

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

In re:

CAFE HOLDINGS CORP., *et al.*,¹

Debtors.

Chapter 11

Case No. 18-05837 (hb)

(Jointly Administered)

DEBTORS’ (I) BRIEF IN SUPPORT OF SALE OF THE DEBTORS’ ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS, AND (II) LIMITED RESPONSE TO RELATED OBJECTIONS AND OBJECTIONS TO ENTRY OF FINAL DIP ORDER

The above-captioned debtors and debtors in possession (collectively, the “**Debtors**”) hereby file this brief (the “**Brief**”) in support of 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 “**Sale Motion**”),² and limited response to Objections to the Sale Motion and objections 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*

¹ 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.

² Capitalized terms used in this Brief but not otherwise defined herein shall have the meanings set forth in the Sale Motion.

Status, (IV) Granting Adequate Protection to the Prepetition Lenders, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief [Docket No. 15] (the “DIP Motion”).

PRELIMINARY STATEMENT

1. No Qualified Bidder, other than ACM Fatz VII LLC (the “**Purchaser**”), submitted a qualifying bid for the Acquired Assets in accordance with the Bidding Procedures Order. The Purchaser submitted the highest or otherwise best offer, and the Purchaser is the bidder that submitted the Prevailing Bid for the Acquired Assets in accordance with the Bidding Procedures Order. In the sound exercise of their business judgment, the Debtors determined that the proposed sale to the Purchaser in the best interest of the Debtors’ estates and creditors. The Debtors therefore request that the Court approve the proposed sale (the “**Sale**”) to the Purchaser free and clear of all claims or interests, other than the Permitted Liens and Assumed Liabilities.

2. Various parties in interest have objected to the Sale and to the proposed Cure Amounts related to the assumption and assignment of the Debtors’ executory contracts and unexpired leases. The Debtors have been working diligently to resolve such objections prior to the Sale Hearing. As of the time of the filing of this Brief, the Debtors believe that the only potentially unresolved objection to the Sale is the objection of the United States Trustee (the “**UST**”) [Docket Nos. 216, 400]. Likewise, the Debtors’ believe that the only potentially unresolved objection to entry of the Final DIP Order is the objection of the UST [Docket No. 185].

3. With regard to Cure Amount objections, the Debtors anticipate that all such disputes will be resolved prior to the Sale Hearing either through consensual agreement or by removing the applicable executory contracts or unexpired leases from the list of Transferred Contracts. Consistent with the Bid Procedures Order, to the extent that disputes regarding Cure

Amounts are not resolved prior to the Sale Hearing, the Cure Amount can be determined at a later hearing to afford the parties additional time to resolve the issues related to the Cure Amounts. *See* Bid Procedures Order ¶ 7. The Debtors submit that any such unresolved Cure Claims are not an obstacle to approval of the Sale at the Sale Hearing.

BACKGROUND

4. On November 15, 2018 (the “**Petition Date**”), each of the Debtors commenced with this Court a voluntary case under chapter 11 of the Bankruptcy Code. Each Debtor is authorized to continue to operate its business and manage its properties as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors’ chapter 11 cases are being jointly administered.

5. On November 28, 2018, the Committee was appointed in the Chapter 11 cases. No trustee or examiner has been appointed in these Chapter 11 Cases.

6. Additional information regarding the Debtors, including their business operations, corporate and capital structure, and the events leading to the Petition Date, is more fully set forth in the *Declaration of Eric Easton in Support of Chapter 11 Petitions and First Day Relief* [Docket No. 17].

A. The DIP Facility

7. On November 16, 2018, the Debtors filed 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) Granting Related Relief* [Docket No. 15] (the “**DIP Motion**”).

8. On November 20, 2018, the Court entered an interim order granting the DIP Motion on an interim basis [Docket No. 70] (the “**First Interim DIP Order**”). On December 18, 2018, the Court entered a second interim order granting the DIP Motion on an interim basis [Docket No. 248] (the “**Second Interim DIP Order**”). On January 9, 2019, the Court entered a third interim order granting the DIP Motion on an interim basis [Docket No. 328] (the “**Third Interim DIP Order**” and together with the First Interim DIP Order and the Second Interim DIP Order, the “**Interim DIP Orders**”).

9. On February 7, 2019, the Debtors filed their proposed form of order approving the DIP Motion on a final basis [Docket No. 417] (the “**Final DIP Order**”). Under the Final DIP Order, the Debtors are seeking authorization to obtain up to \$3,200,000 in debtor-in-possession financing (“**DIP Financing**”), as set forth in the DIP Term Sheet and the Budget. The DIP Term Sheet requires, among other things, that the Debtors obtain entry of an order approving the Sale by February 12, 2019.

B. The Unresolved DIP Objections

10. On December 10, 2018, the UST objected to the DIP Motion [Docket No. 185]. In the objection, the UST’s principal arguments were that Atalaya should not be granted liens on the recoveries from avoidance actions, that Atalaya should not be granted a § 506(c) waiver, and that the Final DIP Order should not be binding on a successor trustee.

11. On December 11, 2018, Old Mill Stream Objected to the DIP Motion [Docket No. 201]. The unresolved issues of Old Mill Stream’s Objection are essentially the same arguments raised by the UST.

C. The Postpetition Sale Process

12. On November 30, 2018, the Debtors filed 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 "**Bid Procedures Motion**"). The form of Asset Purchase Agreement (as subsequently amended, the "**Agreement**") between the Debtors and the Purchaser was attached to the Bid Procedures Motion as Exhibit D.

