



Order Filed on June 28, 2016
by Clerk
U.S. Bankruptcy Court
District of New Jersey

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY LECLAIR RYAN 1037 Raymond Boulevard Sixteenth Floor Newark, New Jersey 07102 (973) 491-3600 Attorneys for Debtor David S. Catuogno (DSC-1397)	
In Re: HFIG FREEHOLD, LLC A/K/A CLUB METRO FREEHOLD, <p style="text-align: center;">Debtor.</p>	Chapter 11 Case No.: 15-33591 Hon. Christine M. Gravelle

ORDER PURSUANT TO 11 U.S.C. §363 (I) AUTHORIZING DEBTOR-IN-POSSESSION TO SELL ASSETS FREE AND CLEAR OF LIENS PURSUANT TO 11 U.S.C. §363, AVOIDING LIENS PURSUANT TO 11 U.S.C. §544 AND APPROVING BID PROCEDURES; AND (II) ASSUMING AND ASSIGNING LEASE FOR NON-RESIDENTIAL REAL PROPERTY, EQUIPMENT LEASE AND FRANCHISE AGREEMENT

The relief set forth on the following pages, number two (2) through seventeen (17) is hereby **ORDERED**.

DATED: June 28, 2016

Christine M. Gravelle

Honorable Christine M. Gravelle
United States Bankruptcy Judge

Debtor: HFIG Freehold, LLC a/k/a Club Metro Freehold

Case No.: 15-33591

Caption: ORDER (I) AUTHORIZING DEBTOR-IN-POSSESSION TO SELL ASSETS FREE AND CLEAR OF LIENS PURSUANT TO 11 U.S.C. §363, AVOIDING LIENS PURSUANT TO 11 U.S.C. §544 AND APPROVING BID PROCEDURES; AND (ii) ASSUMING AND ASSIGNING LEASE FOR NON-RESIDENTIAL REAL PROPERTY, EQUIPMENT LEASE AND FRANCHISE AGREEMENT

THIS MATTER having been brought before the Court by Debtor HFIG Freehold, LLC a/k/a Club Metro Freehold (the “Debtor”), by and through its counsel, , upon a Revised Motion for an Order (I) Authorizing Debtor-In-Possession to Sell Assets Free and Clear of Liens Pursuant to 11 U.S.C. §363, Avoiding Liens Pursuant to 11 U.S.C. §544 and Approving Bid Procedures; and (ii) Assuming and Assigning Lease for Non-Residential Real Property, Equipment Lease and Franchise Agreement; (the “Revised Sale Motion”), and the proposed sale contemplating the Debtor’s real property lease, gym equipment lease (including any rights in the equipment) Franchise Agreement, inventory, goodwill and other intangibles (the “Transferred Assets”) and good and sufficient notice having been provided to all parties-in-interest, as evidenced by the Affidavits of Service filed with the Court; and the Court having conducted a hearing on the sale on May 24, 2016 which hearing was continued until June 14, 2016 (the “Sale Hearing”), and a competing bid of Freehold Health Club LLC having been presented at the initial hearing on May 24, 2016, but withdrawn prior to the continued hearing, and no competing other competing bids having been presented and no objections to the proposed sale having been filed, and after the conclusion of the bidding process it having been determined that the highest and best offer was submitted by Royal Fitness LLC in the amount of \$230,000¹ (“Royal” or the “Buyer”), which sale terms are different than those set forth in the Revised Motion, and the Court having directed that the Debtor provide notice to all creditors of the revised sale terms by

¹ Including a *de facto* acquisition of the Debtor’s \$50,000 security deposit with its landlord Acme.

