

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

In re:	)	Chapter 11
CAFÉ HOLDINGS CORP., et al,	)	Case No.: 18-05837 (hb)
Debtors.	)	

**OFFICIAL COMMITTEE OF UNSECURED CREDITORS' OBJECTION  
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**

The Official Committee of Unsecured Creditors (the "Committee") of Café Holdings Corp., *et al.* (the "Debtors") hereby objects 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* [Docket No. 106] (the "Motion")<sup>1</sup>. In support of this objection<sup>2</sup>, the Committee respectfully represents as follows:

<sup>1</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

<sup>2</sup> On December 11, 2018, the Committee filed its *Objection to the Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection to the Prepetition Lenders, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII)*

## INTRODUCTION

1. Although the Committee has been formed for less than two weeks, one thing is abundantly clear in these cases--the proposed sale process and sale timeline are designed solely to benefit the Debtors' pre-petition first lien and post-petition DIP lender, Atalaya Capital Management, LP ("Atalaya"), leaving nothing to the unsecured creditors. The bidding and sale procedures described in the Motion are unfair to the Debtors' unsecured creditors and should not be approved in their current form.

2. While the Debtors aver that they are engaging in this sale process to maximize value for their estates, their proposed sale process will almost certainly only benefit Atalaya and very likely leave the Debtors' estates administratively insolvent.

3. The Debtors' proposed timetable for the sale of their assets is unduly prejudicial to the Debtors' unsecured creditors and appears to be designed to inhibit potential competing bidders from conducting due diligence and gathering sufficient information to submit a competing bid.

4. It appears that Atalaya seeks to impose an expedited, controlled, and unfair sale process designed solely to protect Atalaya at the expense of unsecured creditors and, at the same time, hinder the Committee's investigation rights and prevent the Debtors from realizing maximum value for their businesses.

5. Further, certain key provisions of the Motion improperly benefit Atalaya to the disadvantage of the Debtors' estates as a whole.

6. For instance, Atalaya is allowed to credit bid its pre-petition debt for all of the Debtors' assets, despite the fact that its lien has not been proven valid.

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*Granting Related Relief* ("DIP Objection") [Docket No. 205]. As several of the Committee's grounds stated in the DIP Objection are relevant to the Committee's objection to the Motion, the Committee incorporates by reference herein its DIP Objection.

7. Further, the Motion seeks to allow Atalaya the ability to credit bid for clearly unencumbered assets, including Chapter 5 causes of action, which belong to the estate, should be preserved for the benefit of all unsecured creditors, and would otherwise provide a potentially meaningful source of recovery to the unsecured creditors.

8. In addition, Atalaya's proposed Asset Purchase Agreement (which, to date, remains unexecuted) is replete with critical, yet missing information, including which leases the Debtors intend to assume and assign to Atalaya and the extent of which liabilities (including post-closing liabilities and accounts payable liabilities) Atalaya intends to assume.

9. Finally, the Debtors must consult with the Committee to determine the highest and best bid for any offer received for the sale of its assets.

10. For the reasons stated more fully herein, the Motion should be denied unless modified to address the issues raised in this objection.

### **BACKGROUND**

11. On November 15, 2018 (the "Petition Date"), each of the Debtors filed a voluntary petition with this Court under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these cases.

12. On November 28, 2018, the Office of the United States Trustee appointed the Committee pursuant to section 1102 of the Bankruptcy Code.

13. The Debtors' prepetition capital structure is set forth in detail in the Motion, and is summarized in the chart below:

<b>DEBT FACILITY</b>	<b>LENDER</b>	<b>COLLATERAL</b>	<b>AMOUNT OUTSTANDING (IN MILLIONS)</b>
First Priority Secured Facility	Atalaya Capital Management, LP or its affiliates	Senior first lien on substantially all assets.	\$9.7 <sup>3</sup>
Second Priority Secured Facility	Benefit Street Partners L.L.P. and other lenders <sup>4</sup>	Subordinated second lien on substantially all assets.	\$2.0
Mezzanine Facility	Benefit Street Partners L.L.P. and other lenders	None.	\$17.5
Subordinated Note	Old Mills Stream, LLC	None.	\$1.9
<b>Total</b>			<b>\$31.1</b>

14. In addition, the Debtors owe at least \$20 million to trade vendors, current and former landlords, and other general unsecured creditors.

