

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

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

**DECLARATION OF MARK SHAPIRO
IN SUPPORT OF THE DEBTORS' MOTION FOR AN
ORDER APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE
DEBTORS' ASSETS FREE AND CLEAR OF LIENS, CLAIMS AND INTERESTS**

I, Mark Shapiro, declare under penalty of perjury:

1. I am a Senior Managing Director of GlassRatner Advisory & Capital Group, LLC d/b/a B. Riley Advisory Services ("B. Riley Advisory"),² a professional services firm engaged in the business of providing interim management, financial advisory and related consulting services with principal offices located at 3445 Peachtree Road, Suite 1225, Atlanta, GA 30326 and 3500 Maple Ave, Ste 420, Dallas, TX 75219. On June 25, 2021, the Court approved my retention as the Chief Restructuring Officer ("CRO") for the above-captioned debtors and debtors in possession (collectively, the "Debtors"). I have functioned continuously in the CRO capacity since February

¹ The Debtors in these chapter 11 cases 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.

² B. Riley Advisory Services is the trade name used by GlassRatner Advisory Capital Group, LLC ("GlassRatner") and its affiliate Great American Group Advisory and Valuation Services, LLC. All services to be provided to the Debtors hereunder will be performed solely by GlassRatner, and references to the B. Riley or B. Riley Advisory trade name herein refer to GlassRatner.

2, 2021, and I have continued in this role pursuant to a Court order approving my retention throughout these chapter 11 cases.

2. I personally have extensive bankruptcy and restructuring, corporate, and related expertise. I have over 25 years' experience as a turnaround advisor and corporate financial executive and have advised debtors, secured lenders, trade creditors and equity holders in both out-of-court and in-court proceedings. Prior to joining GlassRatner in 2016, I provided financial advisory services through my own Dallas-based financial advisory firm called Challenger Advisors LLC. Before that, I served as Chief Financial Officer for a number of public companies, including Big Lots Inc. and Central Parking Corp., as well as private equity-owned portfolio businesses. I received my Bachelor of Science degree in accounting from The Ohio State University and began my career with Ernst & Young in New York. I am a Certified Public Accountant (inactive).

3. I have extensive experience in U.S. Bankruptcy Courts and have been involved in numerous chapter 11 cases and court-appointed receiverships. For example, I have served as financial advisor to the debtors in the GGI Holdings LLC (Gold's Gym) bankruptcy (NDTX Case No. 20-31318), Chief Restructuring Officer to Pine Creek Medical Center LLC (NDTX Case No. 19-33079), Chief Restructuring Officer to Lockwood Holdings, Inc. (SDTX Case No. 18-30197), Co-Chief Restructuring Officer to PBS Brand Co, LLC (DDE Case 20-13157) and financial advisor to the Debtors in the Uplift Rx LLC bankruptcy (SDTX Case 17-32186).

4. The Debtors engaged B. Riley Advisory to assist them with, among other things, the marketing and sale of all or any portion of the Debtors' assets (the "Assets"). I, along with members of my team, have been working closely with the Debtors since approximately February 2, 2021. In providing such professional services to the Debtors, I have become familiar with the

Debtors and their businesses, including the Debtors' financial affairs, debt structure, operations, and related matters. I was involved with the negotiation of the Debtors' DIP financing, which was approved by order dated May 14, 2021, and which contains certain milestones for a sale. See Docket No. 157. I was directly involved with and participated in the marketing efforts of the Debtors' Assets.

5. I submit this declaration (this "Declaration") in support of 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* [Docket No. 165] (the "Bidding Procedures Motion"). The statements in this Declaration are, except where specifically noted, based on my personal knowledge or opinion, on information I have received from the Debtors' employees or advisors, or employees of B. Riley Advisory working directly with me or under my supervision, direction, or control, or from the Debtors' books and records maintained in the ordinary course of their businesses.

6. I am not being specifically compensated for this testimony other than through payments received by B. Riley Advisory as a professional retained by the Debtors. If I were called upon to testify, I could and would competently testify to the facts set forth herein. I am authorized to submit this Declaration on behalf of the Debtors. I reserve the right to supplement this Declaration prior to, or during, the Sale Hearing, as necessary.

The Bidding Procedures Order and Bid Procedures

7. As described more fully in the *Declaration of Mark Shapiro, Chief Restructuring Officer, in Support of Chapter 11 Petitions and First Day Motion* [Docket No. 20] (the "First Day

Declaration”) and the Bidding Procedures Motion, the Debtors are pursuing a sale of all or any portion of their Assets.

