

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA

IN RE:	)	CASE NO. 18-05837-hb
	)	
CAFE HOLDINGS CORP., et al. <sup>1</sup>	)	CHAPTER 11
	)	
Debtors.	)	
	)	

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**OBJECTION OF OLD MILL STREAM, LLC; MRB, LLC; AND M&R INVESTORS, LLC TO DEBTORS' EXPEDITED MOTION, PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a), 363, AND 365, AND BANKRUPTCY RULES 2002, 6004, AND 6006, FOR ENTRY OF ORDERS (I) APPROVING SALE, BIDDING, NOTICE, AND AUCTION PROCEDURES IN CONNECTION WITH THE SALE OF SUBSTANTIALLY ALL OF THE ASSETS OF THE DEBTORS; (II) APPROVING ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (III) AUTHORIZING THE SALE OF THE DEBTORS' ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS, AND (IV) GRANTING RELATED RELIEF**

NOW COME Old Mill Stream, LLC; MRB, LLC; and M&R Investors, LLC (the “Landlord Parties”) and object to the *Debtors' Expedited Motion, Pursuant To Bankruptcy Code Sections 105(A), 363, And 365, and Bankruptcy Rules 2002, 6004, And 6006, For Entry Of Orders (I) Approving Sale, Bidding, Notice, and Auction Procedures In Connection With The Sale Of Substantially All Of The Assets Of The Debtors; (II) Approving Assumption and Assignment Of Certain Executory Contracts and Unexpired Leases; (III) Authorizing the Sale Of the Debtors' Assets Free and Clear Of All Liens, Claims, Encumbrances, and Other Interests, and (IV) Granting Related Relief* filed on November 30, 2018 (the “Sale Motion”) and represent as follows:

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<sup>1</sup>The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Cafe Holdings Corp. (7910); Cafe Enterprises, Inc. (4946); CE Sportz LLC (2009); and CES Gastonia LLC (0863).

## **BACKGROUND**

1. The Landlord Parties are lessors of real property under eight prepetition leases with the Debtors (the “Leases”), pursuant to which the Debtors lease restaurant space from the Landlord Parties at eight locations in North Carolina, South Carolina, and Georgia (the “Leased Premises”).<sup>2</sup>

2. Prior to the Petition Date, the Debtors defaulted under each of their Leases and, as a result, the Landlord Parties commenced eviction proceedings in each of the counties in which the Leased Premises are located (the “Eviction Proceedings”). As of November 12, 2018, the Landlord Parties were cumulatively owed at least \$1,673,146.74 by the Debtors in unpaid rent and related charges under the Leases.

3. The Debtors filed their voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (the “Bankruptcy Code”)<sup>3</sup> on November 15, 2018 (the “Petition Date”), which, among other things, stayed the Eviction Proceedings.

4. On November 28, 2018, the United States Trustee (“UST”) appointed an Official Committee of Unsecured Creditors of the Debtors.

5. On November 30, 2018, the Debtors filed the Sale Motion (Docket No. 106).

6. In the Sale Motion, the Debtors are seeking the entry of two orders. First, the Debtors are seeking an order establishing bidding procedures following an initial hearing. This “Bidding Procedures Order” would (a) authorize and schedule an auction at which the Debtors would solicit bids for the sale of substantially all of the Debtors' assets; (b) approve sale and

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<sup>2</sup> The Leased Premises include the Debtors' restaurant space located at: (a) 2007 W. Lucas Street, Florence, SC 29501; (b) 1430 E. Main Street, Lincolnton, NC 28092; (c) 5 Spartan Lane, Asheville, NC 28806; (d) 206 Highway 515 E., Blairsville, GA 30512; (e) 464 North Belair Road, Evans, GA 30809; (f) 5051 Calhoun Memorial Highway, Easley, SC 29640; (g) 1925 Boiling Springs Road, Boiling Springs, SC 29316; and (h) 6750 Pottery Road, Spartanburg SC 29303.

<sup>3</sup> Subsequent references to the Bankruptcy Code are by section number only.

bidding procedures related to the marketing of the Debtors' assets and the conduct of the auction; (c) approve the form and manner of the notices the auction/sale and the process for the assumption and assignment of the Debtors' executory contracts and unexpired leases and proposed cure costs related thereto. The Debtors would then, following a subsequent, final hearing, seek a "Sale Order" approving the sale free and clear of assets to either the Debtors' prepetition senior lender and DIP lender ACM Fatz VII LLC as the "Stalking Horse Bidder" or to another bidder submitting a higher/better bid and assuming/assigning executory contracts and unexpired leases to the prevailing bidder.<sup>4</sup>

7. Under the Sale Motion, the Stalking Horse Bidder, which is also the Debtors' prepetition senior lender and postpetition DIP lender, has submitted an initial credit bid of its prepetition senior secured debt in the amount of \$1,000,000.00 plus assumption of certain amounts of the DIP Facility, with the Stalking Horse Bidder being authorized to credit bid its prepetition debt in order to purchase the Debtors' assets.

8. The Bidding Procedures proposed by the Debtors in the Sale Motion would require, among other things, that any subsequent overbids from third-party bidders begin at \$4,400,000.00.