**THE PROPOSED BID PROCEDURES**

15. On November 30, 2018, the Debtors filed the Motion, seeking to sell substantially all of their assets to Atalaya for the following consideration: (i) a credit bid of \$1 million of its prepetition first lien debt, (ii) assumption of the Debtors’ outstanding principal and accrued interest owing to it under its DIP Facility, (iii) assumption of certain liabilities under its DIP Facility (excluding the Debtors’ and Committee’s professional fees), the Debtors’ WARN Act liabilities (if any), and certain undisclosed accounts payable.

16. Among other things, the Debtors seek to sell Atalaya certain executory contracts and unexpired leases (which have not yet been identified) and all of the Debtors’ chapter 5 causes of action (“Avoidance Actions”).

17. The Motion contemplates an extremely compressed auction process along the following

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<sup>3</sup> The Debtors stipulated that they owe not less than \$10.5 million under the Interim Order, an amount that is \$800,000 more than what is specified in the Motion.

<sup>4</sup> Benefit Street Partners L.L.P. and such other lenders are referred to herein as the “Prepetition Second Lien Lenders.”

timeline:

EVENT	PROPOSED DATE
Sale Objection Deadline	January 8, 2019 at 4:00 p.m. EST
Cure Objection Deadline	January 8, 2019 at 4:00 p.m. EST
Bid Deadline	January 11, 2019 at 10:00 a.m. EST
Auction	January 14, 2019 at 12:00 p.m. EST
Sale Hearing	January 15, 2019

18. Only the Debtors retain the right to determine which bid received at auction constitutes the highest and best bid.

19. In addition, the Motion sets forth the Debtors' proposed procedures for assuming and assigning certain executory contracts to Atalaya. First, "as soon as practicable" upon entry of the order approving the Motion, the Debtors propose to file and serve an Assumption and Assignment Notice setting forth the following information: (i) the contract(s) and/or lease(s) to be assumed and assigned to Atalaya; (ii) the name and address of the contract counterparty; (iii) the cure amount; and (iv) the deadline (January 8, 2019) for contract counterparties to object to the assumption and assignment and cure amount.

### **OBJECTION**

20. In pertinent part, Bankruptcy Code Section 363 provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate[.]" 11 U.S.C. § 363(b).

21. The overriding goal of any proposed asset sale under section 363 of the Bankruptcy Code is to maximize the proceeds received by a debtor's estate. *See Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 573 (3rd Cir. 2003).

22. The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate. *See e.g., In re Food Barn Stores, Inc.*, 107 F.3d 558,

564-65 (8th Cir. 1997). To accomplish that goal, bankruptcy courts are necessarily given discretion and latitude in conducting a sale. *In re Wintz Co.*, 219 F.3d 807, 812 (8th Cir. 2000) (stating that in structuring a sale of assets, bankruptcy courts “have ample latitude to strike a satisfactory balance between the relevant factors of fairness, finality, integrity, and maximization of assets”).

23. The Motion fails to meet the goals of establishing an open and fair bidding process designed to maximize the value for the Debtors’ estates. In fact, the proposed bid procedures and Asset Purchase Agreement contain provisions that will accomplish the opposite result, resulting in an overall process that is unfairly slanted in favor of Atalaya that will leave the estate administratively insolvent with no recovery to unsecured creditors.

