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

In re:

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

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**RESPONSE TO MOTION TO RECONSIDER AND OBJECTION TO  
ORDER DIRECTING ARIZONA BANK & TRUST TO PRODUCE  
DOCUMENTS AND APPEAR FOR EXAMINATION PURSUANT TO  
BANKRUPTCY RULE 2004**

The Official Committee of Unsecured Creditors (the “**Committee**”) files this Response to the *Motion to Reconsider and Objection to Order Directing Arizona Bank & Trust to*

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

*Produce Documents and Appear for Examination Pursuant to Bankruptcy Rule 2004* (the “**Motion**”) [Docket No. 281] filed by Allen Jones (“**Jones**”), Jason Kemp (“**Kemp**”), Larry Harris (“**Harris**”), Brian Padilla (“**Padilla**”), Rachel Harris and Tara Kemp (together, the “**Guarantors**”).

Although the Guarantors are the only moving parties, they seek to block discovery regarding the Guarantors as well as a multiple of the Debtors’ affiliates that are not debtors but have been intricately involved in the Debtors’ and the Guarantors’ business affairs for the past several years. The Committee seeks the bank records from Arizona Bank & Trust (“**ABT**”) that will reveal the transactions between and among these persons and entities, including the Guarantors. As discussed below, the Committee has well-based cause and reason to explore the dealings by and among the Debtors, their affiliates and insiders – including the Guarantors who are the ultimate owners of the Debtors -- to determine whether causes of action for improper conduct or transfers exist and should be pursued on behalf of the estate.<sup>2</sup>

### **PROCEDURAL AND FACTUAL BACKGROUND**

1. On April 20, 2021 (the “**Petition Date**”), each of the Debtors filed Voluntary Petitions for relief under Chapter 11 of the Bankruptcy Code. The Committee was appointed on April 30, 2021.

2. On May 14, 2021, the Court entered its **Final Order** [Docket No. 157] approving (a) the use of cash collateral and granting adequate protection to VitaNova and Arizona Bank & Trust (“**ABT**”) for their pre-petition loans and (b) a post-petition loan from VitaNova Brands, LLC (“**VitaNova**”)<sup>3</sup> to the Debtors in the amount of \$3,500,000 secured by liens on all of the Debtors’ assets (“**DIP Loan**”).<sup>4</sup>

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<sup>2</sup> The amount of debt in these cases is staggering: \$5 M in priority claims; \$73 M in unsecured claims not including a probable \$75 M + in lease rejection damages or the 100’s of employee claims stemming from approximately 20 pre-petition employee lawsuits or administrative actions. One simply has to question where all the money went.

<sup>3</sup> The Guarantors are believed to be the ultimate owners of VitaNova.

<sup>4</sup> The amount consisted of a \$500,000 pre-petition advance and a new money “line” of \$3,000,000.

3. The Final Order approved certain stipulations by the Debtors that confirmed the validity of the pre-petition liens and granted broad releases to insiders and affiliates, all subject to challenge by the Committee (Final Order at para. 22). The deadline for the Committee to file a challenge is July 14, 2021.

4. On May 18, 2021, the Debtors filed a motion to sell by auction substantially all their assets. [Docket No. 165]. On May 27, 2021, the Court approved bidding procedures and VitaNova's right to credit bid its DIP Loan [Docket No. 203]. The Debtors designated VitaNova as the stalking horse bidder and provided an executed Asset Purchase Agreement (the "**APA**") on May 21, 2021 [Docket No. 178].

5. The Debtors propose to sell their causes of action, apparently including any Chapter 5 avoidance actions, despite, to the Committee's knowledge, no estimation of the nature, extent or value of those actions having been formulated. VitaNova's APA does not identify the causes of action to be purchased. The deadline for objecting to the sale is July 9, 2021.

6. As the Court has noted previously, VitaNova is "wearing multiple hats" in these proceedings as pre-and post-petition lender and stalking horse bidder. But, for purposes of responding to the Motion, the depth of the insider relationship bears repeating:

a. The Managers of VitaNova are Kemp, Jones and Harris -- the Managers and Governing Persons for all the Debtors are Kemp, Jones, Harris and Padilla (Exhibit A).<sup>5</sup>

b. On January 1, 2021, VitaNova entered into a Management Agreement with the Debtors with respect to the so-called "Buffets" side of the business (see Declaration of CRO Mark Shapiro, Docket No. 20 at para. 30 and **Exhibit B**). VitaNova charges a 5 percent (5%) management fee, 1 percent (1%) higher than the Debtors' pre-petition agreement.<sup>6</sup>

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<sup>5</sup> Designated as Governing Persons in the Debtors' Chapter 11 Petitions, e.g. at Docket No. 1.

