

Hearing Date: October 16, 2015 at 10:00 a.m.
Objection Deadline: October 9, 2015 at 4:00 p.m.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:	:	Chapter 11
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THE GREAT ATLANTIC & PACIFIC TEA	:	Case No. 15-23007 (RDD)
COMPANY, INC., <i>et al.</i> ,	:	
	:	<i>(Jointly Administered)</i>
Debtors.	:	
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FURTHER OPPOSITION AND LIMITED OBJECTION OF UNITED FOOD AND COMMERCIAL WORKERS, INTERNATIONAL UNION TO THE MOTION OF DEBTORS PURSUANT TO 11 U.S.C. §§ 105, 363, 365 AND 503 AND FED. R. BANKR. P. 2002, 6004 AND 6006 FOR APPROVAL OF: (I) (A) GLOBAL BIDDING PROCEDURES, (B) BID PROTECTIONS, (C) FORM AND MANNER OF NOTICE OF SALE TRANSACTIONS AND SALE HEARING, AND (D) ASSUMPTION AND ASSIGNMENT PROCEDURES; AND (II) (A) PURCHASE AGREEMENTS (B) SALE OF CERTAIN OF THE DEBTORS’ ASSETS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES, AND (C) ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND LEASES

United Food and Commercial Workers Union, International Union (hereinafter the “UFCW”) together with its affiliated local union (the “Unions”), a creditor and party in interest in this case, submits this further opposition and limited objection to the Motion of Debtors (the “Debtors,” the “Company,” or “A&P”) Pursuant to 11 U.S.C. §§ 105, 363, 365 and

503 and Fed. R. Bankr. P. 2002, 6004 and 6006 for approval of: (i) (a) global bidding procedures, (b) bid protections, (c) form and manner of notice of sale transactions and sale hearing, and (d) assumption and assignment procedures; and (ii) (a) purchase agreements (b) sale of certain of the debtors' assets free and clear of liens, claims, interests and encumbrances, and (c) assumption and assignment of certain executory contracts and leases (the "Sale Motion") [Docket No. 26], as supplemented by further motions and notices concerning PSK/Food Partners (Docket Nos. 1126).¹

1. Local unions affiliated with the UFCW serve as the collective bargaining representative of approximately 26,000 employees of the Debtors (including Great Atlantic & Pacific Tea Company, Food Basics, Inc., Pathmark Stores, Inc., Super Fresh Food Markets, Inc., The Food Emporium, Inc. and Waldbaums, Inc., collectively, the "Company") under the terms of collective bargaining agreements ("CBAs"). The UFCW is also party to a Protection Terms Sheet ("PTS") approved by this Court in the Debtors' previous bankruptcy,² to which Company, the UFCW as well as the local unions were parties. A copy of the PTS is attached as Appendix A.

2. Under the PTS, the Debtors are required to condition any sale of a grocery store on a buyer's assumption of the labor contract, hiring substantially all employees, and respecting relative seniority within the group of employees hired. Appendix A, Section 6 (c).

¹ The UFCW, which is a party to the Protections Term Sheet negotiated during the last bankruptcy, is submitting this objection on behalf of itself and relevant local unions that are the parties to the underlying CBAs subject to the following statement: The UFCW expects that local unions may file joinders and adoptions of this objection, together with any additions or modifications, including those that may be relevant to the particular local union.

²See Case No. 10-24549, *A&P I* Docket No. 2910.

3. On July 20, 2015, the Debtors filed the Motion, seeking approval of bidding procedures and the three Stalking Horse Agreements selling 120 of the Debtors' 296 stores for nearly \$600 million. The Debtors assert that approximately 12,800 employees work at these stores. *See* Motion at ¶1. The Debtors later narrowed the immediate sales relief they sought to deal only with stalking Acme Markets, Inc. ("Acme") and The Stop & Shop Supermarket Company, LLC ("Stop & Shop").

4. The relevant Local Unions reached CBAs, tentative CBAs, or agreements in principle with stalking horse purchaser Acme and Stop & Shop Supermarket so that they did seek to enforce against Acme and Stop & Shop the successorship provisions of the current CBAs and waived that provision as to Acme and Shop & Stop stalking horse sales.

