UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

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

OBJECTION OF UNITED STATES TRUSTEE TO (I) NOTICE OF PROPOSED SALE OF THE DEBTORS' ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS, THE AUCTION, AND THE SALE HEARING AND (II) NOTICE OF CURE AMOUNTS AND PROPOSED ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND LEASES

The United States Trustee (the "UST"), by and through his counsel, hereby files this objection to the Notice of Proposed Sale of the Debtors' Assets Free and Clear of Liens, Claims, Encumbrances and Other Interests, the Auction, and the Sale Hearing (the "Notice of Sale," ECF Doc. No. 337) and the Notice of Cure Amounts and Proposed Assumption and Assignment of Executory Contracts and Leases (the "Cure Notice," ECF Doc. No. 355). The UST files this objection pursuant to the authority granted to him by 28 U.S.C. § 586 and 11 U.S.C. § 307.[1] In support of the Objection, the UST respectfully states:

SUMMARY

The Debtors have made clear that they are not in a position to reorganize, and that the focus of these Chapter 11 cases will be on the liquidation of the Debtors' assets. As a matter of fact, they filed a motion seeking approval of a Global Settlement which seeks, among other things, the dismissal of the cases following the sale of the Debtors' assets. Atalaya Capital

[1] Further reference to Title 11 U.S.C. § 101, *et. seq*. will be by section number only.

Management, LP and some of its affiliates (collectively, "Atalaya"),[2] which bought the first lien debt on November 13, 2018 – two days before the cases filed bankruptcy – will be the primary beneficiary of the liquidation. Atalaya, which was owed approximately $10 million as of the Petition Date, has offered to lend the Debtors $3.2 million to fund the bankruptcy proceedings, while acting as stalking horse bidder for the Debtors' assets.

The agreement between the Debtors and Atalaya, as set forth in the Bidding Procedures Motion, contemplates: (a) the sale of substantially all of the assets of the Debtors; (b) consideration from the Stalking Horse bidder consisting of a credit bid of $1 million of the Debtor's obligation to the Stalking Horse Bidder under the First Priority Secured Facility and the assumption of the outstanding principal and accrued interested owed by the Debtors under the DIP Facility; and (c) the Stalking Horse Bidder's assumption of certain of the Debtors' liabilities – including what appears to be bonus payments to some of the Debtors' insiders. While the auction has yet to take place, what is clear is that the chance of any cash recovery for any creditors – aside Atalaya – is slim to none.

The Debtors ultimately will have to justify the sound business reason behind the sale and meet their burden under 11 U.S.C. § 363 that, among other things, the sale is for a fair price, is in good faith, and can be deemed free and clear of all liens pursuant to the requirements of § 363(f). Against that backdrop, and with reservations of a sale that will result in no significant benefits to any creditors aside Atalaya, the UST objects to the sale on the following grounds:

- The Debtors have taken the liberty – without seeking any order from the Court or without proving that they should be protected under one of the exceptions set forth in § 107(b) – to redact significant information from the Revised APA and attached Disclosure Schedules.

[2] The affiliate that is proposed to act as the stalking horse bidder is ACM Fatz VII, LLC (the "Stalking Horse Bidder").

- The Debtors seek approval of all aspects of the sale under § 363, including the approval of the Revised APA which contemplates the funding by Atalaya of Bonus Payments (as defined below) *as a condition precedent to the closing*, while ignoring the requirements of § 503(c) and failing to shed any light whatsoever as to (a) the identity of all individuals who will be part of the Executive Bonus Compensation Plan, (b) the amounts that the key employees are to receive, and (c) most importantly, why the Bonus Payments need not meet the requirements of § 503(c).

GENERAL BACKGROUND

1. On November 15, 2018 (the "Petition Date"), the Debtors each filed a voluntary petition in this Court for relief under Chapter 11 of the Bankruptcy Code. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Chapter 11 cases are being jointly administered for procedural purposes.