<sup>6</sup> The Debtors have not sought Court approval of the Management Agreement, despite the fact it is an insider transaction that interested parties should be able to challenge.

c. The Debtors and VitaNova office in the same place and have the same CFO (see Exhibit B).<sup>7</sup> This is particularly problematic because the Order approving the retention of B. Riley as the Chief Restructuring Officer (“**CRO**”) specifically restricts B. Riley from acting as a financial advisor to the Debtors (see Docket No. 262 para. 2). Consequently, the CRO must rely on financial information from the CFO who is at the same time working for VitaNova. There can be no independent analysis of past transactions.

7. The Debtors filed their Schedules of Assets and Liabilities (“**Schedules**”) and Statement of Financial Affairs (“**SOFA**”) on May 26, 2021. The Section 341 Meeting of Creditors was conducted by the United States Trustee on June 1, 2021. Committee counsel and several creditors appeared. Questions posed to the CRO appearing on behalf of the Debtors included inquiries about transfers listed in the SOFA’s, why certain non-debtor entities including Alamo Dynamic, LLC (“**Alamo Dynamic**”)<sup>8</sup> were not included in this proceeding, and why potential obligations resulting from the receipt of funds from the federal government’s Paycheck Protection Program (“**PPP**”) were not reflected in the Schedules.

8. A particular concern to the Committee has been the disclosure of intercompany transfers. The Debtors have seemingly “netted” the transfers between companies rather than identifying individual transfers. Therefore, the Committee believes transfers have not been fully disclosed. Despite the Committee’s urging, the Debtors’ amended Schedules and SOFA’s filed June 15, 2021 do not remedy this problem.

### **CONTACT WITH ABT AND THE 2004 MOTION**

9. As described in the Shapiro Declaration, ABT claims to be owed approximately \$13 million by virtue of a 2015 loan agreement and various modifications. The initial borrowers were Fresh Acquisitions, LLC (“**Fresh**”) and non-debtor Alamo Dynamic. FMP SA Management, LLC (“**FMP Management**”) was added as a co-borrower in 2017. (Declaration at 18).

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<sup>7</sup> Martin Cortes as CFO signed for VitaNova on the Management Agreement and as CFO for the Debtors on the B.Riley retention letter [Docket No. 171].

<sup>8</sup> The Guarantors are believed to be the ultimate owners of Alamo Dynamic.

10. Eighteen of the Debtors' 22 bank accounts are maintained at ABT. (See Debtors' Cash Management Motion filed on April 20, 2021 at Docket No. 8). In that motion, the Debtors requested and received authorization to continue use of the accounts and the intercompany transfers described as an "essential component" of the Debtors' operations (paragraph 16). The final order approving the Debtors' cash systems was entered on May 7, 2021 at Docket No. 140.

11. On May 9, 2021, Committee counsel requested ABT's loan documents from ABT's counsel who provided substantially all of the loan documents within two days. Upon a follow-up request on May 17, 2021, ABT provided additional loan documents and UCC filings.

12. After a review and consideration of the ABT documents, the Schedules and SOFA's, the 341 Meeting testimony, and correspondence received from and conversations with various creditors, the Committee determined that it needed to obtain account and transactional information from ABT to further explore the comingling of monies between the Debtors and their affiliates, the many transfers to affiliates prior to the bankruptcy, the actual use of the PPP Funds, and the payment of exorbitant management fees to affiliates.

13. Consequently, on June 5, 2021, Committee Counsel sent to ABT an e-mail with a proposed document request to be attached to a Bankruptcy Rule 2004 motion (**Exhibit C**). ABT's counsel responded immediately and the parties worked to reach agreement as to the scope of the document request that would be filed ultimately.

14. On June 14, 2021, the Committee filed its 2004 Motion and requested expedited consideration, given the challenge and objection deadlines described above. The Court heard the matter on June 23, 2021 (the "**Hearing**").

