

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re:

Golden County Foods, Inc., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 15-11062 (KG)

(Jointly Administered)

Hearing Date For Bid Procedures: June 15,  
2015 at 10:00 a.m. (ET)

Obj. Deadline For Bid Procedures: June 11,  
2015 at 12:00 p.m. (ET)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS'  
OBJECTION TO THE DEBTORS' MOTION FOR ENTRY OF ORDERS (I)  
APPROVING BIDDING PROCEDURES, SCHEDULING AN AUCTION, AND A  
SALE HEARING, AND (II) GRANTING RELATED RELIEF

The Official Committee of Unsecured Creditors (the "Committee")<sup>2</sup> appointed in the cases (the "Chapter 11 Cases") of the above-captioned debtors and debtors-in-possession (collectively, the "Debtors"), by and through its undersigned proposed counsel, submits this objection (the "Objection") to the entry of an order approving (a) the *Debtors' Motion for Entry of Orders (I) Approving Bidding Procedures (the "Bidding Procedures")*, *Scheduling an Auction, And a Sale Hearing, And (II) Granting Related Relief* [D.I. 58] (the "Bid Procedures Motion"), and (b) any sale (the "Sale")<sup>3</sup>, credit bid or otherwise, that does not preserve the Committee's lien challenge rights or ability to prosecute the Committee Litigation Claims.<sup>4</sup> In

<sup>1</sup> The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Golden County Foods, Inc. (3018); GCF Franchisee, Inc. (4385); and GCF Holdings II, Inc. (3151). The address of the Debtors' corporate headquarters is 300 Moore Road, Plover, Wisconsin 54467.

<sup>2</sup> Capitalized terms used herein, but not otherwise defined, shall have the meaning ascribed to the term in the Bid Procedures Motion or the APA (defined herein).

<sup>3</sup> The Committee is aware that the deadline to object to the proposed sale to Monogram (defined herein) or any other potential bidder is currently June 25, 2015 (the "Sale Objection Deadline"). Notwithstanding, how this Objection addresses certain Sale related issues, the Committee reserves the right to raise further Sale related objections prior to the Sale Objection Deadline or at the Sale Hearing (defined herein).

<sup>4</sup> The "Committee Litigation Claims" include, but are not limited to, litigation against any of the Debtors' prepetition secured lenders for avoidance, reduction, recharacterization, disallowance, disgorgement, counterclaim, surcharge, subordination, and marshalling.



support of this Objection<sup>5</sup>, the Committee respectfully states as follows:

### **PRELIMINARY STATEMENT**

1. The Debtors are seeking to sell substantially all of their assets by July 14, 2015 to Monogram Appetizers, LLC (“Monogram”) through an expedited sale process. The Committee is hopeful that the sale process, as currently structured, will maximize the value of the Debtors’ estates. Notwithstanding this cautious optimism, the Committee has several issues with the procedures governing the process and the asset purchase agreement (the “APA”) that the Debtors entered into with Monogram. These issues must be resolved before either the Bid Procedures or Sale is approved.

### **BACKGROUND**

2. On May 15, 2015 (the “Petition Date”), the Debtors filed a voluntary petition (the “Petition”) for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”).

3. The Chapter 11 Cases are being jointly administered for procedural purposes only, pursuant to an order of this Court entered on May 19, 2015 [D.I. 33].

4. Since the Petition Date, the Debtors have continued to operate their businesses and manage 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 the Chapter 11 Cases.

5. On the Petition Date, the Debtors filed the *Declaration of James J. Bradford in Support of Certain First Day Pleadings* (the “First Day Declaration”) [D.I. 10].

6. Also on the Petition Date, the Debtors filed the *Emergency Motion For Interim and Final Orders Authorizing Debtor-In-Possession Financing and Granting Related Relief* (the “DIP Motion”) [D.I. 9]. On May 20, 2015, the Bankruptcy Court entered an order permitting the Debtors to borrow up to \$2,409,000 on an interim basis [D.I. No. 45] (the “Interim DIP Order”).

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<sup>5</sup> The Committee is currently engaged in discussions with counsel for the Debtors and Brazos (defined herein) to resolve the issues addressed in this Objection and is hopeful that the issues can be resolved in advance of the hearing.