**I. Atalaya’s Credit Bid**

**a. The Motion Should Not Establish Atalaya’s Credit Bid Rights**

24. In connection with a sale under Bankruptcy Code Section 363(b), the holder of a secured claim may, under certain circumstances, credit bid its secured claim. *See* 11 U.S.C. § 363(k) (“such holder may offset such claim against the purchase price of such property”). The secured claim holder’s ability to credit bid is not an absolute, unfettered right. Courts have, and this Court may, for cause, restrict or condition the secured claim holder’s ability to credit bid. *Id.*

25. Bankruptcy Courts in this District have previously correctly exercised authority under Bankruptcy Code Section 363(k) to restrict credit bids. *See, In re Daufuskie Island Properties, LLC*, 441 B.R. 60, 64 (Bankr. D.S.C. 2010) (refusing credit bid where claim is disputed). Courts in other jurisdictions have likewise done so. *See, e.g. In re Fisker Automotive Holdings Inc.*, 510 B.R. 55, 60-61 (Bankr. D. Del. 2014); *In re The Free Lance-Star Publishing Co. of Fredericksburg, VA*, 512 B.R. 798, 808 (Bankr. E.D. Va. 2014) (restricting credit bid for

inequitable conduct and to foster competitive bidding environment); *In re RML Development, Inc.*, No. 13-29244, 2014 WL 3378578, at \*5 (Bankr. W.D. Tenn. July 10, 2014) (finding cause to limit credit bid to uncontested portion of claim).

26. Courts have been particularly cognizant of this risk when a lender applies pressure to foreclose on its collateral in the bankruptcy with a bid that offers little to nothing for the estate. *Fisker Automotive*, 510 B.R. at 61; *In re Free Lance-Star Publ'g Co.*, 512 B.R. 798, 806 (Bankr. E.D. Va. 2014) (denying right to credit bid where lender “pressed the Debtor ‘to walk hand in hand’ with it through an expedited bankruptcy sales process” in a “classic loan-to-own scenario”).

27. The Committee recognizes this Court’s opinion in *In re Merit Group, Inc.*, 464 B.R. 240 (Bankr. D.S.C. 2011), whereby the Court denied a committee’s request to deny or condition a junior creditor’s right to credit bid.

28. However, in *Merit Group*, the DIP lender had previously provided several concessions to the estate and general unsecured creditors, including (1) the exclusion of certain assets and claims from the DIP Lender’s collateral; (2) reservation of certain rights by the Committee; (3) a carve-out for an initial plan funding commitment for unpaid professional expenses, certain fees and expenses (not to exceed \$800,000 for fees and \$200,000 for expenses) and United States Trustee fees; and (4) the DIP Lender agreeing to make a loan of \$500,000 “Initial Plan Funding Commitment” for the Debtors to use in connection with confirmation of a chapter 11 plan. *Id.* at 244.

29. The Court recognized that the “Debtors have met their burden of showing that it is more likely than not that continuing on the proposed path will preserve the chance of some distribution to creditors, other than [the DIP Lender].” However, the Court also cautioned that “if the DIP or Trustee is proposing a sale where the only parties to benefit are the secured creditors

and the professionals, the court will generally disapprove the sale. To that end sellers should propose a ‘carve out’ for priority or unsecured creditors. This carve out can range from 1% to over 20%...One can also reasonably anticipate that in sales where there are significant issues about employee retention, court may be sympathetic to a reduction in the proposed carve out.” *Id.* at 251 (internal citations omitted).

30. Here, Atalaya’s credit bid will provide nothing to the estates. Indeed, nothing is being proposed to the general unsecured creditors and the Debtors are only proposing a post-termination carve-out of \$40,000 for the chapter 11 case and \$10,000 in the event of conversion to chapter 7. These amounts are woefully deficient for purposes of an orderly wind-down of these Debtors and means that these estates would be left administratively insolvent.

