

U.S. BANKRUPTCY COURT  
District of South Carolina

Case Number: 09-02140

ORDER

The relief set forth on the following pages, for a total of 21 pages including this page, is hereby ORDERED.

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**FILED BY THE COURT**  
**08/11/2009**



Entered: 08/12/2009

A handwritten signature in cursive script, appearing to read "John L. Currie".

US Bankruptcy Court Judge  
District of South Carolina

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA**

<b>In re:</b>	§	
	§	<b>Case No. 09-02140 (HB)</b>
<b>BI-LO, LLC et al.,</b>	§	
	§	<b>Chapter 11</b>
<b>Debtors.<sup>1</sup></b>	§	
	§	<b>(Joint Administration)</b>
	§	

**ORDER APPROVING DEBTORS' PROCEDURES FOR PAYMENT  
OF CLAIMS PURSUANT TO 11 U.S.C. § 503(b)(9)**

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This matter comes before the Court upon the motion of BI-LO, LLC and affiliates (“BI-LO” or “Debtors”) for approval of Debtors’ proposed procedures for payment of certain 11 U.S.C. § 503(b)(9) claims (the “New 503(b)(9) Motion”).<sup>2</sup> The New 503(b)(9) Motion renews the Debtors’ request for authority to implement a “503(b)(9) program” that provides for the expedited payment of certain administrative expense claims and the release of preference actions arising under § 547 of the Bankruptcy Code (“Preference Actions” and the “Preference Waiver”) against eligible vendors that agree to provide normalized trade terms and promotional programs to the Debtors.

After careful consideration of the record and the arguments the Court makes the following Findings of Fact and Conclusions of Law.<sup>3</sup>

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<sup>1</sup> The Debtors and the last four digits of their respective tax identification numbers are: BI-LO, LLC (0130); BI-LO Holding, LLC (5011); BG Cards, LLC (4159); ARP Ballentine LLC (6936); ARP James Island LLC (9163); ARP Moonville LLC (0930); ARP Chickamauga LLC (9515); ARP Morganton LLC (4010); ARP Hartsville LLC (7906); and ARP Winston Salem LLC (2540).

<sup>2</sup> *Motion of the Debtors Under Rule 9023 For a New Hearing and for Entry of an Order Establishing Procedures for Payment of Claims Pursuant to 11 U.S.C. § 503(b)(9)* (Docket No. 968).

<sup>3</sup> To the extent that any Findings of Fact constitute Conclusions of Law, they are adopted as such; and to the extent that any Conclusions of Law constitute Findings of Fact, they are so adopted.

## **FINDINGS OF FACT**

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. Appropriate notice of this matter was provided to all parties in interest and no other or further notice is necessary.

BI-LO operates as a regional retail supermarket chain under the “BI-LO” and “Super BI-LO” banners. On March 23, 2009 (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, thereby commencing the above-captioned bankruptcy cases (the “Chapter 11 Cases”). On March 24, 2009, the Court entered an *Order Directing Joint Administration of the Debtors’ Related Chapter 11 Cases* consolidating the Chapter 11 Cases under Case No. 09-02140 for procedural purposes. As of the Petition Date, BI-LO was one of the largest food retailers in the Southeast United States, operating more than 200 stores in South Carolina, North Carolina, Georgia and Tennessee, with the majority of stores located in South Carolina. BI-LO’s corporate headquarters are located in Greenville, South Carolina, and it employs more than 15,000 people.

The Debtors’ prepetition capital structure included (1) a revolving credit facility (the “ABL Credit Agreement”) with GE Business Financial Services, Inc. (formerly known as Merrill Lynch Capital, a division of Merrill Lynch Business Financial Services Inc.), as Administrative Agent, and certain lenders party thereto from time to time; and (2) a \$260 million term loan under the *Credit Agreement* dated as of March 26, 2007 (as may have been amended or supplemented, the “Term Credit Agreement”, with the lenders thereunder referred to as the “Term Lenders”). An ad hoc committee of Term Lenders has been active in these Chapter 11 Cases.

Post-petition the ABL Credit Agreement has essentially been supplanted with a debtor-in-possession financing facility under the court-approved *\$125,000,000 Senior Secured Superpriority Debtor-In-Possession Credit Agreement* by and among BI-LO Holding, LLC, BI-LO, LLC, and General Electric Capital Corporation as Administrative Agent and others, dated April 8, 2009.

No request for the appointment of a trustee or examiner has been made in the Chapter 11 Cases and the Debtors are operating their businesses and managing their properties as debtors in possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code. On April 23, 2009, the Court entered an order approving the retention of AP Services, LLC (“APS”) to provide a chief restructuring officer (“CRO”) and additional personnel to provide restructuring services in the Chapter 11 Cases and designated Michael Feder of APS as CRO for the Debtors.

An Official Committee of Unsecured Creditors for these Chapter 11 Cases (the “Committee”) is highly organized and has actively participated and appeared in this case through its counsel. The Committee has also retained a financial consultant.