2. On November 28, 2018, the Office of the UST appointed a committee of general unsecured creditors (the "Committee").

3. As set forth in more detail in the First Day Declaration of Eric Easton, as of the Petition Date, the Debtors had, in aggregate, approximately $23 million in total assets net of accumulated depreciation, of which $14 million consisted of intangible assets. *See* Declaration of Eric Eason In Support of Chapter 11 Petitions and Certain First Day Motions, ECF Doc. No. 17 (the "First Day Declaration") at ¶ 23. Moreover, the Debtors' capital structure is comprised of outstanding funded-debt obligations in the aggregate principal amount of approximately $31 million. *See* First Day Declaration at ¶ 32. The Debtors also owe approximately $20 million to trade vendors, current and former landlords, and other general unsecured creditors. *Id.* at ¶ 48.

4. On the Petition Date, the Debtors filed the DIP Motion, seeking entry of an order authorizing the Debtors to obtain secured post-petition financing from Atalaya in the aggregate

amount of $3.2 million. Three separate interim DIP Orders were entered (ECF Doc. Nos. 70, 248, and 328), authorizing the borrowing in the total interim amount of $2,500,000, with a final DIP hearing scheduled on the same date as the sale hearing.

5. The UST objected to the DIP Motion, which objection was preserved until the final DIP hearing scheduled for the same date and time as the sale hearing. *See* ECF Doc. No. 185.

6. On November 30, 2018, the Debtors filed the Bidding Procedures Motion, seeking to sell substantially all of their assets to the Stalking Horse Bidder for approximately $4.2 million in the aggregate, consisting of a non-cash credit bid of prepetition senior indebtedness and assumption of post-petition indebtedness. *See* Bidding Procedures Motion, Exhibit 2, ECF Doc. No. 106-2 (Form of Sale Notice). The UST raised an objection with respect to the Bidding Procedures Motion, among other things, arguing that the Bidding Procedures Motion lacked any information as to the benefit of the sale and the Debtor's ability to confirm a plan if the sale were authorized. *See* ECF Doc. No. 216.

7. An order approving the bidding procedures and scheduling the sale hearing was entered on January 10, 2019, resolving in part some of the concerns raised by the UST and deferring other issues raised to the sale hearing. *See* ECF Doc. No. 335.

Notice of Sale

8. On January 10, 2019, the Debtors filed the Notice of Sale which provides various information regarding the proposed sale and highlights for parties in interest, among other things, the following:

- The sale is to be through a public auction currently scheduled for February 7, 2019.

- The consideration to be received is estimated at approximately $4.2 million in the aggregate, consisting of a non-cash credit bid of prepetition senior indebtedness and/or assumption of post-petition indebtedness, which, absent a competing bid that contemplates cash consideration in excess of approximately $15.7 million, would not result in a cash distribution to any creditor.

- Various parties assert liens on the Debtor's assets, including (a) Atalaya Administrative LLP, as agent, in the principal amount of $9,698,584.13, (b) BSP Agency, LLC, in the principal amount of $2,000,000, (c) Sysco Columbia, LLC, in the amount of $2,784,619.66, (d) Sysco Charlotte, LLC, in the amount of $1,152,031.26, (e) Refrigeration Heroes of Greenville in the amount of $1,950.48; (f) City of Rockingham for taxes in the amount of $1,102.92; (g) Greene County Trustee for taxes in the amount of $1,413.00; (h) Spartanburg County Tax Collector for taxes in the amount of $7,921.25, (i) Guilford County Tax Dept. for taxes in the amount of $2,782.87, (j) Richmond County Tax Collector for taxes in the amount of $8,598.61, (k) Ridgeway Plumbing and Services Inc. in the amount of $1,026.00 secured by a mechanics and materialman's lien; and (l) Greenwood County for taxes in the amount of $46,012.83 (collectively, the "Lienholders").