**b. Atalaya Should Not Be Allowed to Credit Bid at the Auction or Receive any Proceeds of the Sale on Account of its Alleged Liens**

31. The Motion provides for Atalaya making a credit bid of the amounts owed under its DIP Facility, plus \$1 million of its pre-petition first lien debt. However, Atalaya should not be permitted to credit bid its pre-petition lien because its liens and claims have not yet been proven valid. Enabling Atalaya to credit bid would place the Debtors’ estates at a significant disadvantage. For instance, the Motion enables Atalaya to credit bid for clearly unencumbered assets, including the Avoidance Actions.

32. Because Atalaya’s alleged prepetition liens and security interests in the Debtors’ assets have not been proven valid, the exercise of the Court’s discretion under Bankruptcy Code Section 363(k) denying the credit bid, is appropriate. The Committee, which was formed less than two weeks ago, is in the process of investigating Atalaya’s alleged liens and security interests related to the first lien debt and, until such time as the Committee is satisfied with, or when Atalaya establishes, the validity of its alleged liens and security interests, the privilege of a credit bid should

not be afforded.

33. Where the lender's liens have not been proven valid, courts have prevented or conditioned the lender's ability to credit bid or put in place certain protections that safeguard the debtor's unsecured creditors. *See, e.g., In re Akard St. Fuels, L.P.*, 2001 WL 1568332 (N.D. Tex. Dec. 4, 2001) (denying lender's ability to credit bid and allowing sale free and clear of all liens under section 363(f)(4) where lender's liens were subject to a challenge and lender was "capable of bidding cash at the auction and later recovering the cash if it proved its liens"); *In re McMullan*, 196 B.R. 818, 835 (Bankr. W.D. Ark. 1996) ("At any such sale, NBC shall not be entitled to offset bid any of its claimed liens or security interests under [section 363(k)] because the validity of its liens and security interests are unresolved"); *In re Miami General Hospital, Inc.*, 81 B.R. 682 (S.D. Fla. 1988) (permitting lender's credit bid but preserving the right of the trustee to file an adversary proceeding or otherwise object to the extent, validity and priority of the lender's liens); *In re Octagon Roofing*, 123 B.R. 583, 592 (Bankr. N.D. Ill. 1991) (permitting lender's credit bid so long as lender posted irrevocable letter of credit drawn on other bank in order to protect trustee if lien was later set aside).

34. Here, it is clear that Atalaya's alleged liens and claims underlying the first lien debt have not been proven valid. The Committee's challenge deadline is 45 days after the Petition Date, or December 30, 2018. If Atalaya is allowed to credit bid and is permitted to monetize its claims through a credit bid, the Committee's challenge period applicable to the lenders' liens would be severely impaired.

**c. Approval of Atalaya's Credit Bid Must Not Prejudice the Rights and Remedies of any Party**

35. Even if Atalaya is allowed to credit bid based on its first lien debt, the bid procedures, the order approving the Motion, and the sale order must make clear that Atalaya's

alleged liens and security interests are not *ipso facto* found valid by the entry of the bid procedures or sale order. Thus, the Committee requests that if the Atalaya, or any other alleged secured lender of the Debtors, are allowed to credit bid, the bid procedures and all sale related orders include the following language:

The failure of the Committee to object to a bid put forth by the Debtors pre and post-petition lenders, including but not limited to Atalaya (collectively, the “Lenders”), or the Court’s approval of any such credit bid shall not (a) prejudice or impair the rights of the Official Committee of Unsecured Creditors (the “Committee”) to challenge the nature, extent, validity, priority, perfection or amount of the Lenders’ alleged liens, security interests and claims or (b) release the Lenders from any causes of action which can be brought by or on behalf of the Debtors’ estates.

36. For the same reasons, Atalaya should not receive payment from the proceeds of any sale until such time as its liens are determined to be valid and have the priority alleged. Entry of any order approving the bid procedures or sale should provide that it is not a waiver of, nor shall it impair the Committee’s right to, object to the extent, priority and/or validity of the lenders’ alleged liens. Any order approving the bid procedures or sale order should also expressly state that any and all estate claims against any pre-petition lender and management of the Debtors are preserved for the benefit of the Debtors’ estates.