### **OBJECTION**

#### **1. The Sale Terms of the Debtors' Proposed Bidding Procedures will Chill Third-Party Bidding.**

A review of the sale terms clearly reveals that third-party bidding will be chilled if the Debtors' Bidding procedures are approved. First and foremost, the due diligence period requiring competing bids by January 11, 2018 is plainly unreasonable. Assuming approval and entry of a Bid Procedures Order on January 18, 2018, the date of hearing, during a brief 25-day

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<sup>4</sup> Capitalized terms not otherwise defined have the same meanings as in the Sale Motion.

period, a third-party bidder would be expected to conduct full due diligence, provide a complete list of each and every executory contract and unexpired lease the bidder intended to assume, and provide board or governing body evidence of authorization, evidence of financial ability and a 10% bid deposit for an entity with numerous locations. All these requirements must be met notwithstanding that (a) neither the Debtors nor the Stalking Horse Bidder has identified which executory contracts and unexpired leases it wishes to assume and (b) the entire process will play out in the midst of the holiday season; while a § 363 sale process often moves quickly in bankruptcy, the Landlord Parties are concerned that the proposed schedule has been accelerated to the point where third parties will not have a reasonable opportunity to evaluate and submit competing bids. Moreover, no provision is made in the Sale Motion for addressing differing assumption schedules among the Stalking Horse Bidder and competing bidders.

The Sale Motion calls for the Stalking Horse Bidder to be authorized to bid by means of a credit bid in an amount up to its prepetition and postpetition credit facilities. Sale Motion ¶ 22(iv)(g). At this juncture, and prior to the expiration of an approved Inspection Period for the examination of the Stalking Horse Bidder's liens or the calculation of its indebtedness, neither competing bidders nor creditors can be assured of the amount to which Stalking Horse Bidder could claim to be entitled to credit bid. This same issue presents a serious question as to the amount of the Initial Overbid. The Sale Motion provides that the Stalking Horse Bidder's bid shall be set at its credit bid of \$1,000,000.00, plus "assumption" of the DIP loan. Sale Motion ¶21. The Initial Overbid requirement is set at \$4,400,000.00. Sale Motion ¶22(ii)(a)(y). The DIP loan component of \$3,200,000.00, plus \$200,000.00 serves as the justification for the \$3,400,000.00 increase. Again, this assumes the accuracy of the balance due under the DIP loan.

Whether intended or not, such a sizeable increase for the Initial Overbid will undoubtedly chill bidding.

**2. The Assumption and Cure Terms of the Debtors' Proposed Bidding Procedures are Inequitable to Lease and Contract Counterparties.**

The proposed Bidding Procedures allow the Stalking Horse Bidder with what appears to be an indeterminate period to identify its list of executory contracts and unexpired leases to be assumed and assigned by the Debtors.<sup>5</sup> However, the Bidding Procedures would require that a counterparty to any of such contracts or leases file an objection by January 8, 2018. In light of the undetermined time frame for filing its Assumption and Assignment Notice, the objection period for contract/lease counterparties could be inequitably short.

An additional concern to contract/lease counterparties is the result should a third-party bidder successfully submit a winning bid. The cure objection deadline of January 8, 2018, will occur prior to the deadline for competing bids as well as the proposed auction date, leaving counterparties faced with the possibility of not knowing if there will be an alternative assumption and/or cure schedule to object to from a third-party bidder. Thus, any approved Bidding Procedures should make clear that if a third-party bidder prevails, the counterparties will have additional time to object to assumption and/or cure.

**3. Incorporation of Arguments Raised by the UST and Other Parties.**

In addition to the issues raised above, the Landlord Parties also stand with the UST in his Objection to the Sale Motion filed on December 13, 2018 (Docket No. 216), particularly with respect to the fact that (a) the Sale Motion fails to include necessary and relevant information that would be provided in a disclosure statement, particularly with respect to the benefits that

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<sup>5</sup> As set forth in ¶ 25 of the Sale Motion, the Debtors propose to file and serve their Assumption and Assignment Notice "As soon as practicable after entry of the Bidding Procedures Order."

unsecured creditors could expect to receive as a result of the proposed sale and (b) the proposed Bidding Procedures would provide the Debtors with unfettered decision-making authority with respect to any bids and broad discretion to make substantive decisions without further notice from the Court. The Landlord Parties also reserve the right, after having the opportunity to review any additional objection(s) to the Sale Motion, to join in any other arguments raised in such additional objection(s).

**CONCLUSION**

While a sale of the Debtors' business may very well be a required outcome in order to allow for the continued operation of the Debtors' restaurants, the current timeline is heavily tilted in favor of the Stalking Horse Bidder at the expense of other parties. As such, any order approving the proposed Bidding Procedures should remove the above-reference provisions.

Respectfully submitted,

**MOORE & VAN ALLEN PLLC**

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CHARLESTON, SC  
December 17, 2018

**CERTIFICATE OF SERVICE**

I, David B. Wheeler, do hereby certify that on December 17, 2018, I served the below-named document upon the parties listed below by electronic mail:

**OBJECTION OF OLD MILL STREAM, LLC; MRB, LLC; AND M&R INVESTORS, LLC TO DEBTORS' EXPEDITED MOTION, PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a), 363, AND 365, AND BANKRUPTCY RULES 2002, 6004, AND 6006, FOR ENTRY OF ORDERS (I) APPROVING SALE, BIDDING, NOTICE, AND AUCTION PROCEDURES IN CONNECTION WITH THE SALE OF SUBSTANTIALLY ALL OF THE ASSETS OF THE DEBTORS; (II) APPROVING ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (III) AUTHORIZING THE SALE OF THE DEBTORS' ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS, AND (IV) GRANTING RELATED RELIEF**

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