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Case No.: 15-33591

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way of sworn declaration of the Debtor and a proposed form of order approving the revised sale, and Royal being deemed the Successful Bidder, and all objections to the Revised Sale Motion, if any, having been denied or resolved by agreement as set forth on the record of the Sale Hearing, and the Court having reviewed and considered (a) the Revised Sale Motion, (b) the objections, if any, thereto, (c) the arguments of counsel, and the evidence proffered or adduced at the Sale Hearing and (d) the full record of this case, and it appearing that the relief sought in the Revised Sale Motion is necessary and in the best interests of the Debtor, its creditors, the estate, and other parties-in-interest; and due deliberation having been had; and good cause appearing for the entry of this Order;

IT IS HEREBY FOUND AND DETERMINED THAT:²

A. The Court has jurisdiction over the Revised Sale Motion under 28 U.S.C. §§ 157 and 1334, and this matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (M), (N), and (O). Venue of these cases and the Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409

B. The statutory predicates for the relief sought in the Motion are sections 105(a) and 363(b), (f), (k), (m) and (n) of the Bankruptcy Code and Rules 2002, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure.

C. As evidenced by the affidavits of service previously filed with this Court, and based on the representations of counsel at the Sale Hearing and the service of post-hearing notice as

² Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. *See* Bankruptcy Rule 7052.

Debtor: HFIG Freehold, LLC a/k/a Club Metro Freehold

Case No.: 15-33591

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directed by the Court, (i) the Debtor has provided proper, timely, adequate and sufficient notice of the Revised Sale Motion and the Sale Hearing, in accordance with sections 102(1) and 363 of the Bankruptcy Code, Rules 2002, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure, and the Procedures Order, (ii) such notice was good and sufficient, and appropriate under the particular circumstances, and (iii) no other or further notice of the Sale Motion and the Sale Hearing, or matters related thereto is or shall be required.

D. As demonstrated by the testimony and/or other evidence proffered or adduced in the pleadings and at the Sale Hearing, and the representations of counsel made on the record at the Sale Hearing, the Debtor has sufficiently marketed the Transferred Assets and conducted the sale process in an appropriate fashion.

E. The sale of the Transferred Assets by the Debtor has been duly and validly authorized by all necessary actions of the Debtor. The Debtor (1) has all of the power and authority necessary to consummate the transactions contemplated by the Revised Sale Motion, and (ii) has taken all actions necessary to authorize and approve the sale and the Revised Sale Motion and the consummation of the transactions contemplated thereby. No consents or approvals, other than those expressly provided for in this Order, are required for the Debtor to consummate such transactions.

F. Approval of the Revised Sale Motion and consummation of the proposed sale at this time is in the best interests of the Debtor, its creditors, the estate, and other parties-in-interest.

Debtor: HFIG Freehold, LLC a/k/a Club Metro Freehold

Case No.: 15-33591

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G. The Debtor has demonstrated good, sufficient, as well as sound business purpose and justification and compelling circumstances for the sale pursuant to section 363(b) of the Bankruptcy Code, and has further demonstrated good, sufficient and sound reasons for the sale of the Transferred Assets.

H. A reasonable opportunity to bid, object or otherwise be heard with respect to the Revised Sale Motion and the relief requested therein has been afforded to all interested persons and entities (including all parties that had expressed interest in acquiring the Transferred Assets) as set forth in the Affidavits of Service filed with the Court.

I. The proposed sale was negotiated, proposed, and agreed to by the Debtor and the Buyer without collusion, in good faith, and from arm's-length bargaining positions. Neither the Debtor nor the Buyer has engaged in any conduct that would cause or permit the sale to be avoided under section 363(n) of the Bankruptcy Code.

J. The Buyer is a good faith Buyer under section 363(m) of the Bankruptcy Code and, as such, is entitled to all of the protections afforded thereby. The Buyer will be acting in good faith within the meaning of section 363(m) of the Bankruptcy Code in closing the transaction contemplated by the Revised Sale Motion at any time after the entry of this Order.

K. The consideration provided by the Buyer for the Transferred Assets (i) is fair and reasonable, (ii) is the highest and best offer for the Transferred Assets, (iii) will provide a greater recovery for the Debtor's creditors than would be provided by any other available alternative, and (iv) constitutes reasonably equivalent value and fair consideration under the Bankruptcy Code

Debtor: HFIG Freehold, LLC a/k/a Club Metro Freehold

Case No.: 15-33591

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and under the laws of the United States, any state, territory, or possession thereof, or the District of Columbia.