8. To that end, the Debtors filed the Bidding Procedures Motion, which was subsequently granted through the *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* [Docket No. 203] (the “Bidding Procedures Order”).³ On June 2, 2021, the Debtors’ claims agent served the Bidding Procedures Order, along with the Bidding Procedures and the Sale Notice (as defined below), on the Bid Notice Parties via electronic mail and/or U.S. First Class Mail. *See* Docket No. 221.

9. On June 2, 2021, the Debtors filed and served via CM/ECF the *Notice of Bid Deadline, Auction, and Sale Hearing* [Docket No. 211] (the “First Sale Notice,” and as amended by Docket Nos. 310 and 311, the “Sale Notice”). On June 3, 2021, the Debtors’ claims agent served the First Sale Notice on the creditor matrix maintained in these chapter 11 cases via electronic mail and/or U.S. First Class Mail. *See* Docket No. 222.

10. Certain dates in the Bidding Procedures Order were subsequently extended by agreement of the Debtors, the Committee, and the DIP Lender, as reflected in the *Agreed Order (I) Continuing the Sale Hearing, (II) Modifying the Bidding Procedures Order to Extend Certain Dates; (III) Extending Certain Milestones Under the DIP Financing Order; and (IV) Granting Related Relief* [Docket No. 309]. On July 22, 2021, the Debtors filed and served via CM/ECF the *Second Amended Notice of Bid Deadline, Auction, and Sale Hearing* [Docket No. 311], which was

³ Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Bidding Procedures Motion or the Bidding Procedures Order, as applicable.

served by the Debtors' claims agent on the Bid Notice Parties on the same date via electronic mail and/or U.S. First Class Mail. *See* Docket No. 320.

11. Certain dates and the sale hearing were again continued through the *Second Agreed Order (I) Continuing the Sale Hearing, (II) Modifying the Bidding Procedures Order to Extend Certain Dates; (III) Extending Certain Milestones Under the DIP Financing Order; and (IV) Granting Related Relief* [Docket No. 329]. On August 3, 2021, the Debtors filed and served via CM/ECF the *Third Amended Notice of Bid Deadline, Auction, and Sale Hearing* [Docket No. 330], which was served by the Debtors' claims agent on the Bid Notice Parties on the same date via electronic mail and/or U.S. First Class Mail. *See* Docket No. 340.

12. On June 25, 2021, the Debtors filed and served via CM/ECF the *Notice of Executory Contracts and Unexpired Leases Subject to Possible Assumption and Assignment and Proposed Cure Amounts filed by Debtor Fresh Acquisitions, LLC* [Docket No. 268] (the "Cure Notice"). On the same date, the Debtors' claims agent served the Cure Notice via electronic mail and/or U.S. First Class Mail on the limited service list maintained in these chapter 11 cases and the Counterparties to the contracts and leases listed for possible assumption in the Cure Notice. *See* Docket No. 280.

13. Since filing the Bidding Procedures Motion, I believe that the Debtors have complied in all respects with the terms of the Bidding Procedures and the Bidding Procedures Order.

Marketing Process and Bids Received

14. In May 2021, B. Riley Advisory began evaluating strategies and alternatives for the sale of the Assets. Since that time, as reflected in Debtors' Exhibit 4,⁴ B. Riley Advisory has

⁴ *See* Docket No. 382-3.

contacted at least 654 unique potential buyers regarding the sale of the Assets, including 312 of which were proposed by the Official Committee of Unsecured Creditors (the “Committee”). All contacted parties received a non-disclosure agreement, a “teaser,” and the Stalking Horse Asset Purchase Agreement. Eleven of the contacted parties executed non-disclosure agreements and were given access to the Debtors’ virtual data room, which contained extensive legal and financial materials provided by the Debtors, including additional information supplemented at the request of the Committee. B. Riley Advisory engaged prospective bidders to consider any and all possible transactions for some or all of the Debtors’ assets, including acquisitions of liquor licenses, one or more of the Debtors’ restaurant brands (and accompanying intellectual property), the ongoing Tahoe Joe’s restaurant operations and even the bankruptcy estate causes of action. The marketing and bidding process took place in a manner consistent with industry norms and the standards usually applicable to bankruptcy sales.