Cure Notice

9. On January 10, 2019, the Debtors also filed the Notice of Cure Amounts and Proposed Assumption and Assignment of Executory Contracts and Leases. *See* ECF Doc. 355. Exhibit A, attached to the Cure Notice, sets forth a list of the cure costs and Transferred Contracts. The Cure Notice, however, provides that "[n]ot all of the agreements listed in Exhibit A will be assumed and assigned by the Debtors."[3] Among other contracts, leases, and

[3] The revised Asset Purchase Agreement provides at Section 5.8(iii):

> No later than three Business Days prior to the Auction, Buyer shall, by delivering written notice to Sellers, designate each Contract, Lease or Real Property Lease on the Contracts Schedule that it desires to acquire as a Transferred Contract as "Assumed". Each Contract, Lease, or Real Property Lease so designated as "assumed" is referred to herein as a "Transferred Contract". Prior to the Sale Hearing, Sellers shall have filed a notice with the Bankruptcy Court setting forth the Transferred Contracts.

See Asset Purchase Agreement, ECF Doc. No. 354 at § 5.8.

agreements, the Cure Notice lists the following three employment agreements to be assumed, with their respective proposed cure amounts:

Contracts Counterparty	Description of Contract or Lease	Proposed Cure Amount
James Mazany – President & Chief Executive Officer	Employment Agreement	$137,500
Eric Easton – CFO, Treasurer, and Secretary	Employment Agreement	$70,000
Holly Smith – Vice President of Brand Services	Employment Agreement	$37,500

Revised Asset Purchase Agreement

10. On January 15, 2019, the Debtors filed the Notice of Filing of Revised Asset Purchase Agreement, attaching to it a copy of the revised Asset Purchase Agreement by and Among Café Holdings Corp., the Subsidiaries of Café Holdings Corp., and ACM Fatz VII LLC (the "Revised APA"). *See* ECF Doc. No. 354.

11. The Revised APA has attached a copy of the Disclosure Schedules. *See* ECF Doc. No. 354, pp. 61-93. Some of the information from the Disclosure Schedules, however, is redacted. *See* Disclosure Schedules at § 1.1 (value of inventory, furnishings, and equipment which is part of the "Acquired Assets"), § 3.3 (Non-contravention; Government Filings); § 3.4 (Other Assets); § 3.12 (Employee Benefits and Employees); and § 6.11 (Executive Bonus Compensation Plan). Despite redacting substantial information from the Revised APA's Disclosure Schedules, the Debtors never sought authority from the Court to do so under § 107 or other statutes.

12. Section 3.12 of the Disclosure Schedules indicates that the Stalking Horse Bidder is not intending to assume the 2018 Restaurant Manager Incentive Plan or the Operating Partner Agreement, by and between Café Enterprises, Inc. and an identified employee dated as of March 29, 2016, as amended by that Amendment dated as of August 1, 2016 (collectively, the

"Management Incentive Plan Agreements"). The Disclosure Schedule, however, provides that "Buyer and Seller's management [are] to amend the Management Incentive Plan Agreements in connection with the Transaction." *See* Revised APA, Disclosure Schedules at § 3.12.

13. Section 6.11 of the Revised APA provides:

> **Executive Bonus Compensation Plan**. At or prior to Closing, Buyer shall enter into separate individual agreements with certain key employees or management identified on Schedule 6.11 (as applicable, the "Key Employees"), regarding the payment of certain bonus payments to such Key Employees, up to the amounts set forth on Schedule 6.11, all in accordance with, and subject to, the terms of such individual agreements to be agreed upon by Buyer and Sellers. The Key Employees and amounts set forth on Schedule 6.11 can be changed prior to the Closing with the consent of both Buyer and Sellers. For the avoidance of doubt, the aggregate maximum amount to be paid to all of the Key Employees as set forth on Schedule 6.11, taken as a whole, shall not be reduced by the Buyer prior to such time as Buyer and every Key Employee enter into the individual agreements relating to such bonus payments.

