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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> , ¹	§	Case No. 21-30721 (SGJ)
	§	Chapter 11
Debtors.	§	(Jointly Administered)

**OBJECTION TO DEBTORS' EXPEDITED MOTION TO EXTEND THE
EXCLUSIVE PERIOD TO FILE A CHAPTER 11 PLAN AND SOLICIT
ACCEPTANCES THEREOF**

The Official Committee of Unsecured Creditors (the "**Committee**") files this
Objection to the Debtors' Expedited Motion to Extend the Exclusive Period to File a

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.

Chapter 11 Plan and Solicit Acceptances Thereof (the “**Motion**”) [Doc No. 334]. In the Motion, the Debtors request that the exclusive period to file a plan be extended until October 17, 2021 and the exclusive period to solicit acceptances be extended until December 16, 2021 (the “**Extension**”).

A. INTRODUCTION

The Debtors have not demonstrated any palpable rationale to support an extension of exclusivity. Their arguments consist of rote citations to cases in which extensions have been granted, but they ignore the factual reality of these cases and why an extension cannot be justified. At this juncture, the Committee does not have confidence that any plan proposed by the Debtors will protect the interests of creditors and ensure a meaningful recovery. In spite of vigorous objections, they persist in their plight to sell to an insider, and for little or no consideration, all of the Debtors’ causes of action (including the Bankruptcy Code Chapter 5 causes of action²) (the “**Causes of Action**”) that are the Debtors’ sole assets with any realizable value. Given the extraordinary conflicts of interest and insider transactions, it is imperative that exclusivity be allowed to expire on the statutory date of August 18, 2021, in order to enable the Committee to quickly file its Plan of Liquidation.

B. PERTINENT FACTS

1. For a few years after their last bankruptcy in 2016, the Debtors were a significant operator of buffet-style and steakhouse restaurants with approximately 90 stores in multiple locations throughout the United States.³

2. However, by April 20, 2021, when each of the Debtors filed Voluntary Chapter 11 Petitions (the “**Petition Date**”), all of the Debtors’ restaurant operations

² Causes of action described in Sections 544-550 of the Bankruptcy Code (the “**Avoidance Actions**”).

³ This is the fourth Chapter 11 bankruptcy (previous filings in 2008, 2012 and 2016) for various iterations of these Debtors. See *Declaration of Mark Shapiro* [Doc No.20].

had ceased—most stores had closed in 2020 and never reopened. The only restaurants currently open are 6 stores operating in California under the Tahoe Joe's Famous Steakhouse brand.

3. Within weeks of the Petition Date, the Debtors rejected all store leases except for the six Tahoe Joe's leases and a lease for a store in Texas [Doc Nos. 65, 202, 201]. The Texas lease has now been rejected [Doc No. 317].

4. According to the Debtors' Schedules of Assets and Liabilities (the "**Schedules**"), the amount of debt in these cases is staggering: \$5 million in priority claims; \$73 million in unsecured claims (not including at least \$50 million in anticipated lease rejection damages), or the 100's of employee claims stemming from approximately 20 pre-petition employee lawsuits or administrative actions.

The DIP Loan

5. From the beginning, it has been no secret that these bankruptcy cases were designed to benefit the insiders.

6. On May 14, 2021, the Court entered its **Final DIP Loan Order** authorizing the Debtors to obtain post-petition financing from VitaNova Brands, LLC ("**VitaNova**") in an amount up to \$3.5 million (the "**DIP Loan**") [Docket No. 157], pursuant to a Credit Agreement (attached to the Final Order) executed four days prior to the Petition Date.

7. The DIP Loan consisted of a \$500,000 pre-petition advance that was secured by a lien on all the Debtors' assets and a new money "line" of \$3,000,000. Prior to the Petition Date, only the "Furr's stores" were subject to any secured debt; the "Buffets stores" including Tahoe Joe's were not encumbered.

8. The Final DIP Loan Order and the Credit Agreement provided that VitaNova would have credit bid rights as to any sale of its collateral.

9. VitaNova is an insider of the Debtors inasmuch as (a) the Managers of VitaNova (Jason Kemp, Allen Jones, and Larry Harris (“**Kemp/Jones/Harris**”)) are also the “governing persons” of the Debtors, and (b) VitaNova provides extensive management services to the Debtors by virtue of a Management Agreement dated January 1, 2021.

The Budgets

10. As part of the Final Order, the Court approved an “Initial Budget” through July 30, 2021.

11. The Final Order provides that the DIP Loan terminates on August 20, 2021. However, the date was extended to September 3, 2021 by the Court’s *Second Agreed Order* entered on August 3, 2021 [Doc No. 329].

12. On August 10, 2021, the Debtors delivered a “New Budget” to the Committee and simultaneously filed a *Notice of Approved Budget* [Doc No. 346]. The New Budget indicates that funding on the DIP Loan will be continued through November 5, 2021 despite the Termination Date. The budget also shows that after September 17, 2021, there will be no further restaurant operations, presumably because they will be sold. The terms of the extended funding have not been disclosed to the Committee or to the Court.