5. The Debtors also negotiated and granted stalking horse protection in relation to **Key Foods** (Docket 1125, related to 16 stores), **Wakefern** (Docket Nos. 1081 and 1114, relating to 12 stores), **Food Bazaar/Bogopa** (Docket No. 1115, relating to four stores), **Morton-Williams** (Docket No. 1080 and 1113, relating to three stores), **PSK/Food Partners** (Docket 1126 – 2 stores). In addition, at the first and second week's auction among the winning bids were by **Stop & Shop**, (Store 70226), **Key Foods** (Stores 36732, 36703, 36727, 72297, 70773, 70229, 70263), **Wakefern** (Store 70275), **King Kullen** (Store 70241), **Estevez Markets** (Store 70441), **Food Bazaar/Bogopa** (Stores 72288 and 70618) and **PSK/Food Partners** (Store 70235). In the case of these stalking horse and/or winning bidders the UFCW is not objecting to the proposed sales, and believes that the relevant local unions are also not objecting to these sales and are waiving application of the successorship clauses in their CBAs to these sales, because the local unions have reached CBAs, tentative CBAs, or agreements in principle with these four entities, or there are current collective bargaining relationships between UFCW local unions with

these entities such that the UFCW and local unions have confidence that satisfactory agreements will be reached within a reasonable period.

6. In addition, there is a stalking horse agreement with two real estate buyers, **Federal Realty** (Docket Nos. 1089 and 1112) and **Dave-Marion** (Store 70956), and there were several winning bids at the first week and second of the auction by bidders who were landlords, real estate entities, or non-grocery store entities (**Maglan**, Store 36708; **Fell Whitestone, LLP**, Store 70270; **CVS** – Stores 70185, 36707; **Brixmor** – Stores 70277, 70151, **Saxon** – Store 72602; **West 207th Acquisitions, LLC** – Store 72610;). In the case of these stalking horse and/or winning bidders the UFCW is not objecting to the proposed sales, and believes that the relevant local unions are also not objecting to these sales, because the proposed sales appear clearly not to be to grocery store operators.

7. Finally, the winning bidder in the auction included other grocery store operators or entities who, as shown in some cases by the purchase of inventory - may be already working with grocery store operators: (**Fransula/Food Partners** (Stores 59501, 59036, 70235), **the Manishevitz Family** (Stores 72624, 72642), **K.A.M. Food Store** (Store 59503), **Tawa** (Stores 72535, 72114), **Best Yet Markets** (Stores 70232, 70279, 72611, 70203), **HMart** (Stores 70289) **Shanghai Enterprises** (Stores 70217), **BX & M Food Corporation** (Store 59506), **Jaru Food Corp.**(Store 70208), **Lee & Associates** (Stores 72-634, 59-512), and **Garden Gourmet** (Store 70-769). These bidders have not met with the Unions, have not agreed to do so, *have not agreed to hire any employees*, and have no current collective bargaining relationship with the UFCW or any UFCW local union. The UFCW and local unions **are not** waiving application of the successorship clauses in their CBAs to the sales of these 19 stores to eleven bidders. .

8. It may be noted that Unions would waive the successorship clause if sales of six of these stores were sold to the designated backup bidder (Store 72642 - Winner Manishevitz Family, Backup Wakefern; Store 59036- Winner Fransula Foods, LLC, Backup Key Foods; Store 70232, Winner Best Yet Markets, Back Up Kings; Store 70279, Winner- Best Yet; Backup, Uncle G's Management Corp.; Stores 72634 and 59512, Backup (for both stores) Bogopa Service Corp. (Food Bazaar).

OBJECTION

THE MOTION CANNOT BE APPROVED IN RELATION TO RELEVANT BIDDERS UNLESS THE PURCHASERS REACH AGREEMENTS OR THE DEBTORS COMPLY WITH SECTION 1113 OF THE CODE; CERTAIN BACKUP BIDS ARE ALSO THE BEST BIDS

A. **A Collective Bargaining Agreement May Be Rejected
Only Pursuant to the Exclusive Provisions of Section 1113**

9. A debtor may reject a collective bargaining agreement with a union representing its employees and the obligations contained therein only if the debtor meets the stringent and exclusive requirements set forth in Section 1113 of the Bankruptcy Code. *See* 11 U.S.C. § 1113.³ Section 1113(a) provides that a debtor may reject a collective bargaining agreement “only in accordance with the provisions of this section”, 11 U.S.C. § 1113(a), and section 1113 (f) provides that “[n]o provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.” 11 U.S.C. § 1113(f).

10. The Third Circuit has emphasized that the statute forbids the application of other Code provisions to permit a debtor to escape the requirements of section 1113. “The intent behind section 1113 is to preclude debtors or trustees in bankruptcy from unilaterally

³ The UFCW is filing today an objection to the Debtors’ 1113 Motion, and the UFCW adopts that objection to the extent relevant here.

terminating, altering, or modifying the terms of a collective bargaining agreement without following its strict mandate. *Moreover, the provision operates to preclude the application of other bankruptcy code provisions to the advantage of debtors and trustees to permit them to escape the terms of a collective bargaining agreement without complying with the requirements of section 1113.*” See *In re Cont’l Airlines*, 125 F.3d 120, 137 (3d Cir. 1997) (citation omitted) (Emphasis added).

11. The Second Circuit agrees, “[w]e construe subsection 1113(f) quite literally. We hold that it was meant to prohibit the application of *any* other provision of the Bankruptcy Code when such application would permit a debtor to achieve a unilateral termination or modification of a collective bargaining agreement without meeting the requirements of § 1113.” *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 990-91 (2d Cir. 1990) (emphasis added).

12. Thus, a debtor cannot reject, or *de facto* reject, collectively bargained obligations, including relevant successorship clauses, without invoking and meeting the requirements of Section 1113. The instant Motion therefore must be denied absent the Debtors’ compliance with section 1113 or the purchasers entering into CBAs with the local unions. The Motion cannot be approved if the Debtors’ entry into the proposed APAs and/or whatever entity emerges for the auction as the winning bidder is inconsistent with the collective bargaining agreements and Section 1113.

B. The Debtors’ Section 1113 Motion

13. The Debtors filed the Debtors’ Motion Pursuant To 11 U.S.C. §§ 1113(c), 1114(g), And 105(a) For Authority To Reject Collective Bargaining Agreements, Implement Final Labor Proposal, And Terminate Retiree Benefits And For Related Relief [Docket No. 820]

(the “1113(c) Motion”) on September 9, 2015, and the hearing has now been adjourned until October 16 2015.

14. In the instant Motion, the Debtors seek to sell the assets free and clear of the CBAs and without strict compliance with the successorship provisions of the CBAs – and without any successor liability claims. As noted *supra*, section 1113(f) plainly states that “[n]o provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section”.

15. The Third Circuit has held that section 1113 applies with full force to asset sales. In *Am. Flint Glass Workers Union v. Anchor Resolution Corp.*,⁴ the Third Circuit held that a debtor could not alter its obligations under a CBA by a partial assumption and assignment to a purchaser because that would be “an attempt to effect an alteration of the CBA,” and therefore the debtor “was required to comply with the procedures set out in Code § 1113.” To do otherwise, the court held, would permit the debtor and a purchaser “to misuse the Code in an effort to avoid the collective bargaining process that Congress deemed essential to the balance between labor and reorganizing debtors that it struck in Section 1113.” *Id.* at 82.⁵

16. Similarly, in *In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 89 (2d Cir. 1992), the Second Circuit concluded that “[a] debtor may sell the assets of the business

⁴ 197 F.3d 76, 81-82 (3d Cir. 1999).

⁵ Attempts to utilize other provisions of the Code to override Section 1113’s exclusive provisions have similarly been rejected. *See, e.g., Chicago Dist. Council of Carpenters Pension Fund v. Cotter*, 914 F.Supp. 237, 242 (N.D. Ill. 1996) (CBA cannot be rejected as part of plan of reorganization pursuant to provision providing automatic rejection of unassumed executory contracts pursuant to section 365).

unencumbered by a collective bargaining agreement *if* that agreement has been rejected pursuant to § 1113.”) (emphasis added).