14. As set forth above, Schedule 6.11 is redacted form the Revised APA.

Global Settlement

15. On January 15, 2019, the Debtors also filed a motion seeking an order approving a global settlement between the Debtors, the Committee, and Atalaya (the "Global Settlement"). *See* ECF Doc. 357.

16. Among other things, the Global Settlement, contemplates (a) the payment of all allowed stub rent claims in full, all allowed claims under § 503(b)(9), all of the allowed administrative claims set forth in the Final DIP Order Budget, and all fees and expenses of the Court and the UST; (b) DIP Advances to be provided by Atalaya to fund the total amount of payments to be made under the Executive Bonus Compensation Plan, and (c) the ultimate dismissal of the case.

17. With respect to the contemplated Executive Bonus Compensation Plan, the term sheet for the Global Settlement contemplates:

> On or before the closing of the Sale, the DIP Secured Parties shall deposit into escrow sufficient DIP Advances to fund the amount of payments to be made under the Executive Bonus Compensation Plan on the Sale closing date. The funding of the Executive Bonus Compensation Plan shall be a condition precedent to the closing of the Sale.

See ECF Doc. No. 357-1 p. 2.

ARGUMENT

As this Court previously held, "[t]here is no requirement under § 363(b) that there be equity in property of the estate above any existing liens or interests before the court can approve a sale," however, "[f]rom a pragmatic standpoint, equity is normally necessary to realize a distribution to unsecured creditors and to justify a sale, and courts generally decline approval when a secured creditor is the only or a primary beneficiary of the sale." *In re Childers*, 523 B.R. 608, 612 (Bankr. D.S.C. 2015). Accordingly, the Debtors ultimately carry the burden of proving at the sale hearing: (a) a sound business reason or emergency justifies the pre-confirmation sale; (b) the sale has been proposed in good faith; (c) adequate and reasonable notice of the sale has been provided to interested parties; and (4) the purchase price is fair and reasonable. *In re Daufuskie Island Properties, LLC*, 431 B.R. 626, 638 (Bankr. D.S.C. 2010). To date, the burden has yet to be met. The Court's analysis, however, will not stop there. Because the Debtors are seeking to transfer substantially all of their assets to Atalaya free and clear of liens and interests, the requirements of § 363(f) must also be satisfied and, to date, it is not clear under what subsection of § 363(f) the Debtors will propose the transfer free and clear of

lien.[4] Against that backdrop, and with reservations of a sale that will result in no significant benefits to any creditors aside Atalaya, the UST objects to the sale on the following grounds:

A. The Debtors Have Redacted Important Information from the Documents Without Seeking Proper Authority from the Bankruptcy Court

There is a strong presumption and public policy in favor of public access to court records. In bankruptcy cases, this presumption is codified in § 107(a) of the Bankruptcy Code, which, subject to very limited exceptions, provides that "paper[s] filed in a case under this title ... *are public records and open to examination by an entity* at a reasonable time without charge." (Emphasis added.) Similarly, Rule 5001(b) of the Federal Rules of Bankruptcy Procedure provides, "[a]ll trials and hearings shall be conducted in open court …."

Here, the Debtors have taken the liberty – without seeking any order from the Court or without proving that they should be protected under one of the exceptions set forth in § 107(b) – to redact significant information from the Revised APA and attached Disclosure Schedules. Among other information, the filed documents are redacted to hide from public view the following:

- Value of various inventory in the restaurants (Disclosure Schedule 1.1(b)).
- Value of furnishings and equipment in the restaurants (Disclosure Schedule 1.1(c)).
- Information regarding "Conflicts with Permits or Contracts" (Disclosure Schedule 3.3(c)).
- Information regarding "Other Assets" (Disclosure Schedule 3.4(a))
- Various information regarding Employee Benefits and list of employees (Disclosure Schedule 3.12(a)).

[4] *See In re Southern Manufacturing Group, LLC*, 2016 WL 334787 (Bankr. D.S.C. June 7, 2016).

- Information related to the Executive Bonus Compensation Plan, including the key employees or management with whom the buyer will enter into separate individual agreements (Disclosure Schedule 6.11).