On May 22, 2009, the Debtors filed their first motion for approval of a program under 503(b)(9).<sup>4</sup> Koninklijke Ahold N.V. (“Ahold”), a party to guarantees of a large number of the Debtors’ leases, objected to the Motion. National Music Rack, Inc., (“NMR”) a vendor counterparty to an executory contract<sup>5</sup> with BI-LO, filed a limited objection to the Original Motion as well.

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<sup>4</sup> *Motion for Entry of an Order Establishing Procedures for Payment of Claims Pursuant to 11 U.S.C. § 503(b)(9)*<sup>4</sup> (Docket No. 659).

<sup>5</sup> The Debtors’ Program excludes vendors who are parties to executory contracts. NMR previously filed a separate *Motion for Allowance and Immediate Payment of Administrative Expense Claim Pursuant to 11 U.S.C. § 503(b)(9)* (Docket No. 525), which was pending before the court at the time of this hearing along with similar motions filed by similarly situated vendors.

The Court conducted the hearing on the Debtors' original Motion on June 3, 2009 (the June 3<sup>rd</sup> Hearing"),<sup>6</sup> and as a result on June 19, 2009, entered its *Order On Debtors' Motion for Order Establishing Procedures for Payment of Claims Pursuant to 11 U.S.C. § 503(b)(9)*, which found that the Debtors' proposed 503(b)(9) program (the "Debtors' Program") could not be approved. The Court found that although the Debtors provided sufficient evidence to find that a 503(b)(9) program was appropriate, Debtors had not provided the Court with sufficient evidence to justify the inclusion of the Preference Waiver in the Debtors' Program.

On June 29, 2009, the Debtors filed a *Motion of the Debtors Under Rule 9023 for a New Hearing or to Amend an Order with Respect to Debtors' Motion for Order Establishing Procedures for Payment of Claims Pursuant to 11 U.S.C. § 503(b)(9)*. On July 6, 2009, the Court entered an order granting that request, as the Court already found that such a 503(b)(9) program could be beneficial to the estate. That Order gave the Debtors (or any other party) the opportunity to file a motion for a new evidentiary hearing or a new 503(b)(9) motion.

On July 10, 2009, the Debtors filed the New 503(b)(9) Motion that is now before the Court, and sought to present further evidence in support thereof. On July 16, 2009, the Debtors filed a supplement to the motion which included a stipulation (the "Stipulation"), among the Debtors, Ahold and the Committee setting forth the terms of a compromise and settlement of Ahold's prior opposition to the Debtors' Program. Based upon the Stipulation (as modified at the hearing held on July 22, 2009), Ahold's objection is resolved.

In response to the New 503(b)(9) Motion, NMR submitted a letter to the Court on July 17, 2009, requesting a continuance of the scheduled hearing and the deadline to submit opposition papers thereto. That same day, the Court denied the request for continuance of the

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<sup>6</sup> Coca-Cola Bottling Company Consolidated and Piedmont Bottling Company Consolidated filed an Objection to the Motion on May 31, 2009, and subsequently withdrew its Objection on June 3, 2009.

hearing but granted the request to extend time to file a written response and offered counsel for NMR the opportunity to participate in the hearing by phone. Thereafter, NMR filed a written objection. On the same date, the Term Lenders filed a statement in support of the Debtors' motion.

The hearing on the Debtors' New 503(b)(9) Motion was held on July 22, 2009, (the "July 22<sup>nd</sup> Hearing") and together with the July 3<sup>rd</sup> Hearing, the "Hearings"). Notice of the hearing on the New 503(b)(9) Motion was proper under the Federal Rules of Bankruptcy Procedure and the *Order Establishing Certain Notice, Case Management and Administrative Procedures* (Docket No. 115). Appearing at the hearing in support of the New 503(b)(9) Motion were the Committee, Ahold, the Term Lenders and C&S Wholesale Grocers, Inc. ("C&S"). Objecting party NMR was represented by counsel at the hearing.<sup>7</sup> NMR objected to consideration of any new evidence on the Preference Waiver and also to the terms of the Debtors Program. The Court overruled NMR's objection to the presentation of new evidence for the reasons stated on the record, and heard further evidence and arguments regarding the Debtors' Program.