37. To the extent that this Court is inclined to allow Atalaya to credit bid on its purported collateral, and there is ultimately a successful challenge asserted against Atalaya that determines its liens on such collateral are defective, Atalaya should be required to pay cash for those assets, regardless of whether such determination is made post-closing.

38. Similarly, to the extent a cash bidder is the successful bidder for the Debtors’ assets, such cash proceeds should be held in escrow by the Debtors until the Committee is able to complete its statutory duties of investigating Atalaya’s purported liens.

39. The relief requested herein is particularly appropriate in these cases, as the

Committee’s challenge deadline is December 30, 2018, and any action challenging Atalaya’s liens (or asserting other causes of action) brought by the Committee will most likely not be resolved until after the closing of the asset sale. Accordingly, the Committee merely seeks to preserve the *status quo* until it is satisfied that Atalaya is not unduly improving their position via a credit bid for the Debtors’ assets.

**II. Inadequate Sale Timeline and Process**

40. As set forth in the DIP Objection, notwithstanding the prepetition marketing effort that took place, the Debtors must be given an adequate time period on a postpetition basis to market their assets, which now can be sold free and clear of liens, claims and encumbrances, and based on the circumstances that exist now (not prepetition) to maximize the value of their assets. The currently proposed 60-day sale process is too short of a window to allow a full and fair opportunity for potential competing bidders to evaluate possible overbids, especially as it occurs over the end-of-year holiday season.

41. Below is a chart of sale milestones in recent restaurant bankruptcy cases:

<b>Case</b>	<b>District</b>	<b>Time between filing Bid Procedures and Bid Due Date</b>	<b>Time between filing of Bid Procedures and the Auction Date</b>	<b>Time between filing of Bid Procedures and the Sale Hearing</b>
<i>Café Holdings Corp.</i> (proposed)	SC	42 days	45 days	46 days
<i>Garden Fresh Restaurant Intermediate Holding, LLC</i>	DE	60 days	62 days	69 days
<i>Ignite Restaurant Group, Inc.</i> (Joe’s Crab Shack)	S.D. Tx.	58 days	62 days	72 days
<i>Cosi Inc.</i>	D. Mass.	52 days	54 days	61 days
<i>RM Holdco LLC</i> (Real Mex)	DE	46 days	59 days	67 days
<i>PGHC Holdings, Inc.</i> (Papa Gino’s)	DE	67 days	72 days	79 days

42. As the Court can see, the proposed sale milestones for the instant case are tighter

than the milestones in other recent restaurant cases.

43. The restrictive timeline proposed by the Debtors does not allow sufficient time for third party bidders to formulate and submit qualifying bids, and simply acts as a path to pay Atalaya as quickly as possible, without regard to the Debtors' fiduciary duty of maximizing the value of these bankruptcy estates.

44. Since Atalaya acquired its first lien position only days prior to the Petition Date, there is no rational basis for allowing this new creditor (and stalking horse buyer) to determine the course that these cases will take. At a minimum, all milestones in the Motion should be postponed by at least one month.

45. In any event, at a minimum, the deadline to file objections to the sale must occur *after* the sale, rather than before the sale as presently scheduled. Currently, the sale objection deadline is January 8, 2019, with the auction scheduled for January 14, 2019. Thus, the deadline to file objections to the sale must be extended to after January 14, 2019.

### **III. Sale of Unencumbered Assets**

46. As set forth in the DIP Objection, certain of the Debtors' assets are unencumbered and should not be allowed to be purchased through credit bidding. These assets include, without limitation: (a) store-level cash that was not in bank accounts as of the Petition Date; (b) commercial tort claims; (c) leasehold interests; and (d) avoidance actions arising under chapter 5 of the Bankruptcy Code.