13. On the same day, the Debtors filed a motion requesting that the court schedule an expedited hearing on the Bid Procedures Motion for December 18, 2018 [Docket No. 107] (the "**Motion to Expedite**"). The Bid Procedures Motion and the Motion to Expedite were served on the Debtors' Core/2002 Service List³ on November 30, 2018. See Affidavit of Service [Docket No. 134].

14. On December 1, 2018, the Court granted the Motion to Expedite and scheduled the Bidding Procedures Hearing for December 18, 2018 [Docket No. 108]. The order granting the

³ Pursuant to the Order Authorizing the Debtors to (I) Prepare a Consolidated List of Creditors in Lieu of a Mailing Matrix, (II) File a Consolidated List of the Thirty Largest Unsecured Creditors, (III) Mail Initial Notices, and (IV) Shorten the Mailing List [Docket No. 57], the Debtors' Core/2002 Service List includes parties requesting to be included on the shortened mailing list; the Office of the United States Trustee for the District of South Carolina; the Office of the United States Attorney General for the District of South Carolina; the Internal Revenue Service; Atalaya Administrative LLC; ACM Fatz VII LLC; Midtown Madison Management LLC; Shrayne Capital, LLC; Benefit Street Partners; Milestone Partners; Old Mill Stream, LLC; Triangle Mezzanine Fund LLLP; Sysco; the holders of the thirty (30) largest unsecured claims against the Debtors on a consolidated basis; all parties who, as of the filing of the motion, have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002; all applicable government agencies to the extent required by the Bankruptcy Rules and the Local Rules; the Official Committee of Unsecured Creditors; and counsel to the Official Committee of Unsecured Creditors.

Motion to Expedite was served on the Debtors' Core/2002 Service List on December 1, 2018. *See* Affidavit of Service [Docket No. 135].

15. On December 14, 2018, the Debtors filed a motion requesting that the Bidding Procedures Hearing scheduled for December 18, 2018, be continued to December 27, 2018 [Docket No. 231] (the "**First Motion for Continuance**"). The Court approved the Motion for Continuance and rescheduled the Bidding Procedures Hearing to December 27, 2018 [Docket No. 233]. The Motion for Continuance and the order granting the Motion for Continuance were served on December 14, 2018, on the Debtors' Core/2002 Service List and all parties that filed UCC-1 financing statements against the Debtors, or who, to the Debtors' knowledge, have asserted any liens on any of the Debtors' assets. *See* Affidavit of Service [Docket No. 245].

16. On December 21, 2018, the Debtors filed a motion requesting that the Bidding Procedures Hearing scheduled for December 27, 2018 be further continued to January 8, 2019 [Docket No. 264] (the "**Second Motion for Continuance**"). The Court approved the Second Motion for Continuance and rescheduled the Bidding Procedures Hearing to January 8, 2019. [Docket No. 266]. On December 21, 2018, the Second Motion for Continuance and the order granting the Second Motion for Continuance were served on the Debtors' Core/2002 Service List and all parties that filed UCC-1 financing statements against the Debtors, or who, to the Debtors' knowledge, have asserted any liens on any of the Debtors' assets. *See* Affidavit of Service [Docket No. 274].

17. After considering the evidence and arguments at the Bid Procedures Hearing, the Court entered the *Order Regarding Bid and Auction Procedures, Establishing Deadlines and Scheduling Sale Hearing* (the "**Bid Procedures Order**") [Docket No. 335]. The Bid Procedures

Order was entered on January 10, 2019 and was served on the Debtors' Core/2002 Service List on January 10, 2019. *See* Affidavit of Service [Docket No. 346].

18. Pursuant to the Bid Procedures Order, the deadline to file objections to the sale of the Acquired Assets was February 1, 2019 at 4:00 p.m. Eastern Time (the "**Sale Objection Deadline**"). The Bid Procedures Order provides in bold font that "**Each Person or entity who receives notice of the proposed sale of the Purchased Assets and who does not object thereto on or prior to February 1, 2019, deadline may be deemed by the Court to have consented to the sale.**" Bid Procedures Order ¶ 5. Objections to the Debtors' proposed Cure Amount or the provision of adequate assurance of future performance under any Lease or Contract were also required to be filed by February 1, 2019 at 4:00 p.m. Eastern Time (the "**Cure Objection Deadline**"). Bid Procedures Order ¶ 6.

19. The deadline for any third party (other than the Purchaser) to submit an Initial Overbid was February 4, 2019 at 10:00 a.m. Eastern Time (the "**Bid Deadline**"). *Id.* at ¶ E.(ii). In the event an Initial Overbid was received from a Qualified Bidder, an Auction would be held before the Court on February 7, 2019. *Id.*

20. On January 10, 2019, the Debtors filed 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* [Docket No. 337] (the "**Bid Procedures and Sale Notice**"). On January 15, 2019, the Bid Procedures and Sale Notice was served on the Debtors' entire mailing matrix (consisting of approximately **12,225** creditors and parties in interest). *See* Affidavit of Service [Docket No. 366]. Certain additional parties were served with the Bid Procedures and Sale Notice on January 18, 2019. *See* Supplemental Affidavit of Service [Docket No. 371]. Additionally, Duff & Phelps provided all parties who expressed an interest in acquiring the Debtors' assets with a copy of the

Bid Procedures and Sale Notice and caused the Bid Procedures and Sale Notice to be published in the Atlanta Journal Constitution, Charlotte Observer, Knoxville News Sentinel, The State (South Carolina), and Virginian-Pilot.