The evidence presented at the Hearings indicated that these Debtors purchase, in the ordinary course of business, food, beverages and other groceries as inventory for resale from various direct store delivery vendors (the "Vendors") to stock and operate their stores. The Vendors provide approximately 30% of the Debtors' Goods, with the remainder being supplied through C&S. Within the 20 days prior to the Petition Date, the Debtors received approximately \$22.2 million of goods from around 400 Vendors for which, due to the intervening bankruptcy, they have not yet paid. Regarding these vendor claims, 11 U.S.C. § 503(b)(9) provides:

After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including the value of any goods received by the debtor within 20 days before the date of commencement of

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<sup>7</sup> One attorney representing NMR appeared in the courtroom and another joined by phone.  
**ORDER APPROVING 503(b)(9) PROCEDURES**

a case under this title, in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

11 U.S.C. § 503(b)(9). Debtors seek approval of a program to settle and pay such claims, which are held largely by Vendors that continue to supply goods for the operation of the Debtors' ongoing business. Under the procedures laid out in the Debtors' Program, Vendors that agree to provide and do provide post-petition trade terms and promotional support programs<sup>8</sup> to the Debtors, in each case consistent with their pre-Petition Date practice and subject to certain terms and conditions, until the effective date of a plan of reorganization of the Debtors will receive two principal benefits: (1) the Debtors will pay, in three monthly installments, that Vendor's agreed claim under Section 503(b)(9) of the Bankruptcy Code (the "503(b)(9) Claim"); and (2) the Debtors will be deemed to have granted the Preference Waiver to the Vendor upon the earlier of: (a) the effective date of a Chapter 11 plan of the Debtors, (b) conversion or dismissal of the Chapter 11 Cases, (c) expiration upon maturity, or otherwise, of the Debtor in Possession credit agreement, unless extended or replaced by a comparable facility, or (d) cessation of the Debtors' business operations.

Michael Feder, the Debtors' Chief Restructuring Officer, testified at the Hearings in support of the Debtors' Program. As a preliminary matter, he testified about his significant experience in providing restructuring advisory services in large and complex chapter 11 cases on behalf of both debtors and creditors and about his specific role in developing the Debtor's Program. Mr. Feder has worked as a restructuring consultant and interim manager for more than 25 years and has acted in an interim management role in a number of large and mid-sized bankruptcy restructurings. As CRO, Mr. Feder is a fiduciary of the Debtors. He explained that he was primarily responsible for conducting negotiations on the business terms of the Debtors'

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<sup>8</sup> A promotional support program is a program under which the Vendors contribute a varying share of the Debtors' cost of special promotions, such as advertising or circulars, featuring a Vendor's product.

Program and that he oversaw the analysis conducted by the Debtors to measure potential cash flow and liquidity benefits against the costs or concessions of the Debtors' Program.

At the July 22<sup>nd</sup> Hearing, Mr. Feder testified that, following the June 3<sup>rd</sup> Hearing, he and his colleagues at APS conducted a comprehensive analysis of the economic value of the Preference Waivers.<sup>9</sup> Mr. Feder testified that he has conducted a number of similar analyses in prior chapter 11 cases and that he directly supervised the Preference Waiver Analysis conducted in this case, which was consistent with the analyses conducted by APS in similar chapter 11 cases. The Preference Waiver Analysis indicated that of the approximately \$208 million of payments (other than intercompany transfers or to governmental agencies) made by the Debtors to 3,958 payees in the 90 days prior to the Petition Date, the Debtors' reasonable estimate of the total gross recoveries if it were to pursue potential Preference Actions against Vendors eligible to participate in the Debtors' Program, ranges from \$300,000 to \$1 million. The Debtors' Preference Waiver Analysis was detailed and thorough and Mr. Feder testified at length about how the analysis was performed and how the resulting estimate was made. He testified that he was not surprised by the results because, as he stated at the June 3<sup>rd</sup> Hearing, the Debtors did not experience a liquidity crisis with such Vendors prior to the Petition Date and were generally paying these Vendors in the ordinary course, a fact that is certainly not present in most Chapter 11 cases that come before this Court.

Mr. Feder testified that the Preference Waivers are an integral part of the program and necessary for its success. He testified that following the June 3<sup>rd</sup> Hearing, the Debtors received direct confirmation from several significant Vendors that they would not participate in any vendor program that did not include a Preference Waiver, including Kraft, Sara Lee and Pepsi Bottling—three of the Debtors' largest vendors.

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<sup>9</sup> The Preference Waiver Analysis was submitted as Exhibit 1 to Mr. Feder's direct testimony.

Mr. Feder testified that in exchange for payment of the 503(b)(9) claims of participating Vendors prior to confirmation of a plan, and in consideration of the Preference Waivers, the estates will experience significant benefits as a result of the Debtors' Program. Benefits include increased liquidity resulting from the resumption of normalized trade terms, promotional benefits from participating Vendors, and enhanced efficiency in handling claims of participating Vendors on pre-approved settlement terms rather than separately. Further, the financing of necessary short term credit by Vendors on normal terms reduces the amount of exit financing that may be necessary from another source, making confirmation of a plan of reorganization more likely. According to Mr. Feder's testimony, after the Petition Date many Vendors reduced or eliminated trade credit terms that had been available to the Debtors prior to their filing, resulting in a greater need for cash to keep Debtors' shelves stocked. The Debtors were also concerned that, without implementing the Debtors' Program, trade terms may further deteriorate.