47. The intent behind avoidance powers and a debtor's power to bring causes of actions is to allow the debtor in possession to gain recoveries for the benefit of all unsecured creditors. *See Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. Partn. IV*, 229 F.3d 245, 250 (3d Cir. 2000); *In re Sweetwater*, 55 B.R. 724, 735 (D. Utah 1985) (avoiding powers are

meant to benefit creditors generally and promote equitable distribution among all creditors). As such, avoidance actions are uniquely for the benefit of general unsecured creditors of the estate.

48. The same logic that applies to avoidance actions applies equally to other unencumbered assets. The entire purpose of the Bankruptcy Code and its distribution scheme is to ensure that creditors share ratably in unencumbered assets.

49. As unencumbered assets may be the sole source of recovery for unsecured creditors in these cases, these assets should be excluded from any sale.

50. However, in the event Atalaya wishes to purchase any unencumbered assets, such assets must be paid for in cash, at the fair market value of those assets.

#### **IV. Committee Consultation and Consent Rights**

51. The Committee must be granted meaningful and significant consent and consultation rights with respect to all aspects of the Debtors' decision making process, including but not limited to (a) exclusion of bidders from due diligence or bidding, (b) determination with respect to a Qualified Bidder, Starting Bidder, and Backup Bidder (c) determination with respect to a Qualified Bid, Starting Bid, and Backup Bid; and (d) ultimately determining the highest and/or best bid. Further, any modification or waiver of the bid procedures should require prior consultation with the Committee.

52. The Committee, in order to fulfill its duties to the creditor body as a whole, must have both oversight power and the ability to object to the Debtors' actions and/or challenge the Debtors' decisions regarding the proposed sale, if necessary.

53. Therefore, the proposed bidding procedures order should be revised to reflect that (i) the Debtor must consult with the Committee and that the Committee may request a hearing if the Debtor and the Committee cannot agree, and (ii) the Debtor will act "reasonably."

54. The Committee asserts that oversight of this process is necessary to ensure that the estate is receiving maximum value for its assets. Such a requirement will not be onerous to the Debtor.

55. Further, as Atalaya seeks to credit bid, it should be excluded as a consultation party, as having access to review bids as they come in and determine who is a qualified bidder would provide it an inherent advantage over all other bidders.

V. **The Assumption and Assignment Notice Must be Fixed as of the Auction Date**

56. Currently, the Debtors propose to file the Assumption and Assignment Notice “as soon as practicable” upon entry of the order approving the Motion.

57. Because rejection of a contract or unexpired lease will result in additional claims against the Debtors’ estates, and therefore, impact the value of a particular bid, the list of assumed contracts must be fixed by a date certain and as of the auction date. Otherwise, the value of a bid could prove to be illusory and the Debtors may seek approval of a sale to a proposed buyer who did not submit the highest and best bid.

58. Further, any contract counterparty, who the Debtors did not identify on the first Assumption and Assignment Notice must have more than ten days from being identified on any supplemental Assumption and Assignment Notice to object to their treatment thereunder.

VI. **Adequate Assurance of Future Performance**

59. The Debtors may not assume and assign any leases unless there is adequate assurance of future performance under the leases. *See* 11 U.S.C. § 365(b)(1)(C); 11 U.S.C. § 365(f)(2). Further, it is the Debtors’ burden of establishing adequate assurance of future performance. *In re Toys “R” Us, Inc.*, 587 B.R. 304, 311 (Bankr. E.D. Va. 2018).

60. Therefore, before any leases can be assumed and assigned, any Initial Overbid must

contain information supporting the bidder's ability to comply with the requirements of adequate assurance of future performance under Bankruptcy Code Sections 365(f)(2)(B), and if applicable, Bankruptcy Code Section 365(b)(3), including the bidder's financial wherewithal and willingness to perform under any contracts that are assumed and assigned to the bidder.

