), in the United States Bankruptcy Court for the Southern District of New York (the “**Court**”).

WHEREAS on [___], 2020, the Court entered the *Interim Order (I) Authorizing Debtors to Pay Certain Prepetition Obligations to Critical Vendors; (II) Approving Related Procedures; and (III) Granting Related Relief* (ECF No. [___]) (the “**Critical Vendor Order**”) authorizing the Debtors, under certain conditions, to pay the prepetition claims of certain vendors, including Vendor, subject to the terms and conditions set forth therein.

WHEREAS pursuant to the Critical Vendor Order, the Court approved certain payment procedures, summarized in the *Motion of Debtors for (I) Authority to Pay Certain Prepetition Obligations to Critical Vendors; (II) Approval of Related Procedures; and (III) Related Relief* (ECF No. [___]) (the “**Critical Vendor Payment Protocol**”).

WHEREAS pursuant to the Critical Vendor Order, to receive payment on account of prepetition claims, each Critical Vendor (as defined in the Critical Vendor Order) must agree to continue to supply goods or services to the Debtors on “Customary Trade Terms.” As used herein and in the Critical Vendor Order, “Customary Trade Terms” are trade terms at least as favorable to the Debtors as those terms governing practices and programs (including, without limitation, credit limits, pricing, cash discounts, timing of payments, allowances, coupon reconciliation,

product mix, availability, processing of vendor receivables, such as rebates and volume credits, and other programs) within the twelve (12) months prior to the Commencement Date, or such other trade terms that are acceptable to the Debtors in their sole discretion.

WHEREAS the Debtors and Vendor (collectively, the “**Parties**”) agree to the following terms as a condition of payment on account of certain prepetition claims Vendor may hold against the Debtors.

Agreement

1. The Parties hereby agree that Vendor is a “Critical Vendor” (as defined in the Critical Vendor Order).

2. The balance of Vendor’s aggregate prepetition claim(s) against the Debtors is \$[] (the “**Agreed Critical Vendor Claim**”).

3. Following execution of this Vendor Agreement, the Debtors will pay Vendor \$[] (the “**Payment Amount**”) in full satisfaction of the Agreed Critical Vendor Claim. The Payment Amount will be paid pursuant to the Customary Trade Terms set forth below, and will be applied to any invoices previously received by the Debtors on account of the Agreed Critical Vendor Claim.

4. [The Parties hereby agree that Vendor delivered to the Debtors, and the Debtors received, goods valued at \$[] within twenty (20) days before the Commencement Date, for which Vendor did not receive payment (the “**Agreed 503(b)(9) Claim**”). \$[] of the Payment Amount will be applied toward the Agreed 503(b)(9) Claim.]

5. For a period from the date this Vendor Agreement is executed until the earlier of (a) the effective date of a chapter 11 plan for the Debtors and (b) two (2) years from the date of

this Vendor Agreement, Vendor shall supply goods **[and/or]** services to the Debtors based on the following Customary Trade Terms: _____.

6. The Parties further agree, acknowledge and represent that:
 - a. the Parties have reviewed the terms and provisions of the Critical Vendor Order and consent to be bound by such terms and that this Vendor Agreement is expressly subject to the Critical Vendor Order;
 - b. any payments made on account of the Agreed Critical Vendor Claim shall be subject to the terms and conditions of the Critical Vendor Order, including any orders of the Court granting the relief requested in the Critical Vendor Order on a final basis, as applicable;
 - c. if Vendor refuses to supply goods or services to the Debtors as provided herein or otherwise fails to perform any of their obligations hereunder, the Debtors may exercise all rights and remedies available under the Critical Vendor Order, the Bankruptcy Code, or applicable law;
 - d. Vendor will not separately seek payment for any claims pursuant to section 503(b)(9) of the Bankruptcy Code or other similar claims outside of the terms of the Critical Vendor Order or this Vendor Agreement unless Vendor's participation in the vendor payment program authorized by the Critical Vendor Order is terminated;
 - e. in consideration for receiving the Payment Amount, Vendor shall not file or otherwise assert against the Debtors, their estates, or any other person or entity, or any of their respective assets or property (real or personal) any lien (regardless of the statute or other legal authority upon which the lien is asserted) related to any remaining prepetition amounts allegedly owed to Vendor by the Debtors arising from agreements entered into before the Commencement Date. Furthermore, if Vendor has taken steps to file or assert a lien before entering into this Vendor Agreement, Vendor agrees to take all necessary steps to remove the lien as soon as possible at its sole cost and expense;
 - f. if Vendor fails to comply with the terms and provisions of this Vendor Agreement, the Debtors may, in their discretion, and without further order of the Bankruptcy Court, (i) declare that any payment of the Payment Amount is a voidable postpetition transfer pursuant to section 549(a) of the Bankruptcy Code that the Debtors may recover in cash or in goods from Vendor (including by setoff against postpetition obligations); (ii) declare that Vendor shall immediately return the Payment Amount to the Debtors without giving effect to any alleged setoff rights, recoupment rights, adjustments, or other offsets of any type whatsoever, and Vendor's claim shall be reinstated to such amount as so to restore the Debtors and Vendor

to their original positions as if the Vendor Agreement had never been entered into and the Payment Amount had not been paid; and/or (iii) if there exists an outstanding postpetition balance due from the Debtors to Vendors, the Debtors may elect to recharacterize and apply the Payment Amount to such outstanding postpetition balance and Vendor shall be required to repay to the Debtors such paid amounts that exceed the postpetition obligations then outstanding without the right of any setoffs, claims, provisions for payment of any claims, or otherwise;