15. The document request attached as Exhibit A to the 2004 Motion is summarized as follows:

a. Documents related to PPP funds regarding the Debtors and Affiliates and Insiders.

b. Documents referred to the Limited Forbearance Agreement dated February 18, 2021 between ABT, the Borrowers and Guarantors. (*a document previously provided to the Committee*).

- c. Account statements and disbursement accounts for the Debtors, their Affiliates and Insiders.
- d. Financials for the Debtors, their Affiliates and Insiders.
- e. Asset valuations or purchase offers for assets owned by the Debtors, their Affiliates and Insiders.
- f. Purchase-related documents regarding Alamo Dynamic.
- g. Assignment of Deposit Account. *(mentioned in previously provided ABT documents but not provided)*
- h. Agreement to Provide Insurance. *(mentioned in previously provided ABT documents but not provided)*
- i. Deposit Account held by Catalina Restaurant Group. *(mentioned in previously provided ABT documents but not provided)*
- j. Commercial Pledge and Security Agreement with Catalina Restaurant Group *(mentioned in previously provided ABT documents but not provided)*
- k. Documents relating to direct loans made to the Guarantors

16. Immediately prior to the Hearing, ABT's counsel requested that the Committee modify its proposed 2004 Order to allow for additional time for production, to provide for a confidentiality agreement, and to provide for specific notice to the Guarantors and the opportunity to object. Committee counsel announced the modifications at the Hearing and revised the proposed order accordingly. The Order granting the 2004 Motion was entered on June 25, 2021 [Docket No. 265] and notice was sent to the Guarantors.

17. On June 29, 2021, the Guarantors filed the Motion objecting to the production of documents by not only the Guarantors but also by Alamo Dynamic; Furr's; Furr's II; VitaNova; Sushi Zushi of Texas, LLC; Zios Restaurant Co., LLC; Catalina Restaurant Group; and Alamo Restaurants, LLC (referred to by the Guarantors as the "Non-Debtor Entities") (Motion para 6).

18. The Guarantors fail to articulate any real reason for blocking the production of documents only stating that the Committee "doesn't even minimally allege any connection of the Non-Debtor and Guarantor documents to these Chapter 11 cases." (Motion para 14).

The Guarantors audaciously conclude that they should be able to select which documents should be produced (Motion para. 17).

19. Because of the Motion, ABT has now delayed producing a substantial number of documents.

### **RELATIONSHIPS**

20. It is incredulous for the Guarantors to allege a lack of connection between with the Non-Debtor Entities and the Guarantors. The inter-relationships are blatant:

a. Alamo Dynamic is a Texas limited liability company that owns a food production facility located in Lubbock, Texas. Its managers are Kemp, Harris, Jones and Padilla (Exhibit D). It is a co-borrower on the ABT loan. The ABT loan documents reflect that real property owned by Fresh was transferred to Alamo Dynamic. The Committee believes the property has significant value and the transfer should be explored to determine if any action can be taken to benefit the estate.

One or more of the Debtors purchased product from Alamo Dynamic over the past several years; it is listed as an unsecured creditor in the Fresh Schedules for \$4,030,009.00 and in the Buffets LLC Schedules for \$215,975. According to the Fresh SOFA, it received transfers of \$804,405.00 in the year prior to the bankruptcy. Notably, 24 of 27 payments were “round, even” figures, suggesting that the transfers may not have been related to product purchases.<sup>9</sup>

The Committee is informed that Alamo Dynamic is continuing to make payments to ABT during the bankruptcy.

b. Alamo Furr’s, LLC and Alamo Furr’s II, LLC, Texas limited liability companies, are the parent companies of Fresh (Shapiro Declaration at 13). Their managers are Kemp, Harris, Jones and Padilla (Exhibit E).

c. The relationship with VitaNova is described above. Further, it is listed as an unsecured creditor in the Fresh Schedules for \$138,999.00 and \$57,500 in the Buffets LLC Schedules. The SOFA’s reflect that VitaNova received transfers of \$15,000 from Fresh

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<sup>9</sup> The UST inquired about this at the 341 Meeting and the CRO replied that he would look into it.