**VII. Landlords' Authority to Bid on Their Leases**

61. The bid procedures should include a process for landlords to credit bid the outstanding amounts owing on their own leases, as they are the fee simple owners of the property.

62. Landlords do not need access to due diligence information and should not need to post a deposit of ten percent (10%) of the purchase price or provide an ability to provide adequate assurance of future performance of their leases. Rather, a landlord need only submit a bid letter that evidences the bid on its lease and an agreement to execute an agreeable form of lease termination or other agreement, which should therefore entitle the landlord to appear and participate at the auction.

**VIII. Partial Bids**

63. The bid procedures should also include a process by which bidders may submit an Initial Overbid for a discrete Purchased Asset.

64. Such partial bids must satisfy all of the conditions required for Initial Overbids, except as to the Initial Overbid Amount and the Purchased Assets proposed to be purchased.

65. The Debtors, in consultation with the Committee, will then determine whether such partial bids qualify as Qualified Bids when viewed as a stand-alone bid or when aggregated together with other partial bids and/or landlord lease bids.

**IX. Assumption of Accounts Payable Must be Fixed Prior to the Auction Date**

66. In addition to the Assumption and Assignment Notice being fixed prior to the

auction date, all assumed accounts payable must be fixed prior to the auction date.

67. As consideration for the purchase of substantially all of the Debtors' assets, Atalaya proposes to assume certain accounts payable of the Debtors. However, Atalaya has not provided a list of the accounts payable it intends to assume.

**X. Access to Records**

68. To evaluate the sale process, the Debtors should provide the Committee with the CIM and any other solicitation materials that Duff & Phelps Securities, LLC ("Duff & Phelps") provided potential buyers in the Spring and Summer of 2018, along with the list of the 153 financial buyers and 48 strategic buyers solicited for the sale of the Debtors' assets, and the 21 parties who executed non-disclosure agreements, and any correspondence related thereto.

69. Further, the Committee must be granted immediate access to the Due Diligence Data Room and be provided a list of any potential buyers who were contacted post-petition regarding a sale of the Debtors' assets.

70. Finally, as the sale contemplates the transfer of the Debtors' Files and Records, the Committee must have access to any of the Debtors' books and records post-closing from both the Debtors and the potential purchaser. Because access to such Files and Records post-closing will be critical for both the Debtors and the Committee to administer the Debtors' estates post-closing, any asset purchase agreement must be modified to require the purchasers to provide access to the Debtors' Files and Records.

**XI. Compensation to Duff & Phelps**

71. In the Debtors' notice of sale, they propose to pay Duff & Phelps compensation in the amount of 4% of the sale consideration up to \$10,000,000 and 6% of sale consideration in excess of \$10,000,000, subject to a minimum of \$450,000.

72. However, on December 4, 2018, the Debtors filed an *Application to Employ and*

*Retain Duff & Phelps Securities, LLC as Investment Bank to the Debtors and Debtors in Possession Nunc Pro Tunc to the Petition Date* [Docket No. 128] (“Duff & Phelps Employment Application”).

73. As such, any compensation paid to Duff & Phelps from the Sale must be paid pursuant to the Duff & Phelps Employment Application, which the Committee reserves all rights and objections with respect thereto.

#### **RESERVATION OF RIGHTS**

74. The Committee expressly reserves all rights, claims, defenses, and remedies, including, without limitation, to supplement and amend this objection, to raise further and other objections to the Motion and the form of Final Order, and to introduce evidence prior to or at any hearing regarding the Motion in the event that the Committee’s objections are not resolved prior to such hearing.

#### **CONCLUSION**

75. For all of the foregoing reasons, the Committee respectfully requests that the Court deny the Motion in the form presented.

