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

In re: Fresh Acquisitions, LLC, et al., <p style="text-align: center;">Debtors.</p>	§ § § § § § § §	Chapter 11 Case No. 21-30721-SGJ-11 (Jointly Administered)
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UNITED STATES TRUSTEE’S OBJECTION TO (I) DEBTORS’ MOTION FOR (I) AN ORDER (A) APPROVING BIDDING PROCEDURES AND CERTAIN BID PROCEDURES, (B) SCHEDULING BID DEADLINE, AUCTION DATE, AND SALE HEARING AND APPROVING FORM AND MANNER OF NOTICE THEREOF, AND (C) APPROVING CURE PROCEDURES AND THE FORM AND MANNER OF NOTICE THEREOF; AND (II) AN ORDER APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS’ ASSETS FREE AND CLEAR OF LIENS, CLAIMS AND INTERESTS AND (2) NOTICE OF PROPOSED STALKING HORSE ASSET PURCHASE AGREEMENT
[Docket Nos. 165 and 178]

TO THE HONORABLE STACEY G. C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE:

William T. Neary, the United States Trustee for Region 6 (“United States Trustee”), objects to the Debtors’ Motion for (I) an Order (A) Approving Bidding Procedures and Certain Bid Procedures, (b) Scheduling Bid Deadline, Auction Date, and Sale Hearing and Approving Form and Manner of Notice thereof, and (C) Approving Cure Procedures and the Form and Manner of

Notice thereof; and (II) an Order Approving the Sale of Substantially all of the Debtors' Assets Free and Clear of Liens, Claims and Interests (the "Sale Motion," Docket Entry No. 165) and to the Notice of Proposed Stalking Horse Asset Purchase Agreement (the "APA Notice," Docket Entry No. 178). The United States Trustee would respectfully show:

Overview

Under the Asset Purchase Agreement (the "Stalking Horse APA"), Tahoe Joe's, Inc., Buffets, LLC, Hometown Buffet, Inc., Ryan's Restaurant Group, LLC (the "Sellers") propose to sell to VitaNova Brands, LLC ("VitaNova"), an insider, chapter 5 causes of action "against the Buyer" and related entities. In the event that VitaNova is the successful bidder at the auction, a sale of the chapter 5 causes of action to VitaNova, as "the Buyer," would extinguish a significant source of potential recoveries for the general unsecured creditors in this case. Moreover, the sale of the chapter 5 causes of action to VitaNova is without adequate consideration.

Additionally, the United States Trustee requests that any sale order entered in this case provide that the sale will be followed by a liquidating plan or conversion of these cases to chapter 7 and require the Debtors to reserve sufficient funds to pay United States Trustee fees resulting from sale-related disbursements.

Background

1. Article I, Definitions, of the Stalking Horse APA defines Purchased Actions as follows:

"Purchased Actions" means all causes of action, lawsuits, claims, rights of recovery and other similar rights of any Seller or their respective bankruptcy estates arising under and including (a) avoidance claims and causes of action, and (b) any and all grounds at law or in equity against Buyer, its Affiliates, Subsidiaries and their respective agents, officers, directors, shareholders, members, managers, agents, employees, representatives and attorneys action under Chapter 5 of the Bankruptcy Code and under any applicable state law providing for the preferential transfers or fraudulent claims relating to the Business and the Purchased Assets.

2. Section 2.1(r) of the Stalking Horse APA includes the Purchased Actions among the

Purchased Assets.

3. The Sale Motion contains no valuation of the Purchased Actions, including the chapter 5 causes of action. Neither the Sale Motion nor the Stalking Horse APA have a description of the chapter 5 causes of action that are to be sold or the litigation risks associated with the chapter 5 causes of action.

4. The consideration VitaNova proposes to give for purchase of the Purchased Asset is described in Section 2.5 of the Stalking Horse APA as follows:

(a) the assumption by Buyer of the Assumed Liabilities set forth in Schedule 2.3; and

(b) a credit bid in an amount equal to the outstanding liabilities under the DIP Indebtedness as of Closing and approved and allowed by the Bankruptcy Court as eligible to be a Credit Bid by Buyer, in its capacity as DIP Lender (collectively, the “DIP Credit Bid”),

5. Schedule 2.3 to the Stalking Horse APA reflects that the Assume Liabilities are Administrative Claims, Priority Claims and gift card liabilities.

6. Effective April 16, 2021, four days before the April 20, 2021 petition date, each of the Debtors as a borrower entered into the DIP Credit Agreement with the VitaNova, for a prepetition advance of \$500,000. That advance was secured by a first lien on substantially all assets of all debtors other than the Furr’s Debtors, and a second lien on the Furr’s Debtors’ intellectual property, in which Arizona Bank & Trust asserts a first lien (the “VitaNova Prepetition Lien”).