21. On January 15, 2019, the Debtors filed the *Notice of Filing of Revised Asset Purchase Agreement* [Docket No. 354], which included clean and redline versions of the revised Agreement. The *Notice of Filing of Revised Asset Purchase Agreement* was served on the Debtors' Core/2002 Service List on January 15, 2019. *See* Affidavit of Service [Docket No. 367].

22. On January 15, 2019, the Debtors filed the *Notice of Cure Amounts and Proposed Assumption and Assignment of Executory Contracts and Leases* [Docket No. 355] (the "**Assumption and Assignment Notice**"). On January 15, 2019, the Assumption and Assignment Notice was served on the Debtors' Core/2002 Service List and on the Lease and Contract Counterparties. *See* Affidavit of Service [Docket No. 370]. Certain additional parties were served with the Assumption and Assignment Notice on January 18, 2019. *See* Supplemental Affidavit of Service [Docket No. 371].

23. The Debtors did not receive a conforming Initial Overbid from a Qualified Bidder at or prior to the Bid Deadline. Accordingly, the Debtors filed the *Notice of No Qualified Bidder and Cancellation of Auction* [Docket No. 407] (the "**Auction Cancellation Notice**") on February 4, 2019, in compliance with the Bid Procedures Order. On February 4, 2019, the Auction Cancellation Notice was served on the Debtors' Core/2002 Service List, all parties that filed UCC-1 financing statements against the Debtors, all parties who, to the Debtors' knowledge, have asserted any liens on any of the Debtors' assets, and all parties that filed objections to the Sale or the proposed assumption and assignment of Contracts and Leases. *See* Affidavit of Service [Docket No. 414].

24. On February 8, 2019, the Debtors filed the *Notice of Filing of Proposed Sale Order* [Docket No. 422] (the “**Sale Order**”). On February 8, 2019, the Debtors also filed the *Notice of Filing of Further Revised Asset Purchase Agreement* [Docket No. 423] (the “**Notice of Revised Agreement**”). The proposed Sale Order and the Notice of Revised Agreement were served on February 8, 2019 on the Debtors’ Core/2002 Service List, all parties that filed UCC-1 financing statements against the Debtors, all parties who, to the Debtors’ knowledge, have asserted any liens on any of the Debtors’ assets, and all parties that filed objections to the Sale or the proposed assumption and assignment of Contracts and Leases.

25. Prior to the Sale Hearing, the Debtors intend to file a notice of Transferred Contracts containing the list of Contracts and Leases that the Debtor intends to assume and assign to the Purchaser in connection with the Sale.

D. Unresolved Sale Objections

26. On December 13, 2018, the UST objected to the Sale Motion. Although the objection primarily raised various issues regarding the bidding procedures, the UST also asserted that it was unlikely that the Debtors would establish a sound business reason for the Sale and that Avoidance Actions should not be transferred under the Sale.

27. On December 17, 2018, Old Mill Stream objected to the Sale Motion and incorporated the arguments raised by the UST [Docket No. 242].

28. On February 1, 2019, the UST objected to the proposed Sale and the proposed assumption and assignment of Contracts and Leases. In the objection, the UST noted that Purchaser will be the primary beneficiary of the Sale and objected to (i) the Debtors’ redaction of certain information in the Agreement, and (ii) the inclusion of the Executive Bonus Compensation Plan described in the APA as a condition to closing and the potential payment of the Cure Amounts to insiders listed in the Assumption and Assignment Notice.

29. Several objecting parties disputed the Cure Amount necessary to cure all monetary defaults in order for the Debtors to assume and assign certain agreements to the Purchaser. The Debtors anticipate that all such disputes will be resolved prior to the Sale Hearing either through consensual agreement or by removing the applicable executory contracts or unexpired leases from the list of Transferred Contracts. Consistent with the Bid Procedures Order, to the extent that disputes regarding Cure Amounts are not resolved prior to the Sale Hearing, the Cure Amount can be determined at a later hearing to afford the parties additional time to resolve the issues related to the Cure Amounts. *See* Bid Procedures Order ¶ 7.

RESOLUTION OF CERTAIN OBJECTIONS

30. On January 15, 2019, the Debtors filed *Debtors' Motion for Entry of an Order Approving Global Settlement* [Docket No 357] (the “**Global Settlement Motion**”). After substantial analysis and following good faith, arms-length negotiations among the Debtors, the Committee, and the DIP Secured Parties (collectively, the “**Interested Parties**”), the Interested Parties determined that a sale of the Debtors’ assets within the framework set forth in the Global Settlement embodied in the Term Sheet would be the best means to achieve a resolution of open issues in these Chapter 11 Cases. The terms of the Global Settlement are described in detail in the Global Settlement Motion. The Global Settlement resolves, among other things, the Committee’s objections to entry of the Final DIP Order and to approval of the Sale.

31. The Debtors also revised the proposed Sale Order and the Agreement to resolve the objection to the Sale that was filed by Greenwood County [Docket No. 398] (the “**Greenwood County Sale Objection**”). Specifically, the Debtors (i) revised the definition of “Permitted Liens” in the Agreement to clarify that Permitted Liens include liens of governmental units arising from ad valorem taxes, and (ii) revised the proposed Sale Order to clarify that to the extent that

Greenwood County's tax liens are not fully paid as of the closing of the Sale, Greenwood County's tax liens shall survive the Sale and continue to be enforceable to the extent provided under applicable South Carolina law.

32. Additionally, the Debtors modified various provisions of the proposed Sale Order and the Agreement to resolve comments received from other creditors and parties in interest, including the Department of Justice and FreshPoint.

LEGAL ARGUMENT UNDER SECTION 363

A. Sale Pursuant to Section 363 is a Proper Exercise of the Debtors' Business Judgment

33. A debtor may sell its assets outside the ordinary course of business after notice and a hearing. 11 U.S.C. § 363(b)(1). While noting that "sales of substantially all assets of an estate normally should be proposed and conducted pursuant to a confirmed Chapter 11 Plan," courts in this District have "recognized that when a sound business justification exists, the Court may authorize such a sale under § 363(b)(1) without a confirmed plan or reorganization." *In re Daufuskie Island Properties, LLC*, 431 B.R. 626, 638 (Bankr. D.S.C. 2010) (citing *In re Taylor*, 198 B.R. 142, 156-67 (Bankr. D.S.C. 1996)). Under the sound business purpose test, a sale is generally reviewed against the following requirements: (1) a sound business reason or emergency justifies the pre-confirmation sale; (2) the sale has been proposed in good faith; (3) adequate and reasonable notice of the sale has been provided to interested parties; and (4) the purchase price is fair and reasonable. *See In re Childers*, 526 B.R. 608, 613 (Bankr. D.S.C. 2015); *In re Daufuskie Island Props.*, 431 B.R. at 638.

1. Sound Business Reasons Justify the Sale

34. The Sale process is the only way for the Debtors to realize value for their assets and administer property of their estates for the benefit of creditors within the unique circumstances of these Chapter 11 Cases. The Debtors have established a clear record in these Chapter 11 Cases

that they sought much-needed financing from sources other than the Purchaser, but they were ultimately unsuccessful in obtaining any postpetition financing other than the DIP Facility. Under the terms of the DIP Facility, the Debtors are required to achieve certain milestones for a sale of all or substantially all of their assets. Further, the DIP Facility also contains certain limitations in terms of the amount of money that can be borrowed and the maturity date of the loan. Accordingly, the Debtors pursued the Sale process to realize value for their estates in compliance with the terms of the DIP Facility, the only financing available to permit the continued operation of the Debtors' business.

35. If the Debtors' proposed sale were to be delayed until after or contemporaneously with confirmation of its Chapter 11 plan, the Debtors would not be able to maintain any reasonable level of operations sufficient to have a business that anyone would be willing to purchase as a going concern. *See e.g., In re Georgetown Steel Company, LLC, C/A 03-13156-jw*, at 16 (Bankr. D.S.C. Sept. 15, 2004) (noting that a pre-confirmation sale is likely to preserve and maximize value for the estate); *Daufuskie*, 431 B.R. at 638 (finding a sound business reason or emergency justifying the pre-confirmation sale for similar reasons). The DIP Term Sheet contemplates entry of an order approving the sale of substantially all of the Debtors' assets on or before February 12, 2019. Accordingly, if the proposed Sale is not approved, the Purchaser may declare a default under the DIP Facility. Such a scenario would likely force the Debtors to cease operations and convert their Chapter 11 cases to Chapter 7 where, as will be demonstrated at the sale hearing, unsecured creditors would not receive any distribution. Shutting down operations would cause irreparable harm to the Debtors' customer relationships, destroy the Debtors' value as a going concern, and result in the termination of approximately 1,600 employees.

36. Based on these factors, the Debtors believe the sale of the Acquired Assets at the Sale Hearing is both an exercise of their sound business judgment and necessitated by an emergency to both sell the Acquired Assets and close the sale of the Acquired Assets while they continue to have working capital to operate the businesses.

2. The Sale Has Been Proposed in Good Faith

37. The terms of the Debtors' proposed sale are the product of arms-length negotiations between the Debtors (and its advisors) and the Purchaser. Neither the Debtors nor their principals had any pre-petition affiliation or relationship with the Purchaser. *See, e.g., In re Georgetown Steel Company, LLC, C/A 03-13156-jw*, at 16-17 (Bankr. D.S.C. Sept. 15, 2004) (noting that sale was in good faith as buyer was not an insider, the parties complied with the bid procedures order, and the terms were reached after arms-length negotiations).

38. The Purchaser is not an insider under Bankruptcy Code § 101. The Agreement was negotiated, proposed, and entered into in good faith, without collusion or fraud, and upon arm's-length bargaining. The Purchaser, to the Debtors' knowledge, has not acted in a collusive manner with any entity. Therefore, the Court should conclude that the Sale is being conducted in good faith.

3. Proper and Reasonable Notice has been Provided

39. The Debtors and their professionals conducted significant marketing of the Assets prior to the Petition Date and have continued to market the Assets since the Petition Date. Further, notice of the Bid Procedures Order and the Sale Hearing have been provided to parties-in-interest in these Chapter 11 Cases. The notices in these Chapter 11 Cases have included, *inter alia*, the nature of the Assets being sold, the terms and conditions of the Sale, timing for filing objections, a form of Agreement, and the Auction and bidding procedures. Further, the notice period has been extended by the multiple continuances of the Bid Procedures Hearing.

40. The Debtors submit that their marketing efforts, together with the notices provided to parties in interest in this case, have been reasonably calculated to engender the greatest interest in the Assets and provided all potentially interested parties with the information necessary to decide whether to participate in the Sale process.

4. The Sale Price Constitutes Fair and Reasonable Consideration

41. The Purchase Price under the Agreement consists of consideration furnished by Purchaser in the form of (i) a credit bid of \$1 million of the Debtors' obligations to Purchaser under the Prepetition Credit Facility, and (ii) assumption by the Purchaser of the outstanding principal of \$3.2 million and accrued interest owed by the Debtors under the DIP Facility. Additionally, the Purchaser is assuming the Assumed Liabilities, which include:

- All Liabilities under the DIP Facility pursuant to the Approved Budget, including Accrued Administrative Claims relating to the categories of expenses set forth in the Approved Budget, but specifically excluding any Excluded Administrative Claims;
- all Liabilities of Buyer or the DIP Lender set forth in the Global Settlement Order;
- all Liabilities relating to the Purchaser's ownership or operation of the Acquired Assets, to the extent arising from events, facts or circumstances that occur from and after the Effective Time, but excluding any Liabilities to the extent relating to the Debtors' ownership or operation of the Acquired Assets prior to the Effective Time or relating to any services that were sold or provided by the Debtors prior to the Effective Time;
- all Liabilities of Sellers under the Transferred Contracts (including all Cure Costs), in each case to the extent arising after the Effective Time;
- All Liabilities with respect to any gift cards, gift certificates, or similar items relating to the Business;
- All Liabilities under the WARN Act or any similar state or local law regarding employment terminations, if any, arising out of or resulting solely from layoffs or termination of Employees by Sellers after the Petition Date; and
- Certain accounts payable of the Debtors as determined by the Purchaser in its sole discretion one business day prior to Closing. Agreement § 1.1.

42. The Debtors' use of professionals to market the Assets, the implementation of competitive bidding procedures, and the scheduling of the Auction were all designed to bring the highest and best price for the Assets. The proposed terms of sale, including the sale price, are the result of the Debtors' robust marketing process and indicate that the proposed sale price constitutes fair and reasonable consideration for the Acquired Assets. *See In re Star Trans, Inc., C/A 09-07468-dd* (Bankr. D.S.C. Nov. 5, 2009) (holding the purchase price to be fair and reasonable after finding the Debtor "worked diligently to locate a purchaser for the business and contacted numerous prospects locally and nationwide" and noting that the sale "was subject to higher or otherwise better competing offers under the fair procedures approved by this Court" even though no other offers were submitted).

B. Sale Free and Clear is Appropriate under Section 363(f)

43. A debtor in possession may sell estate property "free and clear of any interest in such property of an entity other than the estate" if any one of the following conditions is satisfied:

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). Section 363(f) is written in the disjunctive; thus, a court may approve a sale free and clear under section 363(f) if any of the subsections is met. *See Mich. Emp't Sec. Comm'n v. Wolverine Radio Co. Inc. (In re Wolverine Radio Co., Inc.)*, 930 F.2d 1132, 1147 n. 24 (6th Cir.

1991). The Debtors submit that the Sale satisfies the requirements of sections 363(f)(2), (f)(3), and (f)(5).

1. Section 363(f)(2)

44. Section 363(f)(2) provides that a debtor may sell property free and clear of an entity's interests if such entity consents to the sale. As set forth in more detail below, the creditors whose liens or security interests are being sold free and clear, including Atalaya, BSP Agency, LLC, and Sysco, have expressly consented to the proposed Sale free and Clear of their liens as provided in the Agreement. The express consent from these entities will be evidenced by representations of their counsel at the Sale Hearing (with respect to Atalaya), approved provisions of the Sale Order (with respect to and Sysco), and a subordination agreement containing express consent provisions (with respect to BSP Agency, LLC). The Debtors are *not* seeking approval of the Sale "free and clear" with respect to the remaining categories of liens or security interests, which consists of ad valorem tax liens and M&M lien claims. The Debtors have modified the definition of "Permitted Liens" to include the "liens of governmental units arising from ad valorem taxes" and intend to modify the Sale Order to provide that the M&M liens described below will be paid at closing.

45. As previously noted by this Court, there is a split in authority regarding whether a lienholder's failure to object constitutes an implied consent to a sale free and clear under § 363(f). *See In re Southern Manufacturing Group, LLC*, 2016 WL 3344787 at *4 (Bankr. D.S.C. June 8, 2016). In *Southern Manufacturing*, this Court determined that affirmative consent is generally required under § 363(f)(2), but nonetheless acknowledged that "[f]actual circumstances may exist that provide grounds to find implied consent." *Id.* The Debtors submit that the factual circumstances of these Chapter 11 Cases provide grounds to find implied consent to the extent that

there is a known or unknown creditor that asserts a lien and has not been found to expressly consent.

46. In the Bid Procedures and Sale Notice, the Debtors indicated in bold text that:

- **The Debtors will seek to sell and transfer the Purchased Assets and assume and assign the Transferred Contracts, subject to the terms of the Prevailing Bid, to either the Stalking Horse Bidder or the purchaser under the Prevailing Bid, free and clear of any and all liens, claims, encumbrances, and other interests other than those specifically assumed by the party submitting the Prevailing Bid.** Bid Procedures and Sale Notice ¶ 7.
- **Each person or entity who receives notice of the proposed sale of the Purchased Assets and who does not object thereto on or prior to the February 1, 2019, deadline may be deemed by the Court to have consented to the sale.** Bid Procedures and Sale Notice ¶ 8.

47. As shown on the Bid Procedures and Sale Notice, the Debtors also informed holders of liens and security interests that the “non-cash bid of approximately \$4.2 million will be insufficient to satisfy the first lien security interest asserted on the Debtors’ assets by Atalaya Administrative LLP as agent for ACM Fatz VII LLC. The Debtors also listed the known existing prepetition liens and security interests, including:

- Atalaya Administrative LLP, as agent, in the principal amount of \$9,698,584.13 secured by a first priority lien on all of the Debtors’ assets, including prepetition and postpetition assets;
- BSP Agency, LLC (“**BSP**”), in the principal amount of \$2,000,000 secured by a lien on all of the Debtors’ assets, which lien is subordinate to the lien of Atalaya Administrative LLP pursuant to an Intercreditor and subordination agreement;
- Sysco Columbia, LLC, in the amount of \$2,784,619.66 secured by a lien on the Debtors’ goods, inventory, instruments, chattel paper, documents, accounts, accounts receivable, general intangibles, payment intangibles, and proceeds and all support obligations of any of the foregoing;
- Sysco Charlotte, LLC (together with Sysco Columbia, LLC (“**Sysco**”), in the amount of \$1,152,031.26 secured by a lien on the Debtors’ goods, inventory, instruments, chattel paper, documents, accounts, accounts receivable, general intangibles, payment intangibles, and proceeds and all support obligations of any of the foregoing;

- Refrigeration Heroes of Greenville Co. in the amount of \$1,950.48 secured by a mechanics and materialman's lien;
- Ridgeway Plumbing and Services Inc. in the amount of \$1,026.00 secured by a mechanics and materialman's lien (collectively with Refrigeration Heroes of Greenville Co., the "M&M liens");
- Various taxing authorities for ad valorem taxes.

48. Atalaya Administrative LLP. Atalaya expressly consents to the Sale. As such, the Acquired Assets may be sold free and clear of Atalaya's liens and security interests pursuant to § 363(f)(2).

49. BSP Agency, LLC. BSP Agency, LLC expressly consented to the sale free and clear of liens pursuant to the Subordination Agreement dated May 5, 2017, attached hereto as **Exhibit A**. BSP, as successor to Triangle Mezzanine Fund LLLP is bound by the terms of the Subordination Agreement. The Subordination Agreement provides in relevant part:

- Each **Subordinated Creditor** agrees that it will consent to, and not object to or oppose, a sale or other disposition of any property securing all of any part of any Senior Debt free and clear of Liens or other claims of such Subordinated Creditor under the Code, including Sections 363, 365 and 1129 of the Code, if Senior Agent has consented to such sale or disposition and released its Lien in connection therewith; provided, however, that Subordinated Agent and Subordinated Creditors shall retain a Lien, subordinated to the Liens on Collateral of Senior Agent in accordance with this Agreement, in the proceeds of such sale or other disposition to the extent they are not applied to reduce the Senior Debt. Subordination Agreement § 5(f) (emphasis added).
- In the event that an Obligor desires to sell, lease, license or otherwise dispose of any interest in any of the Collateral (including the equity interests of an Obligor) and Senior Agent and Senior Lenders consent to such Disposition and release their Liens in connection therewith, then **each Subordinated Creditor shall be deemed to have released, automatically and without any further action, any such Liens which it may have in such Collateral to the same extent the Senior Agent and Senior Lenders have released their Liens on such Collateral** (and if such Disposition involves the equity interests of an Obligor, each Subordinated Creditor shall release such Obligor from such guaranty or other obligation owing to such Subordinated Creditor to the extent required pursuant to Section 15); provided, that to the extent Senior Agent or any Senior Lender retains a Lien on any proceeds of such Collateral, the Subordinated Creditors and Subordinated Agent may retain a Lien with respect to the proceeds of such Collateral (except on proceeds used to pay the

Senior Debt) that is subordinate to the Lien retained by Senior Agent or such Senior Lender pursuant to the terms of this Agreement. *Id.* at § 7 (emphasis added).

- **[E]ach Subordinated Creditor hereby consents and agrees that Senior Agent or any Senior Lender may, in accordance with applicable law, purchase, sell, assign, release, abandon or dispose of the Collateral by private or public sale with or without notice, pursuant to court order, and by any means, all free and clear of any interest or claim of or by any Subordinated Creditor with respect thereto, and all without any liability of Senior Agent or any Senior Lender whatsoever to account for, allocate or deliver to any Subordinated Creditor any proceeds or distributions received by Senior Agent or any Senior Lender as a result thereof. *Id.* at § 18(b) (emphasis added).**

50. Additionally, the Debtors served BSP with notice of all sale related pleadings as evidenced by the certificates of service described above. Based on BSP's receipt of such documents with adequate opportunity to object, combined with the provisions of the Subordination Agreement referenced above, BSP has consented to the proposed Sale, free and clear of BSP's claims and interests.

51. Sysco. The Debtors and Sysco have reached an agreement to resolve the Sysco Cure Objection that will be embodied in a further revised proposed Sale Order to be presented to the Court at the Sale Hearing. Pursuant to the agreement, Sysco consents to the proposed Sale free and clear of its liens.

52. M&M Liens. The Debtors and Purchaser have agreed that the M&M liens shall be paid at closing. The proposed Sale Order will be further revised to reflect this modification. Given that the M&M liens will be paid in full, they should be deemed to consent to the Sale.

53. Taxing Authorities. The Debtors are not seeking to sell their assets free and clear of "Permitted Liens." The definition of "Permitted Liens" has been revised in the Agreement to clarify that that the sale will not be free and clear of liens of governmental units arising from ad valorem taxes.

54. For the reasons set forth above, the entities holding liens on the Debtors' assets have either expressly or impliedly consented to the sale free and clear of their liens.

2. Section 363(f)(3)

55. Section 363(f)(3) provides for a sale free and clear of interests where "such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property." 11 U.S.C. § 363(f)(3). The majority of courts interpret section 363(f)(3) in light of section 506(a)'s dictate that the value of a lien can be no greater than the value of the collateral securing that lien. *See Matsuda Capital, Inc. v. Netfax Dev., LLC (In re Netfax, Inc.)*, 335 B.R. 85, 92 (D. Md. 2005) (noting that a majority of the courts that have confronted the issue have adopted the interpretation of value to mean the "economic value of the lien" rather than the face amount of the claims securing the liens); *In re Beker Indus. Corp.*, 63 B.R. 474 (Bankr. S.D.N.Y. 1986); *Boston Generating*, 440 B.R. at 332. Under the majority position, as long as the sale price is equal to the value of the property being sold, a debtor may sell free and clear of liens under section 363(f)(3). The Debtor's assets have been exposed to the market and the Purchaser's bid, as set forth in the Agreement, represents the best and highest available price for the Acquired Assets, and is therefore fair and reasonable and is the best evidence available of the value of the Debtors' assets. Pursuant to Bankruptcy Code section 506(a), a claim is only a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property. Accordingly, the economic value of the Acquired Assets meets or exceeds the secured value of the liens asserted against the Acquired Assets. Therefore, Bankruptcy Code section 363(f)(3) is satisfied because the "price at which such property is to be sold is greater than the aggregate value of all liens on such property." *See In re Long Point Road LP*, 1996 WL 33340783, at *1 (Bankr. D.S.C. June 5, 1996) ("[T]he Court is compelled to note that the clear language of §363(f)(3) permits sale at a price greater than the value of liens on the Property, as opposed to the amount of

liens on the Property. No evidence was presented to indicate that [Buyer's] offer was less than the value of the Property and therefore the Court finds that the sale of the Property pursuant to §363(f)(3) is appropriate.”). *See also In re Bay Circle Properties, LLC*, 2017 WL 639769 (Bankr. N.D. Ga. Feb. 14, 2017) (authorizing sale free and clear of junior liens pursuant to § 363(f)(3); *In re Nuts & Boltz, LLC*, C/A No. 0909615-dd (Bankr. D.S.C. July 2, 2010) (valuing junior lien at \$0 pursuant to § 506(a)).

3. Section 363(f)(5)

56. Section 363(f)(5) provides that a sale free and clear of an interest is permissible if “such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.” 11 U.S.C. § 363(f)(5). Courts have identified, *inter alia*, the following legal or equitable proceedings which may serve as the qualifying hypothetical legal or equitable proceedings: foreclosure,⁴ cram down,⁵ and receivership.⁶ Courts in this District have agreed with the views of courts that believe that the “hypothetical proceeding” contemplated by § 363(f)(5) needs to be legally possible. *In re Love*, 553 B.R. 54 (Bankr. D.S.C. 2016). Courts in this District

⁴ *See e.g., Boston Generating*, 440 B.R. at 333; *In re Jolan, Inc.*, 403 B.R. 866, 870 (Bankr. W.D. Wash. 2009).

⁵ *See e.g., In re Ricco, Inc.*, 2014 WL 1329292 (Bankr. W.D. Va. Apr. 1, 2014) (granting sale free and clear of tax lien pursuant to § 363(f)(5) based on lack of opposition to Debtors’ assertion that cramdown was a qualifying legal or equitable proceeding under § 363(f)(5); *In re WK Lang Holdings, LLC*, Case No. 13–11934, 2013 WL 6579172 (Bankr. D. Kan. Dec. 11, 2013) (holding that since first lien creditor could be crammed down under section 1129(b), property could be sold free and clear of its lien under section 363(f)(5)); *In re Gulf States Steel Inc. of Ala.*, 285 B.R. 497, 507 (Bankr. N.D. Ala. 2002) (“Even if an actual payment were required, the lienholder would only be entitled to receive what it would receive in the event of a cram-down.”); *In re Grand Slam USA, Inc.*, 178 B.R. 460, 462 (E.D. Mich. 1995) (“A typical legal proceeding which compels a creditor to receive less than full money satisfaction is a procedure, commonly known as ‘cram down,’ that is applicable to Chapter 11 cases”); *In re Healthco Int’l, Inc.*, 174 B.R. 174, 176 (Bankr. Mass. 1994) (“a ‘cramdown’ proceeding complies with the description of proceedings referred to in subparagraph (f)(5), and many courts have so held”).

⁶ *See e.g., In re Jolan, Inc.*, 403 B.R. at 870; *In re Taco Del Mar Franchising Corp.*, No. 10-10528, 2010 Bankr. LEXIS 4794, *9 (Bankr. W.D. Wash. Oct. 12, 2010).

have also agreed with the narrow interpretation of § 363(f)(5), which requires that the trustee or the debtor (as opposed to another entity) be the party able to bring the hypothetical proceeding. *Id.*

57. Circuit courts in South Carolina “may dissolve a corporation in a proceeding by the corporation to have its voluntary dissolution continued under court supervisions.” S.C. Code Ann. § 33-14-300. “A court in a judicial proceeding brought to dissolve a corporation may appoint receivers to wind up and liquidate, or custodians to manage, the business and affairs of the corporation.” S.C. Code Ann. § 33-14-320(a). “Among other powers: (1) **the receiver (i) may dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court....**” S.C. Code Ann. § 33-14-320(c)(1).

58. Accordingly, to the extent that the Debtors have not otherwise satisfied § 363(f), the Debtors submit that the Sale free and clear is permissible under § 363(f)(5).

C. The Unresolved Sale Objections Should Be Overruled.

59. For the reasons set forth above, the Debtors’ business judgment satisfies the requirements of § 363. Additionally, although the Debtors do not agree with the UST’s position regarding the Executive Bonus Compensation Plan in relation to 503(c), the Debtors determined that it was in their best interest to remove the Executive Bonus Compensation Plan from the terms of the Agreement, such that the Debtors are no longer seeking approval of the Executive Bonus Compensation Plan at the Sale Hearing as a condition to the Agreement or otherwise. Additionally, the employment contracts with the Debtors’ insiders will not be Transferred Contract in connection with the Agreement. Furthermore, the Debtors filed a further revised version of the Agreement that removed all redactions, other than redactions necessary to preserve the privacy of the Debtors’ employees and certain employee benefit policy numbers. Accordingly, the Debtors submit that the unresolved sale objections should be overruled.

D. The Unresolved DIP Objections Should be Overruled

60. Lien on Proceeds of Avoidance Actions. The Committee, which was appointed by the UST to represent the interests of unsecured creditors, consents to the terms of the proposed Final DIP Order and the Agreement regarding Avoidance Actions. In the Proposed Final DIP Order, the DIP Lenders are granted liens on the proceeds of Avoidance Actions. Avoidance actions are being acquired by the Purchaser under the Agreement, provided however that Purchaser agreed not to pursue recovery of any Avoidance Actions. This provision was specifically negotiated by the Committee and is embodied in the Global Settlement.

61. 506(c) Waiver. Courts in this District have approved DIP financing orders in other cases that included a § 506(c) waiver. *See, e.g., In re Daufuskie Island Properties, LLC*, Case No. 09-00389-jw (Bankr. D.S.C. May 8, 2009) [Docket No. 279] (approving § 506(c) waiver and including “rights under § 506(c) and the proceeds thereof resulting from § 506(c) charges against parties” within the definition of “Loan Collateral”); *In re BI-LO, LLC*, Case No. 09-02140-hb (Bankr. D.S.C. Apr. 16, 2009) [Docket No. 406] (“The DIP Liens shall not be subject to surcharge under section 506(c) of the Bankruptcy Code.”). Such a waiver is appropriate in circumstances where, such as here, the lender is not willing to provide DIP financing without the 506(c) waiver and the lender has provided an appropriately sized carve-out to fund the professional fees and United States Trustee fees incurred during the case. Neither the UST nor Old Mill Stream have established that the estate is harmed by the 506(c) waiver in these cases, or that any valid 506(c) claims could be asserted against the DIP Lenders. The Committee, which has a responsibility to act for the best interest of the general unsecured creditor body as a whole, has consented to the 506(c) based on the benefits provided to the estate through the Global Settlement.

62. DIP Order Binding on any Successor Trustee. Courts in this District have approved DIP financing orders that included language providing that the order was binding on any successor

trustee. *See, e.g., In re The Merit Group, Inc.*, Case No. 11-03216-hb (Bankr. D.S.C. June 10, 2011) [Docket No. 163] (“The provisions of this Order shall be binding upon all parties in interest in the Chapter 11 Cases, including, without limitation, the Senior Lenders, the Debtors, and their respective successors and assigns (including any...chapter 7 trustee appointed or elected in a superseding chapter 7 case); *In re Daufuskie Island Properties, LLC*, Case No. 09-00389-jw (Bankr. D.S.C. May 8, 2009) [Docket No. 279] (“The [DIP] Liens shall be valid and enforceable against any trustee or other estate representative appointed in the case or any Successor Case, upon the conversion of the case to a case under Chapter 7 of the Bankruptcy Code (or any other Successor Case)); *In re BI-LO, LLC*, Case No. 09-02140-hb (Bankr. D.S.C. Apr. 16, 2009) [Docket No. 406] (“The DIP Documents and this Order shall...be valid, binding, and enforceable against...any trustee or other estate representative appointed or elected in the Cases, or any case under Chapter 7 of the Bankruptcy Code....”). The DIP Lenders are not willing to provide the DIP Facility in the absence of this provision. Practically speaking, it is unclear how a successor trustee could unwind the provisions of the Final DIP Order and what form unwinding the order could take. The DIP Lenders are not willing to take on the risk of such uncertainty. Accordingly, the Debtors request that the Court overrule the unresolved objections to entry of the Final DIP Order.

WHEREFORE, the Debtors respectfully request that this Court (a) enter an order approving the Sale free and clear of liens, claims, and interests and (b) enter the Final DIP Order, and (c) grant such other and further relief as it deems just and proper.

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February 11, 2019

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