13. Finally, the New Budget shows that in the period of time from July 31 to November 5, 2021, Debtors’ professionals have been allocated \$1,112,000 for fees and expenses. However, the Committee’s professionals have been allocated a mere \$60,000 in the same time period, an overwhelming and unjustified disparity. Notably, the Debtors have failed to pay Committee professionals their most recent interim invoices, as required by the Order Establishing Procedure for Interim Compensation for Professionals [Doc No. 263].

14. It appears from the New Budget that as of the date of this filing, only \$1.5 million of the DIP Loan has been drawn.

The Sale

15. On May 18, 2021, the Debtors filed a motion to sell by auction substantially all their assets (the “**Sale**”). [Docket No. 165]. 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]. On May 27, 2021, the Court approved bidding procedures and VitaNova’s right to credit bid the DIP Loan (“**Procedures Order**”) [Docket No. 203].

16. No other bidders submitted a “Qualified Bid” as defined in the Procedures Order and so, on July 29, 2021, the Debtors filed a notice that the auction was cancelled and that VitaNova was designated as the “Successful Bidder.” A revised APA dated July 29, 2021, with few material changes from the original APA was also filed [Doc No. 326].

17. The APA provides for VitaNova’s purchase of the Debtors’ sole operating business, certain related intellectual property, and all of the estates’ causes of action, including the Avoidance Actions, for a credit bid of \$3.5 million and the assumption of about \$10.8 million in liabilities that are, in large part, wholly unrelated to the on-going business proposed to be transferred to VitaNova under the APA.

18. Thus, the total alleged purchase price is \$14,358,000. The proposed Sale produces no cash for the Estates.

19. The APA references several exhibits that supposedly list in detail the assets to be purchased. None of these exhibits are attached to the APA. Critically, no potential causes of action, including the Avoidance Actions, have been identified or quantified except to the extent they can be gleaned from the Schedules.

20. On July 12, 2021, the Committee filed its Initial Objection to the Sale arguing that (a) the Debtors cannot legally transfer the Avoidance Actions and factually have not produced any evidence of the value of the Causes of Action or allocated any of the purchase price to them and (b) that allowing VitaNova to “pay” the purchase price by assuming liabilities violates the priorities of the Bankruptcy Code [Doc No. 296].

21. The Sale hearing is scheduled currently for August 24, 2021.

Potential Causes of Action

22. On the Committee’s request, the Court entered an order requiring Arizona Bank & Trust (“**ABT**”), to produce by July 13, 2021 multiple categories of bank documents related to the Debtors and Kemp/Jones/Harris who had guaranteed Debtors obligations to ABT [Doc No.299]. Virtually all of the Debtors and their affiliates have maintained bank accounts and conducted multimillion dollars of transactions through ABT. Over a period of four weeks, ABT gradually provided batches of documents, all unorganized and uncategorized. The last ostensible set of documents was produced by ABT on August 10th.

23. The Committee’s professionals have reviewed the documents to the best of their ability in a short period of time and with limited resources. In addition, the Committee is bound by confidentiality agreements with the Debtors and ABT. Therefore, the following is not a full discussion of the Committee’s research.⁴ In pursuing its Sale Objection, the Committee will likely seek permission to file additional support under seal.

24. Nevertheless, considerable analysis can be presented from the Debtors’ Schedules and Statement of Financial Affairs (“**SOFA**”). For example, nearly \$12

⁴ In pursuing its Sale Objection, the Committee will likely seek permission to file additional support under seal.

million of “intercompany payments” within the one year prior to the Petition Date, many to non-debtor entities who are or appear to be insiders or affiliates of the Debtors. Those non-debtor entities are ultimately owned or controlled by the same individuals who ultimately manage and own the Debtors and VitaNova -- Kemp/Jones/Harris.

25. Alamo Dynamic is a Texas limited liability company that owns a food production facility located in Lubbock, Texas. Its managers are Kemp, Jones and Harris. 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 may be avoided and funds recovered.

26. In addition, 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 were related to product purchases and are recoverable.

27. VitaNova 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 (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 paid to VitaNova may have been excessive.

28. 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. TXFMP is also listed as an unsecured creditor for \$788,834.00 in the Fresh Schedules and \$160,000 in the Buffets LLC Schedules.

29. Undisputedly, Fresh Acquisitions and Buffets LLC received respectively \$10,000,000 and \$2,900,000 in Payment Protection Program ("**PPP**") funds (see also Fresh and Buffets LLC Schedules). The Committee continues to have concerns about the disbursement of those funds.

C. LEGAL ARGUMENT

30. The question becomes: why is the foregoing relevant to whether the Extension should be granted? The answer is because the Court must be presented with the totality of the circumstances in determining whether a party, in this case the Committee, should be allowed to file a competing plan – one that is based on total independence and with the view of protecting creditors.