7. At the commencement of the case, the Debtors proposed to give VitaNova a lien on the proceeds of chapter 5 causes of action in connection with VitaNova’s provision of debtor in possession financing. *See* Debtors’ Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Granting Adequate

Protection, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (V) Granting Related Relief, Docket Entry No. 16 (the “DIP Motion”).

8. After the United States Trustee filed an objection (Docket Entry No. 105) and the Unsecured Creditors Committee made informal comments to the DIP Motion and the relief requested therein, the final debtor in possession financing order did not give VitaNova a lien in the proceeds of chapter 5 causes of action or in the chapter 5 causes of action themselves. *See* Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief, Docket Entry No. 157 (the “Final DIP Order”).

9. The following Debtors’ Statements of Financial Affairs reflect payments in the following amounts to or for the benefit of VitaNova in the one year preceding the bankruptcy filing:

- a. \$15,000.00 – Fresh Acquisitions, LLC, Case No. 21-30721, Docket Entry No. 230;
- b. \$470,000.00 – Tahoe Joe’s, Inc., Case No. 21-30725, Docket Entry No. 10.

Objections

The Court should not approve the sale of the chapter 5 causes of action to VitaNova.

10. This Court should not authorize the sale of the chapter 5 causes of action against the Buyer and related entities to VitaNova should VitaNova emerge as the winning bidder after the auction. VitaNova’s prepetition loan and prepetition liens fall within the preference period. VitaNova also appears on the list of insiders who received prepetition payments within a year of the bankruptcy filing on two of the Debtors’ Statements of Financial Affairs. As an insider, VitaNova may be subject to other chapter 5 causes of action.

11. Since neither the Sale Motion nor the Stalking Horse APA contain a valuation of the

proposed chapter 5 causes of action to be sold, nor a specific description of such causes of action and the litigation risks, it is impossible to know the value of the chapter 5 causes of action “against the Buyer” and related entities.

12. Typically, avoidance action proceeds are a source of recovery for general unsecured creditors in chapter 11 cases. Chapter 5 avoidance actions are not the Debtors’ property, but, instead, are statute-created rights to benefit creditors. *See In re Cybergenics Corp.*, 226 F.3d 237, 243-45 (3d Cir. 2000) (state law fraudulent transfer claim is not an asset of the debtor). “A paramount duty of a trustee or debtor in possession in a bankruptcy case is to act on behalf of the bankruptcy estate, that is, for the benefit of the creditors.” *Id.* at 243. The use of the authorization of a trustee or a debtor in possession to pursue avoidance actions “for the benefit of creditors is at the heart of avoiding powers.” *Id.* at 244. Debtors in possession have not been permitted to pursue avoidance actions when such pursuit would not benefit creditors. *Id.* By analogy, then, any sale of the avoidance actions in this case should also benefit the creditors.

13. VitaNova’s purchase of the chapter 5 causes of action against the Buyer (itself) and related entities would extinguish a significant source of potential recovery for general unsecured creditors. VitaNova proposes no additional consideration for the purchase of the chapter 5 causes of action against the Buyer and related entities beyond the assumption of administrative, priority and gift card liabilities and its credit bid of the balance owing to VitaNova under the debtor-in-possession financing.

14. The consideration that VitaNova offers does not benefit the general unsecured creditors. While it is true that a secured creditor may credit bid against a proposed sale of its collateral (*see* 11 U.S.C. §363(k)), the chapter 5 causes of action are not VitaNova’s collateral. In fact, the chapter 5 causes of action were specifically excluded from VitaNova’s collateral in the Final DIP

Order. Accordingly, the proposed sale of the chapter 5 causes of action to VitaNova is without adequate consideration and does not benefit the general unsecured creditors.

The sale order should provide that the Debtors will file a liquidating plan or convert the cases to chapter 7 after consummation of any sale.

15. The United States Trustee requests that any sale order entered by this Court include that the Debtors will file a liquidating plan or will convert the cases to chapter 7 after consummation of the sale. *Cf. Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017).

The sale order should provide that the Debtors will reserve sufficient funds to pay United States Trustee's fees resulting from any disbursement sale proceeds.

16. Although the Stalking Horse APA provides for no cash consideration that may be distributed, to the extent that sales proceeds may be distributed after the sale, the Debtors should reserve sufficient funds to pay United States Trustee fees resulting from such disbursements.

Conclusion

The United States Trustee respectfully requests that the Court sustain his objection. The United States Trustee requests any additional relief to which he may be entitled.

DATED: July 9, 2021

Respectfully submitted

WILLIAM T. NEARY
UNITED STATES TRUSTEE
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Certificate of Service

I certify that on July 9, 2021, I certify that I mailed a copy of the foregoing document to the address listed below via first class U.S. Mail, postage prepaid. I further certify that I emailed a copy of the foregoing document to the following parties at the following email addresses listed below on July 9, 2021. All other parties, including counsel for Debtors, Secured Lenders, and DIP Lender, received this document through ECF on July 9, 2021.

/s/ Meredyth A. Kippes
Meredyth A. Kippes

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