The Interim DIP Order provides that the Committee's lien challenge deadline is July 29, 2015 (the "Lien Challenge Deadline"). *See* Interim DIP Order at ¶ 8. The Committee is filing an objection to the DIP Motion (the "DIP Objection") contemporaneously with this Objection.

7. On May 27, 2015 (the "Formation Date"), the Office of the United States Trustee appointed the Committee pursuant to section 1102(a)(1) of the Bankruptcy Code [D.I. 68]. On the same day, the Committee selected Lowenstein Sandler LLP ("Lowenstein") and Gellert Scali Busenkell & Brown, LLC ("Gellert") to serve as its co-counsel, and shortly thereafter, selected GlassRatner Advisory & Capital Group ("GlassRatner") to serve as its financial advisor.

### **THE DEBTORS' PREPETITION CAPITAL STRUCTURE**

8. PNC Bank, National Association ("PBNA") wears several hats in these Chapter 11 Cases. PBNA is the prepetition agent (the "Prepetition Agent") under the Prepetition Credit Agreement (defined herein) and a pre-petition lender (the "Prepetition Lender," and together with the Prepetition Agent, "PNC"). *See* DIP Motion at ¶ 10. PBNA is also both the postpetition agent (the "Postpetition Agent") and a lender (the "DIP Lender") under the DIP Facility. *Id.* PNC, the Postpetition Agent, and the DIP Lender are collectively referred to as the "PNC Secured Parties".

9. Brazos<sup>6</sup> also wears numerous hats. Brazos owns numerous shares in various classes of the Debtors' preferred stock. *See* Petition at 17. In addition, Brazos provided a limited guaranty in the amount of \$12.5 million (the "Limited Guaranty") in connection with the Debtors' obligations owed under the Prepetition Credit Agreement (defined herein). *See* First Day Declaration at ¶ 8. Brazos also purchased an \$8 million participation in the Last Out Term Loan (defined herein) from PNC in order to reduce its outstanding liability under the Limited Guaranty from \$12.5 million to \$4.5 million. *Id.* Finally, Brazos owns Subordinated Notes (defined herein).

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<sup>6</sup> For purposes of this Objection, "Brazos" is defined to mean Brazos Equity Fund II, L.P., Brazos Private Equity Partners L.L.C., Riata Capital Group LLC, or any of these entities' affiliates.

10. The Debtors are parties to a Revolving Credit, Term Loan and Security Agreement, dated as of November 13, 2013 (the “Prepetition Credit Agreement”) with the PNC. *See* DIP Motion at ¶ 6. As amended, the Prepetition Credit Agreement provides for a revolving credit advances of up to \$12.75 million (the “Revolving Advances”), first out term loans of \$10 million (the “First Out Term Loans,” together with the Revolving Advances, the “PNC Secured Debt”), and last out term loans of \$12.5 million (the “Last Out Term Loans”). *Id.* According to the Debtors, as of the Petition Date, there was approximately \$21,527,982.89 due and owing under the Prepetition Credit Agreement, consisting of approximately \$7,303,063.91 in Revolving Advances, \$5,690,476.18 in First Out Term Loans, and \$8,534,442.80 in Last Out Term Loans. *Id.*

11. The Debtors are also indebted to several lenders, including Brazos, under the terms of certain unsecured senior subordinated notes dated November 13, 2013 (the “Subordinated Notes”) in the face amount of \$1 million. *Id.* at ¶ 9. *Id.* As of the Petition Date, the Debtors also report that they owed their trade creditors approximately \$14.7 million. *Id.*

### **BID PROCEDURES SUMMARY**

12. On May 22, 2015, the Debtors filed the Bid Procedures Motion seeking to approve the APA with Monogram. The APA provides for a \$22 million purchase price for the Purchased Assets (as defined in the APA) plus the assumption of certain liabilities. *See* APA at Article 2.8. The Debtors seek entry of an order (the “Bid Procedures Order”) approving the Sale on the following timeline (the “Sale Milestones”):

- June 15, 2015 – Hearing to approve the Bid Procedures.
- June 28, 2015 – Deadline by which objections to (a) any proposed Sale, and (b) proposed cure amounts in connection with the assumption and assignment of executory contracts must be filed.<sup>7</sup>
- June 29, 2015 – Bid deadline (“Bid Deadline”).
- July 1, 2015 – Auction to sell the Purchased Assets (“Auction”).

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<sup>7</sup> It is unclear why the deadline to file a Sale objection is before the Bid Deadline (defined herein) and this discrepancy should be corrected in the Bid Procedures Order to avoid any confusion.