- Amount of cap of "Wind-Up Escrow Amount" to be segregated to pay the fees and expenses of professionals and employees or contractors incurred in connection with the dissolution and winding up of the Debtors (Revised APA at Section 1.1).

Some of the information the Debtors have decided to conceal from public view is important to prove that the sale is for a fair price or to show how the Debtors are not trying to circumvent the requirements of § 503(c)(1) or (2). Accordingly, the UST requests that the redacted or undisclosed information be made publicly available well in advance of the sale hearing or, alternatively, the Debtors must file the proper motion seeking the filing under seal, to which the UST reserves all his rights to oppose at the sale hearing.

B. The Sale Motion Circumvents the Requirements of Section 503(c)

The UST objects to the sale because the Debtors attempt to redact relevant information regarding the Executive Bonus Compensation Plan and fail to explain why the new separate individual agreements to be entered into with certain unidentified key employees or management are permissible under § 503(c) of the Bankruptcy Code.

While the requirements of § 503(c) were not addressed in the Bidding Procedures Motion, the Debtors clearly seek approval of the Revised APA (or of an agreement with the winning bidder), which contemplates that the Buyer will enter into agreements with certain key employees regarding the payment of certain bonus payments whom appear to fit the definition of "insiders" under § 101, and sets a minimum of the amounts of bonuses to be paid. *See* Revised APA at § 6.11. Moreover, the Cure Notice contemplates the assumption of three employment agreements with insiders and proposes cure payments for them totaling $245,000.00. While

embedding the request for this authority in a section of the Revised APA and the Term Sheet to the Global Settlement, as well as in an exhibit to the Cure Notice, the Debtors seek approval of all aspects of the sale under § 363, while ignoring the requirements of § 503(c) and failing to shed any light as to (a) the identity of all individuals who will be part of the Executive Bonus Compensation Plan, (b) the amounts that these key employees are to receive, and (c) most importantly, why the Bonus Payments (as defined below) do not need to meet the requirements of § 503(c).

The Debtors bear the burden of establishing that the Executive Bonus Compensation Plan as well as the cure amounts proposed to be paid to insiders under the Cure Notice (collectively, the "Bonus Payments"), satisfy all of the Bankruptcy Code's requirements – including 11 U.S.C. § 503(c). *See In re Hawker Beechcraft, Inc*., 489 B.R. 308, 313 (Bankr. S.D.N.Y. 2012). Section 503(c) was enacted in order to provide limits on the payments of retention and incentive bonuses and severance to insider and on the payments of retention bonuses granted to non-insiders without factual and circumstantial justification. *See In re Journal Register Co.*, 407 B.R. 520, 535 (Bankr. S.D.N.Y. 2009). That section provides, in pertinent part:

> Notwithstanding subsection (b) there shall neither be allowed, nor paid –
>
> (1) A transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that –
>
> (A) The transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;
>
> (B) The services provided by the person are essential to the survival of the business; and
>
> (C) Either

> (i) The amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligations of a similar kind given to non-management employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or
>
> (ii) If no such similar transfers were made to, or obligations were incurred for the benefit of, such non-management employees during such calendar year, the amount of the transfer or obligations is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred.

See 1 U.S.C. § 503(c).

While the Debtors may argue that payment of the Bonus Payments would not be made until after the closing of the sale; and thus are not subject to § 503(c), the plain text of § 503(c) does not draw a distinction between awards made to insiders pre-closing of a sale versus post-closing (or pre- versus post-confirmation). *See* 11 U.S.C. § 503(c)(1). Notably, because § 503(c) speaks to the allowance as well as the payment of obligations, it applies with equal force regardless of whether the payment is to be made by the debtor prior to plan confirmation, or whether the successor of the debtor is directed to make such a payment after emergence from bankruptcy. *See In re AMR Corp.*, 490 B.R. 158, 167-68 (Bankr. S.D.N.Y. 2013); *In re Dana Corp.*, 351 B.R. 96, 102 (Bankr. S.D.N.Y. 2006) (applying 11 U.S.C. § 503(c) to bonus and severance payments that were to be made to debtor's insider upon emergence from bankruptcy); *In re TCI 2 Holdings, LLC*, 428 B.R. 117, 171-72 (Bankr. D.N.J. 2010) (holding severance provision invalid under section 503(c)(2) notwithstanding fact that severance was to be paid after plan effective date by reorganized debtor).