Dated: December 17, 2018

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Unsecured Creditors

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA**

In re:	)	Chapter 11
	)	
CAFÉ HOLDINGS CORP., <i>et al.</i> , <sup>1</sup>	)	Case No. 18-05837 (hb)
	)	
Debtors.	)	Jointly Administered
_____	)	

**CERTIFICATE OF SERVICE**

I the undersigned administrative assistant with the law offices of Nelson Mullins Riley & Scarborough LLP, proposed counsel of record for the Official Committee of Unsecured Creditors of the above-captioned debtors, do hereby certify that I have served all parties in this action with a copy of the pleading(s) hereinbelow specified by either mailing a copy of the same by United States Mail, postage prepaid, or electronic service through the court's CM/ECF case filing system to the following:

Pleading: Official Committee of Unsecured Creditors' Objection 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

Parties Served: See Attached Mailing Matrix

s/Stephanie Arnold  
Stephanie Arnold  
Administrative Assistant

December 17, 2018

<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). The location of the Debtors' corporate headquarters is 4324 Wade Hampton Blvd., Suite B, Taylors, South Carolina 29687.

Label Matrix for local noticing  
0420-7  
Case 18-05837-hb  
District of South Carolina  
Spartanburg  
Mon Dec 17 14:08:05 EST 2018

7420 BROAD RIVER ROAD LLC  
BARBARA HUNTER  
1525 ASHLEY RIVER RD  
CHARLESTON SC 29407-5201

AAA Accurate Backflow Testing and Repair, LL  
c/o Tobias G. Ward, Jr.  
PO Box 50124  
COLUMBIA, SC 29250-0124

ACM Fatz VII LLC  
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Fox Rothschild LLP  
2 West Washington Street  
Suite 1100  
Greenville, SC 29601-2784

Atmos Energy Corporation  
Attn: Bankruptcy Group  
PO Box 650205  
Dallas, TX 75265-0205

B AND T SAND CO  
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PO BOX 84007  
LEXINGTON SC 29073-0001

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1439 VINTAGE DR  
WATKINSVILLE GA 30677-5824

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STE 200  
GREENSBORO NC 27403-3623

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STE 1900  
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366 NORTH CHURCH ST  
SUITE 400  
SPARTANBURG, SC 29303-3637

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STE 190  
SCOTTSDALE AZ 85255-5494

STORE MASTER FUNDING V LLC  
LYENA HALE  
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SCOTTSDALE AZ 85255-5494

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THRIFT BROTHERS  
TIM HYDRICK  
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WESTLAKE VILLAGE CA 91361-3428

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Broomfield, CO 80021-8254

VALASSIS DIGITAL  
RICH MELIN  
MAXPOINT INTERACTIVE INC  
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PITTSBURGH PA 15251-6668

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The preferred mailing address (p) above has been substituted for the following entity/entities as so specified by said entity/entities in a Notice of Address filed pursuant to 11 U.S.C. 342(f) and Fed.R.Bank.P. 2002 (g) (4).

South Carolina Department of Employment and  
Document Control-Bankruptcy  
P.O. Box 995  
Columbia, SC 29202-0995

Vandelay, LLC  
3578 St. Matthews Road  
Orangeburg, SC 29118

(d)Vandelay, LLC  
3578 St. Matthews Road  
Orangeburg, SC 29118

The following recipients may be/have been bypassed for notice due to an undeliverable (u) or duplicate (d) address.

(u)B&T Sand Company, Inc.

(u)Robert B. Barrier

(u)William L. Barrier

(u)CLAIMS AGENT

(u)Michael A. DiGiacomo

(u)Bruce Dressler

(u)East Forest Plaza III, LLC

(u)M&R Investors, LLC

(du)M&R Investors, LLC

(u)MRB, LLC

(du)MRB, LLC

(u)Official Committee of Unsecured Creditors

(u)Old Mill Stream, LLC

(u)Betty B. Tyson

(u)Joel A. Tyson

End of Label Matrix	
Mailable recipients	86
Bypassed recipients	15
Total	101