15. Despite the Debtors’ efforts to encourage parties to submit offers, the Debtors received only one written offer other than the Stalking Horse Bid. The sole Qualified Bidder is VitaNova Brands, LLC (“VitaNova”), or its designee(s), which the Debtors designated as the stalking horse bidder (the “Stalking Horse Bidder”) pursuant to the terms of an asset purchase agreement executed between the Debtors and the Stalking Horse Bidder (the “Stalking Horse Bid”). *See* Docket No. 178. The Stalking Horse Bid contemplates that the Stalking Horse Bidder will acquire substantially all of the Debtors’ Assets, including the remaining Tahoe Joe’s restaurants, all of the Debtors’ intellectual property, and all estate causes of action. In exchange for such assets, the Stalking Horse Bidder’s consideration will include a credit bid of most of the balance of the DIP Loan, assumption and payment of certain administrative and/or priority trust fund taxes, payment of certain priority employee obligations, and assumption of landlord, vendor,

and customer obligations associated with the restaurants. As demonstrated in Debtors' Exhibit 7,⁵ the Debtors believe that the Stalking Horse Bid would provide their estates, in addition to the satisfaction of approximately \$3 million in DIP Obligations, assumptions of approximately \$8 million in administrative and priority tax claims, and assumption of approximately \$2.5 million in consumer gift card obligation, up to \$13.5 million of value.

16. The only other written offer (as amended after further negotiations, the "Unqualified Bid") received by the Debtors was based on a letter submitted by a third party bidder (the "Competing Bidder").⁶ The Unqualified Bid provided that the Competing Bidder would acquire the Debtors' Tahoe Joe restaurant operations and related intellectual property, in exchange for a one-time payment of \$1.75 million in cash and assumption of the following liabilities:

- a. lease obligations for five of the six open Tahoe Joe's locations, including cure obligations in amounts agreed to by the Competing Bidder and each landlord;⁷
- b. obligations under Tahoe Joe's contract with Sysco, subject to a maximum cure payment of \$250,000;⁸
- c. obligations under Tahoe Joe's contract with NCR, subject to a maximum cure payment of \$15,000; and
- d. Tahoe Joe's gift card liabilities, up to a maximum amount to be determined in a definitive asset purchase agreement.⁹

17. Upon request of the Committee and with the consent of their DIP Lender, the Debtors obtained a one-week extension of the DIP Order milestones and the sale deadlines outlined

⁵ See Docket No. 382-6.

⁶ The identity of the Competing Bidder is not disclosed here in an effort to maintain confidentiality.

⁷ The estimated Cure Amounts for these five Landlords is \$925,000.

⁸ VitaNova has imposed no such cap on the administrative expenses to be paid under its APA. The Debtors estimate such administrative expense to be approximately \$150,000.

⁹ The Competing Bidder provided no further details on this provision. Under the terms of VitaNova's APA, VitaNova, through certain special purpose affiliates, will assume over \$1.6 million in Tahoe Joe's gift card obligations, as well as approximately \$850,000 of gift card obligations due from the Debtors' other concepts.

in the Bidding Procedures Order to allow the Debtors the opportunity to continue negotiating with the Competing Bidder. *See* Docket No. 309. The Competing Bidder ultimately declined to improve its offer such that it would meet the minimal requirements necessary to become designated as a “Qualified Bid” under the terms of the Bidding Procedures Order. Neither the Competing Bidder nor the Committee disputed the Debtors’ decision to reject the Unqualified Bid as an unqualified offer.

18. Since the Debtors did not receive any qualified bid other than the Stalking Horse Bid, the Debtors cancelled the Auction on the Debtors’ Assets after consulting with the Consultation Parties, as authorized pursuant to the terms of the Bidding Procedures Order. On July 29, 2021, the Debtors filed the *Notice of (I) Cancellation of Auction, (II) Designation of VitaNova Brands, LLC as Successful Bidder, including (A) the Proposed Form of Asset Purchase Agreement and (B) the List of Assumed Executory Contracts and Unexpired Leases; and (III) the Proposed Form of Sale Order* [Docket No. 326] (the “Auction Cancellation Notice”). The Auction Cancellation Notice included: (a) the revised form of asset purchase agreement negotiated between the Debtors and the Stalking Horse Bidder (the “APA”); (b) a comparison document showing changes made between the Stalking Horse Bid and the APA; (c) the Assumed Contract Schedule; and (d) the proposed form of Sale Order.

19. I believe the Bidding Procedures facilitated a fair and competitive bidding process through which potential bidders were encouraged to participate and submit competing bids within a specified time frame. The Debtors solicited additional offers and conducted the sale process in a controlled, fair, and open fashion, encouraging participation by financially capable bidders who could demonstrate the ability to assume the transferred obligations and liabilities.

