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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)

**EMERGENCY MOTION FOR *IN CAMERA* REVIEW OF SENSITIVE DOCUMENTS
AND PERMISSION TO FILE UNDER SEAL**

The Official Committee of Unsecured Creditors (the “**Committee**”) files this *EMERGENCY MOTION FOR IN CAMERA REVIEW OF SENSITIVE DOCUMENTS AND PERMISSION TO FILE UNDER SEAL* (the “**Motion for Review**”) requesting the

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.

Court to review certain exhibits to be presented by the Committee at the hearing scheduled for August 24, 2021 (the “**Sale Hearing**”).

A. JURISDICTION AND VENUE

1. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory basis for the relief requested herein is 11 U.S.C. §105(a) and Rule 9077-1 of the Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas.

B. BACKGROUND

3. The Debtors each filed a voluntary Chapter 11 petition on April 20, 2021 (the “**Petition Date**”).

4. As the Court is aware, a hearing is scheduled on August 24, 2021 on the Debtors’ motion to sell substantially all of their assets (the “**Sale**”) to VitaNova Brands, LLC (“**VitaNova**”), an entity owned by Jason Kemp, Alan Jones, Larry Harris and Brian Padilla (also referred to in this case as the “**Guarantors**”), who are also the managers of the Debtors.

5. VitaNova is the DIP Lender. VitaNova also provides and is paid by the Debtors for management services by virtue of a Management Agreement; VitaNova’s employment as manager for the Debtors during these bankruptcy proceedings has never been sought by the Debtors or approved by the Court.

6. The Sale produces no cash for the Estates. Rather, VitaNova proposes to purchase the Debtors’ sole operating business (the Tahoe Joes’ restaurants) and

all of the estate causes of action, including Chapter 5 Avoidance Actions,² for a credit bid of \$3.5 million and the assumption of about \$10.8 million in predominantly pre-petition tax liabilities that are, in part, wholly unrelated to the on-going business proposed to be transferred to VitaNova under the APA.

7. The Committee objected to Sale, arguing in large part that the Debtors cannot legally transfer the Chapter 5 Avoidance Actions to VitaNova and that even if permissible, the Debtors have not provided any evidence of the value of the Chapter 5 Avoidance Action nor have they allocated any portion of the purchase price to their sale.

8. Despite the issues raised in the Committee's Initial Objection to the Sale filed more than a month ago and multiple requests from the Committee, Debtors have refused to provide any analysis of whether the multi-millions of dollars of transfers revealed in their Schedules and Statement of Affairs are avoidable and thereby provide some recovery to creditors.³

9. Certainly, a sale of this nature that provides no money for the estates and effectively gives a full release to VitaNova, the Guarantors, and other insiders deserves the utmost scrutiny.

² Those causes of action of the Debtors' Estates described in Sections 544 through 550 of the Bankruptcy Code.

³ On July 29, 2021, the Committee sent to counsel for the Debtors, VitaNova and the Guarantors a comprehensive settlement memo, which outlined multiple bases for recovery for unsecured creditors. Still the Debtors did not respond with any of their analysis. On August 22nd, two days before the Sale Hearing, Committee received from the Debtors for the first time their position on two possible claims.

C. ARIZONA BANK & TRUST DOCUMENT PRODUCTION

10. In light of the foregoing, the Committee professionals focused their efforts on determining the merit of any possible Chapter 5 Avoidance Actions. The Committee immediately sought discovery from Arizona Bank & Trust (“**ABT**”) where virtually all of the Debtors and their affiliates maintain their bank accounts. The Committee believed that the Guarantors also maintained ABT accounts.

11. On July 14, 2021, the Court entered its *Amended Order Directing Arizona Bank & Trust (“ABT”) to Produce Documents and Appear for Examination Pursuant to Rule 2004* (the “**Amended 2004 Order**”) [Doc No. 299]. The Amended 2004 Order was the result of a hotly contested hearing in which the Guarantors challenged the production of documents related to certain of the Debtors’ affiliates’ accounts and their personal accounts.

12. On July 12, 2021, the Committee entered into a Confidentiality Agreement with ABT (See *Exhibit A*).

12. Over the course of the following weeks, ABT’s counsel provided to Committee counsel thousands of pages of documents in multiple batches. The last set of document production was delivered on August 10, 2021.

13. Part of the Committee’s investigation has focused on the use and disbursement of the Payment Protection Program (“**PPP**”) monies that the Debtors received prior to the Petition Date.

14. The Committee was informed that Buffets, LLC’s \$10 million PPP loan was funded on April 20, 2020. A review of the documents produced by ABT shows that on the very next day, April 21, 2020 (within 1 year of the Petition Date), (a) Buffets transferred **redacted** dollars to an account held by non-debtor affiliate TXFMP

Management, LLC,⁴ and (b) the same LLC's that own TXFMP each made a **redacted** payment to ABT on their respective personal credit lines.

15. Having discovered this information, the Committee made further inquiry to ABT about documents pertaining to these accounts as well as other documents the Committee believed had not been produced (see *Exhibits B* and *C*).

16. On July 27, 2021, ABT's counsel sent a letter to Committee counsel expressing ABT's position as to its refusal to provide certain documents. Counsel indicated that ABT had been contacted by counsel for the Guarantors, "who contends that the Bank has *overproduced*, by producing loan histories of guarantors ..." (emphasis original), and demanded that such documents be destroyed pursuant to the Confidentiality Agreement (see *Exhibit D*). Committee counsel responded (see *Exhibits E* and *F*).

17. At the Sale Hearing, the Committee intends to introduce into evidence the transfer to TXFMP and the pages of loan histories that show the personal payments made by the Guarantors (the "**Exhibit**") (see *Exhibit G*).⁵

D. RELIEF REQUESTED

17. This discovery dispute presents a difficult conundrum. The Committee has information that is relevant to the Sale Hearing but may be restricted from using it and offering it to the Court. In a normal litigation situation, the Committee would have the opportunity and time to seek further discovery to complete a thorough investigation. But, here, the very targets of the investigation are hindering the Committee — the Guarantors own and control the proposed buyer of the Chapter 5 Avoidance Actions; they are the ones who control the purse strings (see recent DIP

⁴ TXFMP is owned by LLC's that are owned by the Guarantors.

⁵ The filed version of this Motion for Review excludes *Exhibit G*. A copy of that Exhibit has been provided directly to the Court and to counsel for the Debtors, ABT, the Guarantors, and the United States Trustee.

budget that provides \$60,000 for Committee fees vs. more than \$1,000,000 for the Debtors over the next 3 months of these Chapter 11 cases); and they are the ones receiving a side-door release by virtue of the proposed Sale, which release would include claims for the potential misuse of PPP funds.

18. The Committee cannot possibly prove “a case within a case” at the Sale Hearing. That is to say, it has not had the time, resources, or information to establish the viability of each and every potential cause of action.

19. But, what the Committee can do is establish that there is sufficient cause to believe there is value in the Chapter 5 Avoidance Actions – including in regard to the misuse of the PPP funds -- that should not be effectively released at this expedited juncture or pursuant to the Sale.

20. While the Committee acknowledges the need for confidentiality, at some point there is a need for the truth.

21. The Committee proposes to file the Exhibit under seal and to be provided only to counsel for the Debtors; counsel for the United States Trustee; counsel for the Guarantors; counsel for VitaNova; and counsel for ABT.

Dated: August 23, 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 23, 2021.

/s/ Carolyn J. Johnsen
Carolyn J. Johnsen

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