(with which it has no contract) and \$470,000 from Tahoe Joes, Inc. in the one-year prior to the bankruptcy. Thus, the Debtors have paid or claim to owe VitaNova a total of \$666,499.00 from January 1, 2021, the date of its Management Agreement, to the Petition Date. Because the Debtors' Schedules show that the only gross revenues generated in this time frame was slightly over \$6,000,000, the fees may have been inflated.

d. Similarly, the SOFA's for Fresh, Alamo Buffets Payroll, Buffets LLC, FMP Management, and Tahoe Joes indicate that in the year prior to the filing of the bankruptcy, when nearly all of the Debtors' restaurants were closed, these Debtor's transferred \$3,344,811.00 to non-debtor TXFMP Management, LLC, an entity owned by Kemp, Harris, and Jones. (**Exhibit F**). TXFMP is also listed as an unsecured creditor for \$788,834.00 in the Fresh Schedules and \$160,000 in the Buffets LLC Schedules.

e. Zios Restaurant Company, LLC is a Texas limited liability company managed by Kemp, Harris, and Jones (**Exhibit G**). It is listed as an unsecured creditor in the Fresh Schedules for \$70,000.

f. Sushi Zushi of Texas, LLC is listed as an unsecured creditor in the Fresh Schedules for \$59,913 and in the Buffets LLC for \$100,000.<sup>10</sup>

The foregoing examples of the intertwined relationships and questionable payments to insiders and non-debtors illustrate the very need to obtain the ABT documents. All of these parties had the same managers (who are now the objecting Guarantors) and any transactions related to the Debtors should and must be explored.

## **FURTHER BASES AND RELEVANCE OF DISCOVERY**

### **The PPP Funds**

21. Undisputedly, Fresh Acquisitions and Buffets LLC received respectively \$10,000,000 and \$2,900,000 in PPP Funds (see also Fresh and Buffets LLC Schedules). The Committee has concerns about the disbursement of those funds.

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<sup>10</sup> Note that the Committee believes that the unsecured claims listed for the various non-debtor entities may be a "net" number resulting from offsetting previous transfers reaching back (and subject to avoidance) for the four years prior to the Petition Date.



22. On March 5, 2021, Plaintiff Arthur N. Rupe Foundation conducted a sworn deposition of Peter Donbavand in the case of *Arthur N. Rupe Foundation v. Fresh Acquisitions, Inc.* Case No. 5:20-cv-00130-H pending in the United States District Court for the Northern District of Texas, Lubbock Division. Excerpts from the Deposition are attached as **Exhibit H**. Mr. Donbavand is a former employee of the Debtors whose employment was terminated on or about April 2020 (see e.g. Alamo Buffet Payroll, LLC SOFA). The Defendant Fresh Acquisitions was represented by counsel.

23. With respect to the PPP money, Mr. Donbavand testified as follows beginning at line 12 on page at pages 112:

Q. *Do you think they have done dishonest things just to you or to others as well?*

A. *They have done dishonest things to quite a few people.*

...

Q. *What would make you think that?*

A. *Conversations with Allen Jones*

...

Q. *What did Mr. Jones say they did with that money?*

A. *He told me that they used it to settle that fraud lawsuit with Steve Madlinger and the River North Group and said they were continuing to pay their very large salaries and other things.*

Q. *What other things?*

A. *I believe they used it to remodel some of the stores. And Jason's attempt to save Fresh Acquisitions, because I mean for selfish reasons, I mean, he – they all have very large personal guarantees to Arizona Bank and Trust that they don't want called, which is my understanding why they started commingling funds so they can use other businesses' money to cover loses at Furr's. And they have also used the PPP money to settle things and spend it improperly.*

24. The Committee has asked the Debtors for a tracing to the PPP fund. The information provided does not indicate the source and use of the funds and therefore, the

Committee must seek documentation from ABT where the monies were held and disbursed (See Cash Management Motion at 6).

25. Finally, the Committee believes that Zios and Sushi Zushi received PPP funds (see **Exhibit I**) and those transactions should be reviewed as well.

### **Commingling**

26. The Debtors admit in the Cash Management Motion that their entire operational system relies on the commingling of funds. The Committee should be able to explore whether funds have been commingled with or transferred to non-debtor entities or the Guarantors.

27. Moreover, Mr. Donbavand testified that

*Fresh Acquisitions has struggled for a long time. It has been propped up and I mean, had bills covered by other entities that I mean, honestly that should have never happened. . . . from my conversations with Allen Jones, they have taken all of the different businesses' moneys and commingled them together and are now paying all the bills out of one joint account which I expressed my disagreement with.* Exhibit H, pp. 110-111.