- g. if Vendor fails to comply with the terms and provisions of this Vendor Agreement, the Debtors may, in their discretion, declare that such Vendor Agreement has terminated; provided that the Vendor Agreement may be reinstated if:
 - i. after notice and a hearing (following a motion filed by the respective Critical Vendor), the Bankruptcy Court reverses the Debtors' decision to terminate the Vendor Agreement for good cause shown that the Debtors' determination was materially incorrect;
 - ii. the Critical Vendor fully cures the underlying default of the Vendor Agreement within five (5) business days from the date of receipt of notice of termination of the Vendor Agreement; or
 - iii. the Debtors, in their sole discretion, reach a commercially acceptable agreement with the breaching party; and it is further
- h. the Parties hereby submit to the exclusive jurisdiction of the Court to resolve any dispute arising under or in connection with this Vendor Agreement.

7. Subject to the requirements of the Bankruptcy Code, further orders of the Court, or applicable law, and unless it otherwise becomes public without a breach of this Vendor Agreement, Vendor agrees to hold in confidence and not disclose to any party: (a) any and all payments made by the Debtors pursuant to this Vendor Agreement; (b) the terms of payment set forth herein; and (c) the Customary Trade Terms (collectively, the "**Confidential Information**"); provided that if any party seeks to compel Vendor's disclosure of any or all of the Confidential Information, through judicial action or otherwise, or Vendor intends to disclose any or all of the Confidential Information, Vendor shall immediately provide the Debtors with prompt written notice so that the Debtors may seek an injunction, protective order or any other available remedy to prevent such

disclosure; provided, further, that if such remedy is not obtained, Vendor shall furnish only such information as Vendor is legally required to provide.

8. The undersigned hereby represent and warrant that: (a) they have full authority to execute this Vendor Agreement on behalf of the respective Parties; (b) the respective Parties have full knowledge of, and have consented to, this Vendor Agreement; and (c) they are fully authorized to bind the Party to all of the terms and conditions of this Vendor Agreement.

9. This Vendor Agreement sets forth the entire understanding of the Parties regarding the subject matter hereof and supersedes all prior oral or written agreements between them. This Vendor Agreement may not be changed, modified, amended or supplemented, except in a writing signed by both Parties.

10. This Vendor Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement. Signatures by facsimile or electronic signatures shall count as original signatures for all purposes.

AGREED AND ACCEPTED AS OF THE DATE SET FORTH ABOVE:

Fairway Group Holdings Corp.

[VENDOR]

Exhibit C

Form of Notice of Repudiating Vendor

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
In re :
 : **Chapter 11**
FAIRWAY GROUP HOLDINGS :
CORP., et al., : **Case No. 20-[_____] (___)**
 :
Debtors.¹ : **(Joint Administration Pending)**
-----X

NOTICE OF REPUDIATING VENDOR

PLEASE TAKE NOTICE OF THE FOLLOWING:

1. On January 23, 2020 (the “**Commencement Date**”), Fairway Group Holdings Corp. and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “**Debtors**”), filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the Southern District of New York (the “**Court**”).

2. On the Commencement Date, the Debtors filed the *Motion of Debtors for (I) Authority to Pay Certain Prepetition Obligations to Critical Vendors; (II) Approval of Related Procedures; and (III) Related Relief* (ECF No. [___]) (the “**Motion**”).²

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are as follows: Fairway Group Holdings Corp. (2788); Fairway Group Acquisition Company (2860); Fairway Bakery LLC (4129); Fairway Broadway LLC (8591); Fairway Chelsea LLC (0288); Fairway Construction Group, LLC (2741); Fairway Douglaston LLC (2650); Fairway East 86th Street LLC (3822); Fairway eCommerce LLC (3081); Fairway Georgetowne LLC (9609); Fairway Greenwich Street LLC (6422); Fairway Group Central Services LLC (7843); Fairway Group Plainview LLC (8643); Fairway Hudson Yards LLC (9331); Fairway Kips Bay LLC (0791); FN Store LLC (9240); Fairway Paramus LLC (3338); Fairway Pelham LLC (3119); Fairway Pelham Wines & Spirits LLC (3141); Fairway Red Hook LLC (8813); Fairway Stamford LLC (0738); Fairway Stamford Wines & Spirits LLC (3021); Fairway Staten Island LLC (1732); Fairway Uptown LLC (8719); Fairway Westbury LLC (6240); and Fairway Woodland Park LLC (9544). The location of the Debtors’ corporate headquarters is 2284 12th Avenue, New York, New York 10027.