Mr. Feder estimated that the potential benefit derived from returning to normalized trade terms would initially be approximately \$22 million and that the Debtors would also receive a benefit of approximately \$200 million from continued promotional opportunities from Vendors participating in the Debtors' Program. The initial liquidity benefit to the Debtors of increased trade terms from Vendors would gradually decline as the installment payments on 503(b)(9) Claims are made, but an incremental increase in liquidity of about \$2 million would still remain along with the removal of these claims from exit financing needs.

Mr. Feder testified that based on the analysis of costs and benefits, implementation of the Debtor's Program is in the best interest of the estate.

### **DISCUSSION AND CONCLUSIONS OF LAW**

Section 503(b)(9) was added to the Bankruptcy Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Although that section defines certain

administrative claims, it does not address the timing of payment. Pursuant to § 1129(a)(9)(A) of the Bankruptcy Code, however, the holder of an administrative claim is paid on the effective date of the plan. Accordingly, the Code does not require immediate pre-confirmation payment to holders of administrative expense claims. *In re Grant Broad. of Phila., Inc.*, 71 B.R. 891, 899 (Bankr. E.D. Pa. 1987) (“We believe that there is no authority whatsoever for the principle that administrative claims should generally be paid immediately.”); *Lisanti v. Lubetkin* (In re Lisanti Foods, Inc.), 329 B.R. 491, 502 (D.N.J. 2005) (“Unless the holder of a particular claim agrees otherwise, § 1129(a)(9)(A) requires that the holder of an administrative claim receive payment on the effective date of the plan.”).

Some courts have recognized the practical benefits of addressing these claims through an organized program rather than through individual claim determination and payment and have approved immediate or expedited payment of 503(b)(9) claims in exchange for a creditor’s agreement to continue business with the debtor under ordinary or pre-petition trade terms. Such a program is essentially a pre-approved settlement and compromise with creditors. Bankruptcy Rule 9019 provides, in relevant part: “(a) On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” Fed. R. Bank. P. 9019(a). Settlements and compromises are “a normal part of the process of reorganization” and are strongly favored over litigation. *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) (quoting *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 130 (1939)). See also *In re Bond*, 1994 U.S. App. Lexis 1282, \*9–\*13 (4<sup>th</sup> Cir. 1994) (“To minimize litigation and expedite the administration of a bankruptcy estate, ‘compromises are favored in bankruptcy,’”); *In re HomeGold Financial, Inc.*, No. 8:04-CV-2379, Order Approving Settlement at 10 (D.S.C. Oct. 5, 2004) (“Generally, compromises are favored in bankruptcy matters.”). The Eleventh Circuit has stated that: [P]ublic policy strongly

favors pre-trial settlement in all types of litigation because such cases, depending on their complexity, “can occupy a court's docket for years on end, depleting the resources of parties and taxpayers while rendering meaningful relief increasingly elusive . . . .” Second, litigation costs are particularly burdensome on a bankrupt estate given the financial instability of the estate. *Munford v. Munford, Inc. (In re Munford, Inc.)*, 97 F.3d 449, 455 (11th Cir. 1996) (quoting *Wald v. Wolfson (In re U.S. Oil & Gas Litig.)*, 967 F.2d 489, 493 (11th Cir. 1992)).

Debtors seek to offer such a compromise to these hundreds of similarly situated Vendors to further reorganization efforts.<sup>10</sup> As the moving party, the Debtors bear the burden of proof, and such a program warrants significant additional scrutiny when it includes a waiver of preferences. Avoidance actions, including preference claims, are ordinarily treated as property of the Debtors’ estate. *See, e.g.*, 11 U.S.C. § 541(3). Section 363 of the Bankruptcy Code provides, in relevant part: “The trustee, 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). In determining whether to authorize the use, sale or lease of estate property, courts generally apply a business judgment test. *In re Derivium Capital, LLC*, 380 B.R. 392, 404 (Bankr. D.S.C. 2007) (the trustee’s business judgment is ordinary given “great judicial deference,” although the Court must scrutinize whether the Trustee has fulfilled his duty to “maximize the value obtained from a sale . . . .”); *see* 3-363 Collier on Bankruptcy-15th Edition Rev. P 363.02. In the bankruptcy context, the business judgment rule requires the debtor’s decision be accepted “unless it is shown that the [debtor’s] decision was one taken in bad faith or in gross abuse of the bankrupt’s retained business discretion.” *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1046–47 (4th Cir. 1985).

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<sup>10</sup> Previously this Court has approved the Debtors’ agreement to waive preference claims in an arrangement with C&S, its principal supplier. *See, Order Approving Payment to, and Allowing Administrative Claim of, C&S Wholesale Grocers, Inc.*, May 29, 2009 (Docket # 676).