- July 2, 2015 – Hearing to consider approval of any Sale (the “Sale Hearing”).
- July 11, 2015 – Deadline by which an order approving any Sale (the “Sale Order”) must be entered.

13. The Purchased Assets, include “certain avoidance actions or similar causes of action arising under sections 544 through 553 of the Bankruptcy Code, including proceeds thereof, regarding a vendor identified by Monogram as important to the continuation of the Debtors’ business (the “Avoidance Actions”), and for which a portion of the Purchase Price has been allocated to the purchase of the Avoidance Action.” *See* APA at Article 2.1(b) (xiii).

14. Under the DIP credit agreement (the “DIP Credit Agreement”), the DIP Lender preserves the right to credit bid. *See* DIP Credit Agreement at Articles 7.22 and 10.7(q). However, according to the first paragraph of the credit bidding provision included in the Bid Procedures, PNC has agreed not to credit under certain circumstances. *See* Bid Procedures at ¶ h. In addition, the second paragraph of the credit bidding provision, allows Brazos to direct PNC to credit bid if certain conditions are satisfied. *Id.*

15. Section 9.10 of the APA (the “APA Release”) releases all parties, aside from those that are specifically identified as parties to the APA, from “all claims or causes of action (whether in contract or in tort, in law or in equity) that may be based upon, arise out of or relate to the Agreement or the negotiation, execution or performance of the Agreement (including any representation or warranty made in or in connection with the Agreement or an inducement to enter into the Agreement).”

16. The APA also includes an overly broad Seller Material Adverse Effect clause, which should be stricken or narrowed. *See* APA at Article 6.9.

### **MARKETING PROCESS**

17. The Debtors retained Piper Jaffray & Co. (“Piper Jaffray”) to assist with strategic alternatives and “marketing the sale of the Debtors’ assets on a going-concern basis.” *See* Bid Procedures Motion at ¶ 6. Piper Jaffray assisted with:

- (a) drafting an offering document describing the Debtors, its operations, historical

performance and future prospects; (b) identifying, contacting and screening potential purchasers of the Debtors' assets or business; (c) contacting such potential purchasers; (d) preparing a due diligence data room (the "Data Room") and coordinating the due diligence investigations for potential purchasers; (e) analyzing proposals received from potential purchasers; and (f) negotiating the financial aspects of the proposed sale transaction.

*Id.*

18. The Debtors indicate that the marketing process commenced in February 2015 and lasted for approximately 3 months until May 2015, culminating in the APA with Monogram. *Id.* at ¶¶ 3 and 7. The Debtors state that Piper Jaffray identified 101 potential purchasers (the "Potential Purchaser List"), sixty three (63) of which executed non-disclosure agreements and received an offering memorandum (the "Offering Memorandum"). *Id.* Of the parties receiving the Offering Memorandum, six were interested in purchasing the Debtors' assets and returned initial indications of interest (the "Indications of Interest"). *Id.*

### **OBJECTION**

#### **A. Monogram's Stalking Horse Bid Provides Insufficient Cash Consideration**

19. Monogram, the PNC Secured Parties, and Brazos must "pay the freight" and ensure that after the Sale there will be sufficient funds left in the estate to cover: (a) all administrative and priority claims, including claims arising under Bankruptcy Code Section 503(b)(9) ("Section 503(b)(9) Claims"), (b) the costs of winding down the Debtors' estates, and (c) a distribution to general unsecured creditors. *In re NEC Holdings Corp., et al.* Case No. 10-10890 (Bankr. D. Del. July 13, 2010) Tr. at 100:17-20 and *In re Townsends, Inc., et al.*, Case No. 10-14092 (Bankr. D. Del. January 21, 2011) Tr. at 23:25-24:22.

20. The Court cannot allow the bankruptcy process to be used if it only benefits the PNC Secured Parties and Brazos. *See In re Defender Drug Stores, Inc.*, 145 B.R. 312, 317 (B.A.P. 9th Cir. 1992) (prohibiting "convert[ing] the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the postpetition lender."); *PBGC v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935 (5th Cir. 1983), *reh'g denied*, 705 F.2d 450 (5th Cir. 1983) (reversing order authorizing section 363 sale of



Procedures nor the Sale can be approved.