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

3. On [], 2020, the Court entered an order (ECF No. []) granting the relief requested in the Motion on **[an interim/a final]** basis (the **“Order”**).

4. Pursuant to the Order, the Debtors have identified [] (the **“Vendor”**) as a Repudiating Vendor due to the Vendor’s refusal to perform its obligations under the **[NAME OF AGREEMENT]**, in violation of the Bankruptcy Code. **[The Debtors have conditionally paid the Vendor’s prepetition claim in the amount of \$[], on [], 2020 (the “Provisional Payment”).]**

5. Contemporaneously herewith, the Debtors are filing a proposed Order to Show Cause requesting that the Court order the Vendor to appear before the Court at a hearing to be held on [], 2020, at [] (**Prevailing Eastern Time**), in the Bankruptcy Court, Courtroom [], [], and demonstrate why the Vendor should not be held to have violated sections 362 and 365 of the Bankruptcy Code **[and why the Vendor should not be required to return the Provisional Payment]**.

Dated: [], 2020
New York, New York

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
Ray C. Schrock, P.C.
Sunny Singh

*Proposed Attorneys for Debtors
and Debtors in Possession*

Exhibit D

Form of Order to Show Cause

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
In re :
 : **Chapter 11**
FAIRWAY GROUP HOLDINGS :
CORP., et al., : **Case No. 20-[] ()**
 :
Debtors.¹ : **(Joint Administration Pending)**
-----X

ORDER TO SHOW CAUSE

Upon the Notice of Repudiating Vendor dated [], 2020 (EFC No. []) (the “**Notice**”) filed by Fairway Group Holdings Corp. and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “**Debtors**”); the Court having reviewed the Notice and the *[Interim/Final] Order (I) Authorizing Debtors to Pay Certain Prepetition Obligations to Critical Vendors; (II) Approving Related Procedures; and (III) Granting Related Relief* (ECF No. []) (the “**Order**”),² pursuant to which the Notice was filed; and the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference M-431, dated January 31, 2012 (Preska, C.J.); and this matter being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409; and the Debtors having provided sufficient

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are as follows: Fairway Group Holdings Corp. (2788); Fairway Group Acquisition Company (2860); Fairway Bakery LLC (4129); Fairway Broadway LLC (8591); Fairway Chelsea LLC (0288); Fairway Construction Group, LLC (2741); Fairway Douglaston LLC (2650); Fairway East 86th Street LLC (3822); Fairway eCommerce LLC (3081); Fairway Georgetowne LLC (9609); Fairway Greenwich Street LLC (6422); Fairway Group Central Services LLC (7843); Fairway Group Plainview LLC (8643); Fairway Hudson Yards LLC (9331); Fairway Kips Bay LLC (0791); FN Store LLC (9240); Fairway Paramus LLC (3338); Fairway Pelham LLC (3119); Fairway Pelham Wines & Spirits LLC (3141); Fairway Red Hook LLC (8813); Fairway Stamford LLC (0738); Fairway Stamford Wines & Spirits LLC (3021); Fairway Staten Island LLC (1732); Fairway Uptown LLC (8719); Fairway Westbury LLC (6240); and Fairway Woodland Park LLC (9544). The location of the Debtors’ corporate headquarters is 2284 12th Avenue, New York, New York 10027.

² Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to such terms in the Order.

notice of the relief requested; and the Debtors having complied with the terms and conditions set forth in the Order; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT

1. [] (the “**Vendor**”), who is identified by the Debtors as a Repudiating Vendor, is hereby ordered, at a hearing to be conducted before this Court on [], **2020 at [] (Prevailing Eastern Time)**, in the Bankruptcy Court, Courtroom [], [] (the “**Hearing**”), to show cause why the Vendor should not [(a)] be held to have violated sections 362 and 365 of the Bankruptcy Code for willfully threatening to withhold essential [**goods and/or services**] from the Debtors under one or more contracts between the Debtors and Vendor, as identified in the Notice, **[and (b) be required to return any payment(s) of a Critical Vendor Claim (as defined in the Order) made to it by the Debtors, plus the accumulated interest].**

2. Service of this Order to Show Cause is to be made by the Debtors upon (a) the Vendor; (b) the Office of the United States Trustee for Region 2; (c) counsel to the Ad Hoc Group and DIP Lenders, King & Spalding LLP, 1185 Avenue of the Americas, New York, NY 10036 (Attn: W. Austin Jowers, Esq., Michael Rupe, Esq., and Michael R. Handler, Esq.); and (d) the attorneys retained by any official committee of unsecured creditors appointed in these chapter 11 cases.

3. This Court shall retain jurisdiction to hear and determine all matters arising from implementation of this Order.

Dated: _____, 2020
New York, New York

By order of the Court.