To aid the Court in reviewing the Debtors' judgment in this matter, Debtors presented their Preference Waiver Analysis to indicate that the potential recovery available from pursuing those actions would be insignificant, both in absolute terms given the size of these Chapter 11 Cases and as measured against the significant benefits to the estates of the Debtors' Program as a whole. This evidence was credible and thorough and demonstrates the Debtors' good faith and informed business judgment in including this feature in Debtors' Program. Further, the Debtors' evidence that significant Vendors would not participate in any vendor program not including a Preference Waiver was uncontroverted. The evidence also shows that implementing the Program would allow the Debtors to borrow less on the DIP Facility during the case because, under the Debtors' Program, trade credit for new goods necessary for the Debtors' business will be financed on normal terms by Vendors, providing an exit financing benefit of approximately \$20 million to the Debtors' estates. Consequently, the potential benefits of the Debtors' Program, which include normalized trade terms, vendor support programs, increased liquidity, lower exit costs, administrative convenience involving up to 400 Vendors, and stability and certainty, far outweigh the potential cost to the estate of including Preference Waivers and paying the claims prior to the effective date of a plan.

The Debtors' decision to offer the 503(b)(9) Program that includes Preference Waivers is a reasonable exercise of the Debtors' business judgment and is in the best interests of the Debtors, their estates and creditors. This conclusion is supported not only by the factual record, but further by the overwhelming support of the Committee, represented vigorously by counsel and with the informed advice of financial advisors, and by the support of major creditors and other parties in interest in this case. Accordingly, the Court authorizes the Debtors to implement a 503(b)(9) Program and to include Preference Waivers therein as requested.

Pursuant to the authorities cited above and 11 U.S.C. § 105, it is HEREBY ORDERED:

**ORDER APPROVING 503(b)(9) PROCEDURES**

1. That the Ahold Objection has been withdrawn pursuant to the Stipulation and NMR's objections are overruled.

2. That the 503(b)(9) Motions are granted as set forth herein and the Debtors' Program is approved.

3. That the following shall be the Procedures for filing, reconciling, paying and allowing 503(b)(9) Claims:

- a. ***Eligible Vendors.*** Any Vendor not party to an executory contract and holding a valid 503(b)(9) Claim that executes a letter agreement (a "Trade Agreement") in substantially the form attached as **Schedule 1** hereto setting forth the applicable trade terms for that Vendor and the Debtors, which, unless otherwise mutually agreed, (i) shall be not less favorable to the Debtors than the terms provided by such Vendor sixty (60) days prior to the Petition Date; (ii) shall also include such cash discounts, promotional support (as requested by the Debtors), allowances and other applicable credit programs that are not less favorable to the Debtors than was provided during the fifty-two (52) week period prior to the Petition Date, or are currently being offered to customers in good standing of like size; and (iii) shall include a waiver by the Vendor of any right to charge back, withhold or invalidate any vendor credits or similar programs (collectively, the "Minimum Trade Terms"), which Minimum Trade Terms or Vendor Minimum Trade Terms (as defined in Schedule 1) shall apply until the effective date of a plan of reorganization of the Debtors (except as provided in section 3.g below), shall be deemed an "Eligible Vendor." To qualify as an Eligible Vendor, the Vendor must not be subject to a supply agreement that provides for payment terms that may be otherwise enforced.
- b. ***Payment of 503(b)(9) Claims.*** So long as an Eligible Vendor is providing Minimum Trade Terms or Vendor Minimum Trade Terms in accordance with its Trade Agreement, the Debtors shall pay to such Eligible Vendor its valid 503(b)(9) Claim in cash as follows: (i) if the Eligible Vendor and the Debtors agree on the amount of the 503(b)(9) Claim as of the first payment date, in three equal consecutive monthly installments commencing on the first day of the month following the effective date of the Trade Agreement (if such agreement was executed at least seven days prior to such date), or (ii) if the Eligible Vendor and the Debtors have not fully reconciled the 503(b)(9) Claim as of the first payment date, commencing on the first day of the month following the effective date of the Trade Agreement (if such agreement was executed at least seven days prior to such date), in three consecutive equal monthly installments of the undisputed amount of the 503(b)(9) Claim (with any amounts due to the

Eligible Vendor based upon any higher reconciled amount of the 503(b)(9) Claim, paid to the Eligible Vendor in the next monthly installment after such reconciliation in such amount as would provide such vendor with the distribution it would have received if the 503(b)(9) Claim had been reconciled as of the first payment date), with any balance due to the Eligible Vendor if its claim is fully reconciled after the third monthly installment, paid in the month after the 503(b)(9) Claim is fully reconciled. All amounts shall be paid pursuant to this Trade Agreement upon the effective date of a Chapter 11 plan of the Debtors (for Vendors executing Trade Agreements where a monthly installment or other amount would fall due after such dates).