31. Section 1121 (d)(1) provides that a court may "for cause" increase the time periods in which a debtor has the exclusive right to file and gain acceptance of a plan. Although "cause" is not defined in the Bankruptcy Code, courts have typically considered a number of factors in determining whether the time frames should be extended, namely:

- a) the size and complexity of the case;
- b) the need for sufficient time to permit the debtor to negotiate a chapter 11 plan and prepare adequate information;
- c) whether the debtor has made progress in negotiations with its creditors;
- d) the existence of good faith progress toward reorganization;
- e) whether the debtor is seeking to extend exclusivity to pressure creditors to accede to the Debtors' reorganization demands;

- f) whether the debtor has demonstrated reasonable prospects for filing a viable plan;
- g) the fact that the debtor is paying its bills as they become due;
- h) the amount of time which has elapsed in the case; and/or whether an unresolved contingency exists.

See e.g. *In re New Millennium Mgmt., LLC*, No. 13-35719, 2014 WL 792115, at *6 (Bankr. S.D. Tex. Feb. 25, 2014).

32. The decision of whether to extend exclusivity is within the sound discretion of the court based on the totality of the circumstances. See *In re Mirant Corp.*, No. 4-04-CV-476-A, 2004 WL 2250986, at *3 (N.D. Tex. Sept. 30, 2004).

33. Here, the Debtors have focused on six of the factors enumerated above; however, their arguments ring hollow in view of the actual factual reality of the cases as described here. The Extension is not justified on this record.

The Size and Complexity of the Cases

34. The Debtors argue that the Extension is warranted because they have a significant number of creditors and assets. Ultimately, the only viable plan for these Debtors will be one that provides for the liquidation the Causes of Action, the resolution of claims and the estates, and an orderly distribution of the proceeds. Under no circumstances will the Debtors be continuing operations. A proof of claim deadline has been established, all non-operating leases have been rejected, and there are no pending issues with any creditors. Size and complexity is not a realistic factor.

The Terms of a Plan Depend on the Outcome of the Sale Hearing

35. The Proposed Sale will be resolved in one week on August 24, 2021. It has no real bearing on the plans that will be filed by either the Debtors or the Committee.

The Debtors Have Made Significant Progress in Negotiating a Viable Plan, Are Not Seeking to Extend Exclusivity to Pressure Creditors, and an Extension Will Not Prejudice Creditors

36. This argument is disingenuous on two levels. First, the Debtors have at no time proposed a plan to the Committee. Rather, at this juncture, the only question is the Sale and whether, as discussed above, the potential Causes of Action against the Debtors' affiliates and insiders will be sold to an insider, hence effectuating a release.

37. After considerable pressure from Debtor's counsel to make an offer to resolve this issue and without having the benefit of a full document production from ABT, the Committee sent a written settlement proposal to Debtors' counsel and to counsel for VitaNova and Kemp/Jones/Harris on July 29, 2021. On August 6, 2021, Debtor's counsel rejected the offer flatly and did not make a counter-offer. There has been no response from counsel for VitaNova or Kemp/Jones/Harris. On August 13, 2021, Debtors' counsel extended to Committee counsel an oral offer to settle, ostensibly on behalf of the insiders. However, the difference between the two numbers is too vast at this stage. The Extension will not remedy it.

38. Secondly, and more important, the conflicted relationships cannot be overcome. Here, the targets of the Causes of Action are Debtors' affiliates and insiders, all of which are owned and/or controlled by the same individuals who are the managers of the Debtors. The Debtors should have no role in negotiating with or against the Committee — they should be fighting alongside the Committee to bring in more funds to the estates. The Extension will not solve this problem.⁵

⁵ The Committee submits that the Debtors and their counsel have the fiduciary obligation to research and analyze the causes of action that the estates may have against any third parties, including the Debtors' affiliates and insiders, prior to any proposed transfer of the Purchased Actions, including the

The Debtors Are Paying Their Bills as They Come Due

39. The Debtors argue that they are current with their post-petition obligations. But, creditors have no way of knowing since the Debtors have failed to file their Monthly Operating Reports for the month of June. The Committee has been informed by Mark Shapiro, whose company is paid \$20,000 per week to serve as CRO for the Debtors, that B.Riley has not received the necessary information. The Debtors also pay VitaNova a monthly management fee and they are apparently not fulfilling that duty either. The July report is due in a few days.

Significant Time has Not Elapsed in These Cases

40. This length of time that has elapsed in this case is really not relevant.

The administration of these cases has been minimal. The only issues have been cash collateral, debtor-in-possession financing, and an asset sale of 6 restaurants, none of which have required extensive negotiation or litigation. The Bankruptcy Code specifically limits exclusivity to four months, except for good cause. And, the Debtors have been unable to specify any facts that support that finding.

D. THE COMMITTEE PLAN

41. The Committee is prepared to file a plan in 30 days that will provide for the orderly, independent liquidation of the estates to provide the maximum recovery for creditors.

42. The Committee is also prepared to request that approval of the disclosure statement be combined with plan confirmation in order to expedite the plan process.

Chapter 5 Avoidance Actions. If any such research and analysis has been done, it has not been provided to the Committee (although requested on multiple occasions) or this Court.

E. CONCLUSION

Based on the foregoing, the Committee requests that the Court deny the Motion and allow plan exclusivity to expire on August 18, 2021, as provided in the Bankruptcy Code.

Dated: August 16, 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 August 16, 2021.

/s/ Carolyn J. Johnsen

Carolyn J. Johnsen

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