In the case of *In re AMR Corporation*, the debtors sought the court's approval of a merger agreement among AMR Corporation, AMR Merger Sub, Inc., and US Airways Group, Inc., which contemplated, among other things, the termination of the American Airlines' CEO employed upon the closing of the merger agreement. As part of the motion, the debtors sought to pay the CEO severance of close to $20 million, and the UST objected. In denying authorization for the proposed severance payment, the Court (a) rejected the debtors contentions that § 503(c) does not apply because the severance payment would be paid by the new enterprise created by the merger and not by the debtors themselves, (b) rejected the debtor's argument that § 363 provides a basis for immediate approval of the severance payment, and (c) found that the offer made by the debtors during the hearing to amend the merger agreement to require the board of Newco to vote on the severance payments before any severance payment could be made would not obviate the need for the debtors to comply with the requirements of § 503(c). *In re AMR Corporation*, 490 B.R. 158, 169 (Bankr. S.D.N.Y. 2013). Subsequently, the debtors sought the approval of the severance letter agreement pursuant to a plan of reorganization, and the UST again objected. In sustaining the UST's objection and finding that the debtors could not use the Chapter 11 plan confirmation process to bargain for the severance payment that was prohibited by statute, the Court held, among other things:

> The Debtors argue that the Horton Severance Payment is being paid post-emergence by non-estate assets and therefore is not subject to the requirements of Section 503. . . . But the Horton Severance Payment is a condition *precedent* to the plan going effective, and therefore must be paid in order for the Debtors to emerge from bankruptcy.

In re AMR Corporation, 497 B.R. 690, 698 (Bankr. S.D.N.Y. 2013).

Similarly here, Atalaya appears to be the one funding the Bonus Payments. The funding of the Bonus Payments, however, is a condition precedent to the closing of the sale. Moreover,

at or prior to the closing, the Buyer shall enter into the employment agreement with the Key Employees, but the aggregate amount of the Bonus Payments is pre-determined and set as part of the Revised APA – albeit being hidden from public view – and the approval of the Court as to that minimum cap is sought as part of the sale.

To be clear, the UST does not have any issue with the continued employment of the proposed Key Employees by the purchaser of the Debtors' assets, nor does the UST question the value of the Key Employees' assistance in orchestrating a smooth transition after the closing of the sale. With that said, if the purchaser wants to ensure the continued employment of the Key Employees, "it is free to pay [them] without the oversight of the Bankruptcy Court and the confines of the Bankruptcy Code." *In re AMR Corporation*. 497 B.R. at 698. In order to obtain approval from the Court, however, the Debtors must comply with the applicable law, and the Debtors have not advanced any argument or evidence regarding how the Bonus Payments comply with the requirements of § 503(c).

WHEREFORE, the UST respectfully requests that this Court enter an order denying the approval of the sale of substantially all of the Debtors' assets and the assumption and the assignment of the three identified employment agreements, unless the Debtors cure the objections presented herein, and for any and all further relief as may be equitable and just.

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Date: 2/1/2019

CERTIFICATE OF SERVICE

I, Elisabetta G. Gasparini, do hereby certify that on February 1, 2019, I served the below-named documents upon the parties listed below by electronic mail.

OBJECTION OF UNITED STATES TRUSTEE TO (I) NOTICE OF PROPOSED SALE OF THE DEBTORS' ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS, THE AUCTION, AND THE SALE HEARING AND (II) NOTICE OF CURE AMOUNTS AND PROPOSED ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND LEASES

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