- c. ***Amount of 503(b)(9) Claims.*** In the event the Debtors and the Eligible Vendor cannot agree as to the amount of the 503(b)(9) Claim, the parties shall negotiate in good faith regarding the disputed portions. If after good faith negotiations, the parties still cannot resolve the dispute, the matter shall be brought before the Bankruptcy Court for resolution.
- d. ***Reclamation Claims.*** All reclamation claims held by an Eligible Vendor pursuant to Bankruptcy Code § 546(c) shall be tolled until October 1, 2009.
- e. ***Offsets.*** The Debtors may offset against 503(b)(9) Claim payments all prepetition and postpetition deposits held by the Eligible Vendor. Any prepetition amounts owed to the Debtors including any prepetition promotional funds (or other prepetition credits, including the credits for the valid return of goods) unpaid or held by an Eligible Vendor in connection with prepetition Claims (collectively, the “Credits”) shall be applied to amounts that came due from the Debtors to the Eligible Vendor during the period in which the Credits are earned.
- f. ***Preference Waiver.*** So long as an Eligible Vendor has provided Minimum Trade Terms or Vendor Minimum Trade Terms in accordance with its Trade Agreement through the earlier of the effective date of a Chapter 11 plan of the Debtors, conversion or dismissal of the Debtors’ Chapter 11 cases, expiration upon maturity, or otherwise, of the Debtor in Possession Credit Agreement, unless extended or replaced by a comparable facility, or cessation of the Debtors’ business operations, on such date the Debtors shall be deemed to have waived any claims they may have against an Eligible Vendor pursuant to § 547 of the Bankruptcy Code for payments made to such Eligible Vendor on account of goods supplied prior to the Petition Date (“Preference Waiver”).
- g. ***Vendor Performance.*** An Eligible Vendor may cease providing Minimum Trade Terms or Vendor Minimum Trade Terms if: (i) the Debtors fail to pay Vendor as set forth in the Trade Agreement, which failure to pay is not cured within 10 days of the due date; (ii) there is an

Event of Default under the Debtor in Possession Credit Agreement that is not cured or waived pursuant to the terms thereof; (iii) the Debtor in Possession Credit Agreement expires upon maturity, or otherwise, unless extended or replaced by a comparable facility; (iv) there is a default under the C&S Supply Agreement that is not cured or waived pursuant to the terms thereof; or (v) there is a cessation of the Debtors' business operations.

- h. ***Remedies for Default.*** If an Eligible Vendor refuses to supply goods to the Debtors on the Minimum Trade Terms or otherwise fails to comply with the terms of the Trade Agreement following receipt of payment of all or a part of its 503(b)(9) Claim, the Debtors may, after 5 days written notice to the Vendor, in their sole discretion and without further order of the Court, declare that such Eligible Vendor is in breach of its Trade Agreement with the Debtors and cease making any further payments to such Vendor on account of its 503(b)(9) Claim. To the extent the Eligible Vendor fails to cure such default or reach an agreement with the Debtors, the Debtors may (i) seek appropriate relief from the Court, including injunctive relief, to compel performance pursuant to the Trade Agreement; (ii) declare the prior payments of the applicable 503(b)(9) Claim a voidable postpetition transfer pursuant to § 549(a) of the Bankruptcy Code that the Debtors may recover from such Eligible Vendor in cash and the 503(b)(9) Claim shall be reinstated in such an amount as to restore the Eligible Vendor and the Debtors to their original position, as if the Trade Agreement had never been entered into and the payment of the 503(b)(9) Claim had not been made; and/or (iii) demand that the Eligible Vendor immediately return such payments in respect of the 503(b)(9) Claim to the extent the aggregate amount of such payments exceeds the postpetition obligations then outstanding and the 503(b)(9) Claim shall be reinstated in such an amount as to restore the Debtors and the Eligible Vendor to their original positions, as if the agreement had never been entered into and the payment of the 503(b)(9) Claim had not been made. Upon such a demand by the Debtors as set forth in (iii) above, the Vendor shall return any payments previously made to such Vendor on account of its 503(b)(9) Claim within five (5) business days of such demand. The Debtors may elect any or all of the remedies set forth above at their discretion. Further, such Vendor shall not be entitled to the Preference Waiver described in section 3.f above.

4. Notwithstanding anything set forth herein or in the Motions to the contrary, this Order shall not affect the rights or claims of any Vendors that are not Eligible Vendors, or of Vendors that elect not to participate in the Procedures, under contract or pursuant to applicable law, including, but not limited to, pursuant to 11 U.S.C. § 503(b), and all such rights and claims are expressly preserved and not waived.

5. Nothing in this Order shall impair the ability of the Debtors or appropriate party in interest to contest any claim of any creditor pursuant to applicable law or otherwise dispute, contest, setoff, or recoup any claim, or assert any rights, claims or defenses related thereto.

6. This Order and the Trade Agreements to be entered into by the Debtors pursuant to this Order shall be binding upon any person or entity claiming by or through the Debtors or their estates whether by assignment, order of this Court or otherwise.

7. The Debtors shall serve a copy of this Order on all Vendors who the Debtors reasonably believe may have 503(b)(9) Claims.

8. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

9. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied by the contents of the Motion or otherwise waived.