C. Section 1113’s Requirements Apply to Successorship Clauses

17. Consistent with the decisions of the Third Circuit in *Anchor Resolution* and Second Circuit in *Maxwell Newspapers*, bankruptcy courts have also upheld the application of contractual successorship clauses to asset sales. *See In re Stein Henry Co., Inc.*, No. 91-15491S, 1992 WL 122902, at *2 (Bankr. E.D. Pa. June 1, 1992) (refusing to confirm plan which would result in asset sale without satisfaction of CBA’s successorship clause, which stated that the contract applied to “successors” and “assigns,” because “[o]nly through the medium of 11 U.S.C. § 1113(f) can a collective bargaining agreement be terminated or modified in any way” and “[r]ights provided in the agreement as to successor-entities must be preserved unless there is, unlike here, compliance with the procedures of 11 U.S.C. § 1113.”); *See also In re Nat’l Forge Co.*, 289 B.R. 803, 808 (Bankr. W.D. Pa. 2003) (Debtor “compelled” prior to gaining approval of sale of assets to seek rejection of CBA “[b]ecause of the successor language.”); *In re Bruno’s Supermarket, LLC*, 2009 WL 1148369 (Bankr. N.D.A1.) (Debtor seeks rejection of collective bargaining agreement with successorship clause prior to seeking approval of sale of assets).

18. As Judge Bernstein concluded in the *Journal Register* case here in the Southern District of New York, a debtor may not utilize Section 363 to bypass the requirements of Section 1113 in relation to a labor contract’s successor clause:

The collective bargaining agreement continues to bind the debtor post-petition, and a debtor cannot reject a collective bargaining agreement except in accordance with Bankruptcy Code § 1113. Generally speaking, a rejection represents a decision not to perform a burdensome executory contract. A debtor cannot bypass § 1113 and obtain a de facto rejection of its collective bargaining agreement simply by refusing to perform it. Although the obligation to comply with the successor clause is only one duty among many under a collective bargaining agreement, a debtor's

intentional breach of a material provision of the collective bargaining agreement is tantamount to a rejection, or alternatively, a unilateral alteration of its provisions in violation of Bankruptcy Code § 1113(f). Thus, as a general proposition, a sale under Bankruptcy Code § 363 cannot circumvent the condition imposed under a successor clause absent compliance with § 1113.

In re Journal Register Company, 488 B.R. 835, 840 (Bankr. S.D.N.Y. 2013).

19. Thus, the Court should not approve the relevant sales unless the purchasers have reached agreements with the UFCW or the Court has granted relief under Section 1113(c) which should not be granted for the reasons set forth in the UFCW's objection), and in the case of such bids with back-up bidders for whom the successorship clause would be waived, the court should approve the sales to the back-up bidders.

20. For these same reasons the Court should not find that the objected-to bids, where there is a back-up bids encompassing employment which would not be subject to an objection, are the best bids.

21. The Bankruptcy Court has "broad discretion and flexibility" to determine the outcome, particularly where bids are complex and the determination which is the "highest" and/or "best" is not always clear. *See In re Financial News Network, Inc.*, 980 F.2d 165, 169-70 (2d Cir. 1992); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (bankruptcy courts should "consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor" and other constituencies in ruling on a sale of the debtor's assets pursuant to Section 363(b)); *In re United Healthcare*, 1997 WL 176574 * 5 (D.N.J. March 26, 1997) ("the law allows the bankruptcy court to entertain higher and better offers, which means that the bankruptcy court may not focus solely on price.")

22. The preservation of jobs is appropriately a significant goal of this and other Chapter 11 cases. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984)

(“fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources”). Thus, determining the bids on mere price alone (should the bids be unequal in that regard) would “overlook a fundamental truism, i.e., a ‘highest’ bid is not always the ‘highest and best’ bid.” *See In re Bakalis*, 220 B.R. 525, 533 (Bankr. E.D. Pa. 1998).

23. Where a prospective buyer has demonstrated its intentions to carry on the business by committing to hire employees and entering into an agreement with their union, then the sale should be treated as a continuation of the debtor’s business in the same manner as if the Debtor were reorganizing. *Cf. In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 91 (2d Cir. 1992) (where debtor newspaper was “reorganized as an ongoing business” as a result of a sale transaction, Section 1113, applicable to a debtor’s reorganization, could be used to serve the interests of the buyer).

CONCLUSION

For the foregoing reasons, the Debtor’s motion should be denied in relation to the relevant sales.

Dated: New York, New York
October 9, 2015

Respectfully submitted,

/s/ Richard M. Seltzer

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2015, a true and correct copy of the above Opposition of United Food and Commercial Workers, International Union to Motion of Debtors for Approval of Key Employee Retention Program was served by electronically filing it with the Court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system. Copies were also emailed and mailed to the Standard Parties in accordance with the Case Management Order [Docket No. 62].

/s/ David R. Hock

David R. Hock