The Proposed Sale

20. In my business judgment, the proposed transaction with VitaNova under the terms of the APA (the "Sale") is the highest and best offer for the Debtors' Assets. The APA was negotiated in good faith and without collusion between the Debtors and the Stalking Horse Bidder. Given that the VitaNova is an insider of the Debtors, I, along with Vin Batra, the Debtors' Independent Director, carefully scrutinized the terms of the APA to ensure that is truly the highest and best offer. The Debtors negotiated the terms of the APA from as close to arms'-length bargaining positions as we could manage, given the Stalking Horse Bidder's related-party status. I believe in my sound business judgment that the proposed Sale to VitaNova is in the best interests of the Debtors, their estates, and their creditors.

21. Neither the Debtors nor VitaNova has engaged in any conduct that would cause or permit the application of Bankruptcy Code § 363(n) to the transaction, including voiding the transaction or APA or any of the transaction documents and related instruments contemplated thereunder. Indeed, throughout the bidding process, VitaNova was responsive to B. Riley Advisory's requests for financial and legal documents and information to respond to the many requests received from the Committee and prospective bidders. During the course of the bidding process, VitaNova and its officers and employees gave their full cooperation, allowing B. Riley Advisory and the Debtors to market the Debtors' assets and operations to the broadest extent possible. The Debtors' inability to produce a higher or better offer for their Assets through the Bidding Procedures was not the results of VitaNova's conduct during the course of the bidding process. Rather, it is my belief, based on the Debtors' discussions with prospective bidders throughout the course of the bidding process, that VitaNova's offer for the Assets exceeds the fair market value for the Debtors' Assets, as discussed below. VitaNova, as the Stalking Horse Bidder,

is purchasing the Assets in good faith and is a good faith purchaser within the meaning of 11 U.S.C. § 363(m). VitaNova has proceeded in good faith in all respects in connection with the sales process, including, but not limited to, complying with the provisions in the Bid Procedures Order and disclosing all agreements and all payments to be made by VitaNova with respect to the transactions set forth in the APA. I believe VitaNova is therefore entitled to all of the protections afforded under 11 U.S.C. § 363(m).

22. It is the Debtors' business judgment that the terms and conditions of the APA: (a) are fair and reasonable; (b) are valid, binding, and enforceable; (c) constitute the highest and best offer for the Assets; (d) will provide a greater recovery for the estates' creditors than would be provided by any other practical available alternative; and (e) constitute at least reasonably equivalent value and fair consideration for the Assets (as those terms are defined in the Uniform Fraudulent Transfer Act, the Uniform Fraudulent Conveyance Act, 11 U.S.C. § 548, and the laws of the United States, any state, tribe, territory, or possession of the United States, and the District of Columbia). No other person, entity, or group of entities has offered to purchase the Assets for greater overall value to the Debtors' estates than the Stalking Horse Bidder.

23. Specifically, not only does the Sale to VitaNova save approximately 200–250 jobs for the remaining restaurant locations, but the Sale would provide up to \$13.5 million in value for the Debtors' estates through a combination of a credit by VitaNova against the Debtors' DIP Obligations and VitaNova's assumption and payment of the Debtors' administrative, priority and gift card obligations.

24. As of the filing of this Declaration, the total DIP Obligations due or expected to be due under the DIP Order were approximately \$3 million. Absent VitaNova's agreed credit toward such DIP Obligations, the Debtors would have no efficient way of satisfying the DIP Obligations

to VitaNova. Any litigation pursued would only benefit VitaNova until the balance of the DIP Obligations were paid in full. Further, under the APA, VitaNova, as the Stalking Horse Bidder, has agreed to assume and pay approximately \$925,000 in lease and contract cure obligations, as well as approximately \$8 million in sales taxes, payroll taxes and other administrative and priority claims that the Debtors would otherwise have to pay as a condition for confirmation of any chapter 11 plan. Absent VitaNova's agreement to pay such obligations, litigation would have to be pursued to pay these priority claims before any litigation proceeds could be paid to general unsecured non-priority claim holders. Finally, VitaNova, through certain affiliate designee has agreed to assume approximately \$2.5 million in gift card liabilities under the conditions set forth in the APA. The Debtors received no higher or better offer during the course of the bidding process, despite extending the Bid Deadline as discussed above.

25. In exchange for the consideration offered under the APA, VitaNova will receive substantially all of the Debtors' Assets, including rights in the designated Leases, all of the Debtors' intellectual property, and certain "Purchased Actions" defined in the APA. The "Purchased Action" provision of the APA accomplishes two conditions, both of which I believe are critical to VitaNova's willingness to consummate the Sale. First, with respect to third-party vendors who may have received preferential or otherwise avoidable transfers before the Petition Date, VitaNova seeks to acquire such causes of action in an effort to maintain ongoing business relationships while VitaNova continues to operate the Tahoe Joe's restaurants and looks to relaunch or otherwise monetize the Debtors' other restaurant concepts. Second, with respect to claims against other insiders, affiliates and related parties, based on the negotiations over the APA and proposed form of sale order, that VitaNova seeks releases of such estate causes of action. Such releases would include claims ranging from avoidance actions to potential breaches of fiduciary duty. Under the

circumstances, and based on the Debtors' analysis of such claims and the consideration provided by VitaNova under the terms of the APA, I believe that both terms are reasonable and appropriate. Even if certain causes of action against the related parties could generate proceeds for the estate, our analysis of such claims is that the costs and attendant risks of pursuing such prospective litigation are outweighed by the certainty that the APA provides to the Debtors' employees, vendors and other creditors in these cases. Under either scenario, the Debtors estimate that general unsecured non-priority creditors stand to receive little, if any, distributions in these cases. Under the terms of the APA, the Debtors can provide certainty for priority and administrative claimants, as well as the Debtors' employees who would stand to be hired by VitaNova to continue operating the Tahoe Joe's restaurants under the terms of its APA. The transaction contemplated under the APA was not entered into for the purpose of hindering, delaying, or defrauding creditors under the Bankruptcy Code or under the laws of the United States or any state, tribe, territory, or possession of the United States, including the District of Columbia. Neither the Debtors nor VitaNova, as the Stalking Horse Bidder, is fraudulently entering into the transaction contemplated by the APA.

26. The Debtors also have considered the benefits of accepting the Unqualified Bid in favor of VitaNova's APA. It should be noted that the Unqualified Bid was not submitted with a proposed form of asset purchase agreement. Thus, pursuing a transaction with the Competing Bidder would have required the Debtors to engage in additional negotiations over a final form of asset purchase agreement with key terms remaining to be finalized, including the allocation and payment of assumed administrative expenses and gift card liabilities. Even if approved by this Court, the Debtors believe that the Unqualified Bid, once reduced to a final form of asset purchase agreement, would be detrimental to the estates because it would have left the estates without sufficient cash necessary to pay all administrative and priority expenses.

27. The \$1.75 million cash offered by the Competing Bidder was insufficient to pay the approximately \$3 million DIP Obligations expected to be due to VitaNova at closing. Further, the Unqualified Bid would have left the estates burdened with over \$6 million in administrative and priority tax obligations. While the Unqualified Bid would have left potential estate causes of action to be pursued, it is the Debtors' business judgment that they should not gamble administrative solvency on the potential merits and collectability of potential lawsuits against insiders and affiliates. As discussed above, the certainty provided under VitaNova's APA outweighs the net benefits of any upside the estates might receive from pursuing protracted litigation against insiders and affiliates (the net proceeds of which, first, would have to be used to pay off the remaining balance due to VitaNova under the DIP Order).

28. It is the Debtors' belief that VitaNova would not have entered into the APA and will not consummate the Sale (thus adversely affecting the bankruptcy estates and their creditors) without the releases discussed herein, and without receiving the Assets free and clear of any and all liens, claims, interests, and encumbrances.

29. The APA and proposed Sale exceeds the market value for the Assets indicated from interested third parties bidders during the course of the bidding process. As discussed above, we estimate that the Sale will provide up to \$13.5 million in value for the Debtors' estates. The only written offer received for the Debtors' Tahoe Joe's restaurant operations was the Competing Bidder's offer to pay \$1.75 million in cash, plus assumptions of fewer obligations than proposed by VitaNova through its APA. As noted above, the value of the APA already exceeds the value offered in the Unqualified Bid. Further, despite our efforts to encourage offers for the remainder of the Debtors' assets, including potential litigation rights and intellectual property, no prospective bidder was willing to offer any value for such assets.

30. It is the Debtors' business judgment that the relief sought in the Bidding Procedures Motion, including approval of the APA and other documents necessary to effectuate the sale of the Assets to the Stalking Horse Bidder, and consummation of the transaction contemplated thereunder, is in the best interests of the Debtors' bankruptcy estates, creditors, and all parties in interest. Time is of the essence, however, given the ongoing cash burn in these chapter 11 cases.

31. The Debtors believe that their estates and creditors will be adversely affected absent the approval of the Sale to VitaNova. The Debtors will continue to incur costs that, if this Sale is not approved and consummated promptly, will erode the value that can be realized for creditors from a Sale.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in the foregoing declaration are true and correct to the best of my knowledge, information, and belief.

Dated: August 23, 2021

/s/ Mark Shapiro

Mark Shapiro
Chief Restructuring Officer