10. All time periods set forth in this Order shall be calculated in accordance with Bankruptcy Rule 9006(a).

11. Any Findings of Fact that constitute Conclusions of Law, and vice versa, shall be adopted as such.

12. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

**AND IT IS SO ORDERED.**

**SCHEDULE 1**

## TRADE AGREEMENT

[date], 2009

[Name of Vendor]  
[Vendor Address]

BI-LO, LLC, Case No. 09-02140 (Bankr. D.S.C.) (Jointly Administered)

Dear [Name of Vendor]:

BI-LO, LLC and certain of its affiliates (collectively, the “Company” or the “Debtors”) each filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of South Carolina on March 23, 2009 (the “Petition Date”).

On [date], the Company requested the Bankruptcy Court’s authority to pay certain vendors on account of such vendors claims pursuant to §503(b)(9) of title 11 of the United States Code, §§101-1532 (the “Bankruptcy Code”) which provides for administrative claim status for the unpaid value of certain goods delivered to the Company in the twenty (20) days prior to the Petition Date. On [date], 2009, the Bankruptcy Court entered an order (the “Order”) authorizing the Company, under certain conditions, to pay the 503(b)(9) claims of certain vendors that agree (1) to the terms set forth in this letter agreement (this “Trade Agreement”) and (2) to be bound by the terms of the Order. A copy of the Order is enclosed.

In order to receive payment on pre-bankruptcy claims, each vendor must agree to continue to supply goods, as applicable, to the Company based on “Minimum Trade Terms” which shall be defined, unless otherwise mutually agreed, as trade terms which (i) shall be not less favorable to the Company than the terms provided by such Vendor sixty (60) days prior to the Petition Date; (ii) shall also include such cash discounts, promotional support (as requested by the Company), allowances and other applicable credit programs that are not less favorable to the Company than was provided during the fifty two (52) week period prior to the Petition Date, or are currently being offered to customers in good standing of like size; and (iii) shall include a waiver by the Vendor of any right to charge back, withhold or invalidate any vendor credits or similar programs. Except as otherwise provided herein, the Minimum Trade Terms or Vendor Minimum Trade Terms (as defined below) shall apply until the effective date of a plan of reorganization for the Debtors.

For purposes of administration of this vendor payment program as authorized by the Bankruptcy Court (the “Vendor Payment Program”), the Company and you agree as follows:

1. The estimated balance of the 503(b)(9) claim (net of any setoffs, credits or discounts) (the “503(b)(9) Claim”) is [\$].

If you disagree with the above amount, then fill in the balance of the 503(b)(9) claim which you believe that the Company owes you in the following blank (the “Vendor 503(b)(9) Claim”): \$ \_\_\_\_\_

In order to aid in the reconciliation process, please send a detail of the Vendor 503(b)(9) Claim, in Microsoft Excel format, to Dudley Jordan with AlixPartners at [djordan@alixpartners.com](mailto:djordan@alixpartners.com).

2. You will hereafter extend to the Company terms at least as good as the Minimum Trade Terms, as follows:

(i) [INSERT INDIVIDUAL CREDITOR TERMS]

If you disagree with the terms listed above, please fill in the terms which you believe represent the Minimum Trade Terms in the following blank (the "Vendor Minimum Trade Terms"): \_\_\_\_\_

The Company will pay in accordance with the Vendor Minimum Trade Terms until such time the Company and the Vendor reach an agreement on the Minimum Trade Terms.

In order to aid in the reconciliation process, please send backup for the Vendor Minimum Trade Terms to Dudley Jordan with AlixPartners at djordan@alixpartners.com.

3. Vendor may cease providing Minimum Trade Terms, or Vendor Minimum Trade Terms, if:

(i) the Company fails to pay Vendor as set forth in paragraphs 2(i) and 4 herein, which failure to pay is not cured within 10 days of the due date;

(ii) there is an Event of Default under the Debtor in Possession Credit Agreement that is not cured or waived pursuant to the terms thereof;

(iii) there is a default under the C&S Supply Agreement that is not cured or waived pursuant to the terms thereof; or

(iv) there is a cessation of the Company's business operations.

4. So long as you are providing Minimum Trade Terms, or Vendor Minimum Trade Terms, the Company shall pay to you the 503(b)(9) Claim in cash as follows: (i) if you and the Company agree on the amount of your claim as of the first payment date, in three equal consecutive monthly installments commencing on the first day of the month following the effective date of this Trade Agreement (if such agreement was executed at least seven days prior to such date), or (ii) if you and the Company have not fully reconciled your claim as of the first payment date, commencing on the first day of the month following the effective date of this Trade Agreement (if such agreement was executed at least seven days prior to such date), in three consecutive equal monthly installments of the undisputed amount of your claim (with any amounts due you based upon any higher reconciled amount of your claim, paid to you in the next monthly installment after such reconciliation in such amount as would provide you with the distribution you would have received if your claim had been reconciled as of the first payment date), with any balance due you if your claim is fully reconciled after the third monthly installment, paid in the month after your claim is fully reconciled. All amounts shall be paid pursuant to this Trade Agreement upon the earlier of the effective date of a Chapter 11 plan of the Debtors or March 23, 2010 (for Vendors executing Trade Agreements where a monthly installment or other amount would fall due after such dates).