### **Excessive Management Fees**

28. As noted above, the Debtors' own Schedules and SOFA's raise questions about the management fees that have been paid or are purportedly owed to non-debtor affiliates.

## **POINTS AND AUTHORITIES**

The Court in *In re Correra*, 589 B.R. 76 (Bankr. N.D. Tex. 2018) succinctly described the purpose and breadth. Citing numerous cases, the Court summarized:

**Third parties are subject to examination pursuant to Rule 2004 if they have knowledge of the debtor's affairs.**" Courts tend to be reluctant to allow "escape from a Rule 2004 examination unless the party can show that the examination" would be "oppressive or burdensome." "A rule 2004 exam has been explained as a broad investigation into the financial affairs of the debtor for the purpose of the discovery of assets of the estate and the exposure of fraudulent

conduct.” The scope of a Rule 2004 examination is “**unfettered and broad**” and “is commonly recognized as more in the nature of a ‘fishing expedition.’” The purpose of the examination is to enable the trustee to discover the nature and extent of the bankruptcy estate. Legitimate goals of Rule 2004 examinations include “**discovering assets, examining transactions, and determining whether wrongdoing has occurred.**”

*In re Correria*, 589 B.R. 108-09 (emphasis added, footnotes with internal citations omitted). See also *In re Kipp*, 86 B.R. 490, 491 (Bankr. W.D. Tex. 1988) (“Bankruptcy Rule 2004 authorizes examination of any entity and the scope of such examination is virtually unlimited. As many courts have noted, the Rule allows an unrestrained “fishing expedition.” (internal citation omitted)).

Courts have routinely permitted Rule 2004 discovery of information relating to affiliates and potentially fraudulent transfers. See, e.g., *Medve Energy Ventures LLC v. Warhorse Oil & Gas LLC*, No. 6:17-CV-01336, 2018 WL 7051038, at \*2, n. 3 (W.D. La. Nov. 21, 2018), report and recommendation adopted, No. 6:17-CV-01336, 2019 WL 303122 (W.D. La. Jan. 17, 2019) (“[T]he bankruptcy court entered an order granting a Rule 2004 examinations [sic] relevant to the financial affairs of the Debtor and the Debtor affiliates . . . that are discoverable pursuant to F.R.B.P. 2004, including the [affiliates’] non-privileged financial and tax documents as well as documents and communications related to acquisition and transfer of various assets . . . .”); *In re Transmar Commodity Grp. Ltd.*, No. 16-13625-JLG, 2018 WL 4006324, at \*2 (Bankr. S.D.N.Y. Aug. 17, 2018) (noting that a prepetition lender had received documents, pursuant to its Rule 2004 inquiry, which evidenced transactions and claims between one of debtor’s largest creditors, debtor, and debtor’s affiliates); *In re Fearn*, 96 B.R. 135, 138 (Bankr. S.D. Ohio 1989) (finding that Rule 2004 permitted discovery of materials relating to potentially fraudulent transfers from debtors, reasoning that Rule 2004 inquires can reach “those who might have had business dealings” with debtor (emphasis omitted)).

The Committee has overwhelmingly satisfied the standard for obtaining the discovery it seeks from ABT pursuant to Rule 2004.

## CONCLUSION

The circumstances of these cases scream for transparency that can only be achieved by discovery such as that sought from ABT. The Committee has demonstrated a substantial basis and need to obtain the documents it has requested under Rule 2004 in order to properly discharge its responsibility in maximizing any recovery for unsecured creditors. The Committee respectfully asks the Court to deny the Objection and enter an immediate order permitting the production by ABT to resume immediately.

## CERTIFICATION OF CONFERENCE

Per Local Bankruptcy Rule 2004-1, the undersigned counsel has conferred with the Guarantors' counsel Robin Phelan and the parties will continue to work to resolve the Objection.

Dated: July 2, 2021.

Respectfully submitted,

/s/ Carolyn J. Johnsen

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**CERTIFICATE OF SERVICE**

I hereby certify that Notice of this document was electronically filed and served to the parties that are registered or otherwise entitled to receive electronic notices in this case pursuant to the Electronic Filing Procedures in this District on July 2, 2021.

/s/ Carolyn J. Johnsen  
Carolyn J. Johnsen

4823-3172-5297 v2 [97257-1]