**B. The Committee's Lien Challenge Rights and Ability to Prosecute the Committee Litigation Claims Must Be Preserved in Either a Credit Bid or Cash Sale**

22. The Bid Procedures and Bid Procedures Order must be amended to ensure that the Committee's lien challenge rights and ability to prosecute the Committee Litigation Claims are preserved in the event that there is a credit bid. *See e.g., In re Free Lance-Star Publ'g Co.*, 512 B.R. 798, 806 (Bankr. E.D. Va. 2014) (capping lender's credit bid in light of questionable liens); *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").

23. If PNC desires to credit bid the PNC Secured Debt prior to the Lien Challenge Deadline, it should be required to post a cash bond sufficient to cover the amount that it is credit bidding. Similarly, notwithstanding the Lien Challenge Deadline, Brazos should be required to post a cash bond if it directs PNC to credit bid prior to expiration of the Committee's challenge deadline.

24. This reasoning applies equally to the proposed cash sale to Monogram. It is an Event of Default under the DIP Credit Agreement if the Debtors do not disburse the full amount of the sale proceeds to the Postpetition Agent contemporaneously with the closing of the Sale. *See* APA at Article 6.27. However, in order to preserve the Committee's lien challenge rights and the right to pursue the Committee Litigation Claims, this Event of Default must be stricken and amended to require that the Sale proceeds be escrowed pending expiration of the Committee's investigation deadline.

25. If a credit bid is allowed, the Bid Procedures, the Bid Procedures Order, and any Sale Order must make clear that the alleged liens and security interests are not *ipso facto* found valid by the entry of the Bid Procedures Order or Sale Order. According to *In re Radnor Holdings Corp.*, 353 B.R. 820 (Bankr. D. Del. 2006), unless this Court expressly reserves the



Committee's rights, the entry of an order permitting a credit bid may be tantamount to an order approving the nature, extent and validity of the lien claim and also prevents the prosecution of any Committee Litigation Claims. Thus, the Committee requests that if any credit bids are allowed, 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 PNC or Brazos (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.

26. In addition, the Committee requests that if a credit bid is allowed, the Sale must exclude any unencumbered prepetition assets and require a cash payment for those assets at fair market value.

**C. The Committee Reserves its Rights to Seek Relief From the Court if the Debtors' Current Sale Timeline Precludes Potential Purchasers From Participating in the Sale Process**

27. The Committee recognizes the Debtors' liquidity constraints and does not currently object to the Sale Milestones. The Committee, however, was only appointed two weeks ago, and although it has been given access to the Debtors' investment banker running the sale process, has access to the Data Room, and has been provided with the Potential Purchaser List, the Offering Memorandum and the Indications of Interest, the Committee is still conducting diligence to determine whether the sale process, as currently structured, will truly maximize the value of the Debtors' estates. Thus, a provision should be added to the Bid Procedures and the Bid Procedures Order that authorizes the Committee to seek relief from the Court, if it determines in the course of its diligence, that an extension of the current deadlines would help maximize the value of the Debtors' estates.

**D. Avoidance Actions, Other Estate Causes of Action, and Insurance Policies**

28. Monogram should not be authorized to purchase non-insider Avoidance Actions and then use those Avoidance Actions to leverage better terms and other concessions from trade creditors that may not receive a recovery in the Chapter 11 Cases. *See* APA at Article 2.1(b) (xiii). Instead, if Monogram chooses to purchase any non-insider Avoidance Actions, it should be required to pay fair value for the purchased actions and agree to release the actions as part of the purchase.

29. The APA is silent about whether other estate causes of action, including Chapter 5 causes of action against insiders (e.g., officers and directors), are being purchased by Monogram. Any Sale Order should reflect that these causes of action remain with the estate for the benefit of general unsecured creditors. *See In re Cybergenics Corp.*, 226 F.3d 237, 243 (3d Cir. 2000) (“A paramount duty of a trustee or debtor in possession in a bankruptcy case is to act on behalf of the bankruptcy estate, that is, for the benefit of the creditors. To fulfill this duty, trustees and debtors in possession have a variety of statutorily created powers, known as avoidance powers, which enable them to recover property on behalf of the bankruptcy estate.”); *See also In re Vogel Van & Storage, Inc.*, 210 B.R. 27, 32 (N.D.N.Y. 1997) *aff’d*, 142 F.3d 571 (2d Cir. 1998).