5. In the event you and the Company cannot agree as to the amount of the 503(b)(9) Claim, the parties shall negotiate in good faith regarding the disputed portions. If after good faith negotiations, the parties still cannot resolve the dispute, the matter shall be brought before the Bankruptcy Court for resolution.
6. All reclamation claims held by you pursuant to Bankruptcy Code § 546(c) shall be tolled until October 1, 2009.
7. The Company may offset against your 503(b)(9) Claim payment any prepetition and postpetition deposits you hold. Any prepetition amounts owed to the Company including any prepetition promotional funds (or other prepetition credits, including credits for the valid return of goods) unpaid or held by you in connection with prepetition Claims (collectively, the “Credits”) shall be applied to amounts that came due from the Company to you during the period in which the Credits are earned.
8. So long as you have provided Minimum Trade Terms, or Vendor Minimum Trade Terms, in accordance with this Trade Agreement through the earlier of the effective date of a Chapter 11 plan of the Debtors, conversion or dismissal of the Debtors’ Chapter 11 cases, cessation of the Debtors’ business operations or March 23, 2010, on such date the Company shall be deemed to have waived any claims it may have against you pursuant to § 547 of the Bankruptcy Code for payments made to you on account of goods supplied prior to the Petition Date.
9. If you refuse to supply goods to the Company on the Minimum Trade Terms, or Vendor Minimum Trade Terms, or otherwise fail to comply with the terms of this Trade Agreement following receipt of payment of all or a part of its 503(b)(9) Claim, the Company may after 5 days written notice to the Vendor, in their sole discretion and without further order of the Court, declare that you are in breach of this Trade Agreement with the Company and cease making any further payments to you on account of your 503(b)(9) Claim. To the extent you fail to cure such default or reach an alternative agreement with the Company, the Company may (i) seek appropriate relief from the Court, including injunctive relief, to compel performance pursuant to this Trade Agreement; (ii) declare the prior payment of the applicable 503(b)(9) Claim a voidable postpetition transfer pursuant to § 549(a) of the Bankruptcy Code that the Company may recover from you in cash and the 503(b)(9) Claim shall be reinstated in such an amount as to restore you and the Company to our original positions, as if this Trade Agreement had never been entered into and the payment of the 503(b)(9) Claim had not been made; and/or (iii) demand that you immediately return such payments in respect of the 503(b)(9) Claim to the extent the aggregate amount of such payments exceeds the postpetition obligations then outstanding and the 503(b)(9) Claim shall be reinstated in such an amount as to restore you and the Company to our original positions, as if this Trade Agreement had never been entered into and the payment of the 503(b)(9) Claim had not been made. Upon such a demand by the Company as set forth in (iii) above, you shall return any payments previously made to you on account of your 503(b)(9) Claim within five (5) business days of such demand. The Company may elect any or all of the remedies set forth above at their discretion. Further, in such an event, you shall not be entitled to the deemed

waiver described in section 8 above.

10. In consideration for payment of all or a portion of your 503(b)(9) Claim, you agree not to file or otherwise assert against the Company (including directors, officers, members or responsible employees), its estates or any of its respective assets or property (real or personal) any lien (regardless of the statute or other legal authority upon which such lien is asserted) related in any way to any remaining 503(b)(9) amounts allegedly owed to you by the Company arising from agreements entered into prior to the Petition Date. Furthermore, if you have taken steps to file or assert such a claim prior to entering into this Trade Agreement, you agree to take the necessary steps to withdraw such claim as soon as possible.

Payment of your 503(b)(9) Claim in the manner set forth in the Order may occur only upon execution of this Trade Agreement by a duly authorized representative of your company and the return of this agreement to the Company. Your execution of this Trade Agreement and return of the same to the Company constitutes a legally binding agreement between you and the Company. You agree to be bound by the Order and you submit to the jurisdiction of the Bankruptcy Court for enforcement thereof.

The Company and you also hereby agree that any dispute with respect to this Trade Agreement or the Order shall be determined by, and subject to the jurisdiction of, the Bankruptcy Court.

If you have any questions about this Trade Agreement or the Company's financial restructuring, do not hesitate to call Dudley Jordan at (864) 289-3241 or e-mail any questions to [djordan@alixpartners.com](mailto:djordan@alixpartners.com). Please return executed agreements as follows:

BI-LO, LLC  
C/O Dudley Jordan  
208 BI-LO, Blvd.  
Greenville, SC 29607

Sincerely,

[Debtor]

By:

Title:

Dated:

Agreed and Accepted by:

[Name of Vendor]

By:

Title:

Dated: