

Robin Phelan
Texas Bar No. 5903000
PHELANLAW
4214 Woodfin Drive
Dallas, Texas 75220
Telephone: (214) 704-0222
robin@phelanlaw.org

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

In re:

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

**GUARANTOR REPLY TO 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**

Allen Jones, Jason Kemp, Larry Harris, Brian Padilla, Rachel Harris and Tara Kemp (the “Guarantors”) file this reply (the “Reply”) to the 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 “CC Response”) filed by the Official Creditors Committee in these Chapter 11 cases (the “Committee” or the “CC”) regarding the Order Directing Arizona Bank & Trust to Produce Documents And Appear For Examination Pursuant To Rule 2004 entered on June 25, 2021 (the “2004 Order”) directing Arizona Bank & Trust (“ABT”) to produce documents and to

¹ 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.

appear for examination pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure.

INTRODUCTION

1. The Guarantors appreciate the efforts of the Committee to clarify its motion under Rule 2004 (the “Committee Motion”) filed by the Official Creditors Committee in this Chapter 11 case. The Committee has the responsibility to make reasonable efforts to determine the validity of transfers by, and transactions of, the Debtors. Consequently, the Committee is entitled to review items documenting those transfers and transactions. Transactions and documents of non-debtors which do not involve the Debtors are an entirely different matter.

2. Many of the requests of the CC in the CC Response are appropriate since they reflect transactions among the Debtors or between the Debtors and third parties, including affiliates of the Debtors. However, absent compelling circumstances not present in these cases, the CC is not entitled to demand documents reflecting transactions between non-Debtors, including affiliates.

JURISDICTION AND VENUE

3. This Reply does not constitute a submission by the Guarantors to the jurisdiction of this Court or an independent appearance in this Chapter 11 case or request for independent relief and is limited to a response dictated by the 2004 Order.

4. On April 20, 2021 (the “Petition Date”), each of the Debtors filed Voluntary Petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. The statutory predicates for the relief requested in this motion are section 105 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2004.

RELIEF REQUESTED

6. The 2004 Order directs the production of documents of Alamo Dynamic, LLC, Furr’s, Furr’s II and VitaNova; Sushi Zushi of Texas, LLC; Zios Restaurant Co. LLC; Catalina Restaurant Group (“Catalina”) and Alamo Restaurants, LLC. (collectively the “Non-Debtor Entities”) as well as documents of the Guarantors, in the possession of ABT. Unless the documents reflect transactions with

Reply Regarding Rule 2004

the Debtors, they are not relevant to these cases.

7. Taking the comments of the CC in the CC Response in order, VitaNova Brands, LLC (“VitaNova”) is actively involved in these cases. Documents reflecting transactions between VitaNova and the Debtors should be provided by ABT to the Committee. VitaNova has business dealings with parties totally unrelated to these Debtors, therefore Documents regarding transactions between VitaNova and others are not relevant to these cases and need not be provided to the Committee.

8. The Committee questions why Alamo Dynamic, LLC (“Alamo Dynamic”), a supplier to one or more of the Debtors, didn’t file Chapter 11.² The CC inquiry isn’t relevant to these cases. A reasonable request by the CC for documents reflecting transactions between Alamo Dynamic and the Debtors may very well be relevant to these cases.

9. Documents demonstrating transfers of Paycheck Protection Program (“PPP”) funds from the Debtors appear to be relevant to these cases and it would be appropriate for the CC to inquire of the Debtors regarding the utilization of these funds and why the utilization of PPP funds were not reflected in the schedules and statement of affairs of the Debtors.

10. The Committee questions intercompany transfers of the Debtors.³ Presumably the records of the Debtors reflect these transfers. Intercompany transfers are common in enterprises which employ cash management systems. If ABT has records of these transfers they should be provided to the Committee. Documents of the Guarantors and the Non-Debtors aren’t relevant to this inquiry by the Committee.

11. The Committee describes management fees paid by the Debtors to “affiliates”, as “exorbitant”.⁴ Documents reflecting these payments should be provided to the Committee. The CC has not indicated why transactions between management companies and non-debtors would be relevant to these cases.

12. In the Committee Response the Committee lists a summary of requested documents

² Committee’s Response, Dkt. 284 at ¶ 7.

³ *Id.* at ¶ 8.

⁴ *Id.* at ¶ 12.

many of which have no relevance to these cases.⁵ Documents provided to ABT by the Guarantors and Non-Debtors in connection with a forbearance agreement with ABT do not appear to be relevant to these cases. Account statements, asset valuations, purchase offers and financial statements of the Guarantors and Non-Debtors do not appear to be relevant to these cases. Purchase documents for Alamo Dynamics do not appear to be relevant to these cases. Deposit accounts and other agreements of Catalina do not appear to be relevant to these cases. Certainly, documents relating to direct loans made by ABT to the Guarantors are not relevant to these cases.

13. The Committee seems to contend that the Guarantors have not articulated any reason why certain documents should be produced. The reason is simple, the documents are not relevant to these cases and the Committee has not demonstrated otherwise. It's up to the Committee to show at least a minimal relevance since it is impossible for anyone to demonstrate non relevance beyond so stating. For example, how is it possible to demonstrate that loans by ABT to a particular Guarantor aren't relevant beyond the fact that the loans are to the Guarantor, not any of the Debtors.

14. The Guarantors do not allege a lack of connection between the Non-Debtors and the Guarantors. For that matter, the guarantors recognize that they have multiple relationships with both the Non-Debtors and the Debtors. To the extent that those relationships involve transactions with the Debtors, then the Committee is entitled to investigate those transactions. For example, if real property owned by Fresh Acquisitions, LLC ("Fresh"), a Debtor, was transferred to Alamo Dynamic the Committee should be allowed to investigate that transaction. Purchases by the Debtors from Alamo Dynamic and the validity of any unsecured claims in these cases of Alamo Dynamic are legitimate areas of inquiry by the Committee.

15. Likewise, payments by the Debtors to VitaNova and TXFMP Management, LLC ("TXFMP"), which was accompanied by the assumption of liabilities, are legitimately subject to reasonable review by the Committee as is any claim of Zios Restaurant Company, LLC ("Zios") against the Debtors. A claim of Sushi Zushi, LLC (Zushi") against the Debtors also may be questioned by the Committee. However, independent relationships of these Non-Debtors with ABT are not relevant to

⁵ *Id.* at ¶ 15(a-k).

these cases.

16. The speculative, generic and sometimes contradictory statements of Mr. Donbavand (e.g. “They have done dishonest things to quite a few people”) should be evaluated from the perspective that Donbavand was fired by the Debtors.⁶ To the extent that they purportedly identify transfers by the Debtors then reasonable inquiry into those transfers by the Committee appears to be justified and will demonstrate that transfers and payments by the Debtors (including PPP payments) were appropriate in light of the reduced revenue and limited sources of financing environment for restaurants during the period in question.

17. Documents showing disbursements by the Debtors of PPP funds would appear to be relevant to these cases. Any PPP Funds of non-debtors are not relevant to these cases.

18. Donbavand’s comments regarding “commingling” appear to demonstrate a lack of understanding of how a concentrated cash management system operates.⁷ Documents of the Non-Debtors and the Guarantors are not relevant to the internal cash management of the Debtors.

19. Documents showing payments of management fees by the Debtors would appear to be relevant to these cases.

20. Rule 2004 is designed to provide information about activities *of the Debtors*, not the activities of the Non-Debtors and Guarantors. What’s on a financial statement given by a Guarantor to ABT is absolutely unrelated to these cases. The assets of a particular Guarantor are not relevant to this case. While transfers from and transactions with the Debtors are subject to Rule 2004, transactions between the Guarantors or between a Guarantor and ABT are not relevant to this case.

21. Although Rule 2004 has been described as a “fishing expedition” the fishing has to be in the Debtors’ lake. Much of what is requested by the Committee is in bodies of water far distant from the lake of the Debtors.

22. Certainly, the Guarantors and the Non-Debtors have significant relationships with the Debtors, the Non-Debtors and ABT but the existence of those relationships does not mean that the

⁶ *Id.* at ¶ 23.

⁷ *Id.*

separate existence of those entities should be disregarded.

23. Transfers by and transactions with the Debtors to Non-Debtors or the Guarantors are fair game for a Rule 2004 inquiry, however, asset valuations and purchase offers for assets held by the Non-Debtors and the Guarantors aren't within the scope of Rule 2004

24. Other documents to be produced by ABT will likely show and evidence transactions of the Debtors. To the extent that those transactions require further examination additional inquiry may be appropriate. While transparency is necessary, it should be transparency regarding transfers and transactions *of the Debtors*, not third parties.

25. At minimum, ABT should be required to provide the Non-Debtors and the Guarantors with a list of the documents of the Non-Debtors and the Guarantors in the possession of ABT and afford the Guarantors and the Non-Debtors adequate opportunity to determine which such documents, if any, should be produced to the Committee.

26. The Guarantors request that the 2004 Order be amended to exclude documents of the Non-Debtor Entities and the Guarantors in the possession of ABT, that that this Court limit the 2004 Order as it relates to the Non-Debtor Entities and the Guarantors to include only the documents held by ABT that are relevant to these cases, as set forth above, and for such other relief as is just.

CONCLUSION

Based on the foregoing, the Guarantors requests the Court to amend the 2004 Order as set forth above.

Dated: July 6, 2021.

Respectfully submitted,

/s/ Robin Phelan

Texas Bar No. 15903000

PHELANLAW

4214 Woodfin Drive

Dallas, Texas 85004

Telephone: (214) 704-0222

robin@phelanlaw.org

CERTIFICATION OF CONFERENCE

Per Local Bankruptcy Rule 2004-1, the undersigned counsel has conferred with the Committee's counsel Carolyn Johnson and the parties are working to resolve this objection to the Committee Motion.

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 6, 2021.

/s/ Robin Phelan
Robin Phelan