30. With respect to insurance policies, the Committee objects to any policies related to officer and director coverage, errors and omissions (a/k/a professional liability coverage), and/or employment practices liability insurance being sold in the Sale. As currently drafted, the APA is unclear as to the treatment of these policies. *See* APA at Article 2.1 (definition of Purchased Assets) and Article 5.11 (addressing insurance policies). The insurance policies (and any recovery therefrom) are not property of the Debtors’ estates. As such, the insurance policies and any such recovery should be made available for all of the Debtors’ creditors, not solely

Monogram.<sup>10</sup> *Cf. In re Allied Digital Technologies Corp.*, 306 B.R. 505, 512-13 (Bankr. D. Del. 2004).

**E. Alternative Bids Should Not Need to Conform to The Terms of Monogram's bid in All Material Respects.**

31. The Bid Procedures require potential purchasers to propose an alternative transaction "involving substantially all the Purchased Assets and Assumed Liabilities under the APA." *See* Bid Procedures at ¶ g(5). Similarly, although variations may be allowed in narrow circumstances, any competing APA "shall contain substantially all the material terms and conditions contained in the APA". *Id.*

32. Alternative bids should not be required to materially conform with Monogram's bid. Alternative purchasers should be able to bid for subsets of the Debtors' assets as the sum of the parts may be greater than the whole.

**F. The APA Release Should be Stricken**

22. The APA Release is too broad and inappropriately provides various parties, including Brazos, with a release for any conduct in connection with the negotiation, execution or performance of the APA. Brazos, and other third parties, should not receive releases in connection with the APA or any other actions, unless they prove they are making a substantial contribution to the Debtors' estates and the Chapter 11 Cases and after the Committee's investigation is complete.

**G. The Committee Should be Involved in All Aspects of the Sale Process**

23. While the Committee is granted consultation rights in connection with many aspects of the sale process, there are other instances where the Committee is not given a seat at the table. Specifically, the Committee should be granted consultation rights with respect to: (a) the determination as to whether an alternative bidder is likely to submit a higher and/or

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<sup>10</sup> The Committee does not object to the sale of insurance policies (and proceeds thereof) from any policies that cover property damage and/or any losses relating to operating assets incurred after the Sale closes.

better bid than Monogram's bid, (b) the adoption of additional rules related to the Bidding Process (defined in the Bidding Procedures), and (c) determining whether the financial disclosure or credit quality support information provided by an alternative bidder is acceptable. *See* Bidding Procedures at ¶ b(iii) (discussing the selection of a Qualified Bidder), ¶ b(iii)(e) (addressing the rules governing the Bidding Process); ¶ g(a)(x)(d) (addressing financial disclosures). In addition, the Committee, including Committee members and their professionals, should be permitted to attend the Auction and assist with the determination as to whether it should be cancelled. *See* Bid Procedures at section entitled "Reservation of Rights".

**H. The Committee Should Be Involved In All Discussions And Determinations With Respect To Purchase Price Allocation.**

24. The APA appears to be silent as to which party or parties are responsible for allocation of the purchase price. The Committee should be involved in this process, as this allocation may have a significant impact on the purchase price and may create liabilities for the Debtors' estates.

**I. No termination of APA pending an appeal.**

25. The Bid Procedures Order should provide that a successful bidder for the Purchased Assets shall not be permitted to terminate the APA should any order approving the Sale be appealed.

**J. Access to Books and Records**

26. The Committee and/or other estate representatives should be granted unfettered access to the Debtors' books and records post Sale.

**WHEREFORE**, the Committee respectfully requests that the Court (a) deny the Bid Procedures Motion and not approve any Sale that does not preserve the Committee's lien challenge rights or ability to prosecute the Committee Litigation Claims or, in the alternative, (b) enter a Bid Procedures Order and Sale order addressing the Committee's objections set forth herein, and (c) grant the Committee such other and further relief as the Court deems just and

appropriate.

Dated: June 11, 2015

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on June 11, 2015 a copy of the foregoing *Official Committee of Unsecured Creditors' Objection to the Debtors' Motion for Entry of Orders (I) Approving Bidding Procedures, Scheduling an Auction, And a Sale Hearing, And (II) Granting Related Relief* has been electronically filed using the Court's CM/ECF system and served via Hand Delivery on the parties listed below and via First Class U.S. Mail on the attached Service List.

June 11, 2015

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