L. The sale contemplated by the Revised Sale Motion must be approved and consummated promptly in order to preserve and maximize the value of the Transferred Assets and reduce the expenses of the Debtor's estate.

M. The sale and/or assignment of the Transferred Assets to the Buyer will be a legal, valid, and effective transfer of the Transferred Assets, and will vest the Buyer with all right, title, and interest of the Debtor in and to same, free and clear of all liens, liabilities, claims, interests and encumbrances of any kind or nature whatsoever and all debts arising under or out of, in connection with, or in any way relating to, any acts of the Debtor, claims (as defined in section 101(5) of the Bankruptcy Code), rights or causes of action (whether in law or in equity), obligations, demands, guaranties, rights, contractual commitments, restrictions, interests and matters of any kind or nature whatsoever, whether arising prior to or subsequent to the commencement of this case, and whether imposed by agreement, understanding, law, equity or otherwise, (collectively "Adverse Interests"). To the extent holders of Adverse Interests objected to the Revised Sale Motion or the sale, all such objections are hereby resolved subject to the terms negotiated by the parties as stated herein.

N. The Buyer would not have agreed to the sale and would not consummate the transactions contemplated thereby, thus adversely affecting the Debtor, his estate, and creditors,

Debtor: HFIG Freehold, LLC a/k/a Club Metro Freehold

Case No.: 15-33591

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if the sale of the Transferred Assets were not free and clear of all Adverse Interests, or if the Buyer would, or in the future could, be liable for any of the Adverse Interests.

O. The Debtor may sell the Transferred Assets free and clear of all Adverse Interests because, in each case, one or more of the standards set forth in sections 363(f)(1)-(5) of the Bankruptcy Code has been satisfied. Those holders of Adverse Interests who did not object, or who withdrew their objections to the sale or the Sale Motion, are deemed to have consented pursuant to section 363(f)(2) of the Bankruptcy Code.

P. All interested parties have agreed to the terms of the sale and the proposed allocation distribution of proceeds. Specifically:

- (i) \$70,000 towards the cure of the deficiency on the lease with Acme Markets, Inc. (“Acme”) (plus Acme’s retention and setoff and recoupment of the \$50,000 security deposit Acme holds for total consideration of \$120,000). Upon assumption, the Buyer will replenish the \$50,000 security deposit directly to Acme. Additionally, the Buyer and Acme have agreed to certain post assumption credits which will be effectuated between the non-Debtor parties subsequent to assumption;
- (ii) \$55,000 to cure the deficiency on the United equipment lease. The Buyer and United have reached an agreement to restructure the remaining lease payments/lease term in the post-assumption period, which agreement will be effectuated between these non-debtor parties subsequent to assumption;
- (iii) \$40,000 for priority sales taxes to the State of New Jersey; and
- (iv) \$15,000 to LeClair Ryan as a “carve-out” for Debtor’s counsel, which sum shall be held in trust pending an Order allowing fees based upon appropriate application

Debtor: HFIG Freehold, LLC a/k/a Club Metro Freehold

Case No.: 15-33591

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Acme, United, creditor ABC Financial and franchisor Club Metro USA, LLC. (“CMUSA”) have consented to the treatment as outlined above.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Approval of the Sale

1. The sale as set forth in the Revised Sale Motion, and all of the terms and conditions thereof, except only as modified pursuant to this Order, is hereby approved.

2. Pursuant to section 363(b) of the Bankruptcy Code, the Debtor and the Buyer are authorized and directed to consummate the sale, pursuant to and in accordance with the terms and conditions of the Sale Motion.

3. The Debtor and the Buyer are authorized and empowered to perform under, consummate and implement, the sale, together with all additional instruments and documents that may be reasonably necessary or desirable to implement the transactions contemplated in the Sale Motion, and to take all further actions as may be requested by the Buyer for the purpose of assigning, transferring, granting, conveying, conferring or reducing to possession the Transferred Assets to the Buyer, or as may be necessary or appropriate to the performance of the obligations as contemplated by the Revised Sale Motion. The Debtor and the Buyer are hereby authorized to take any and all steps necessary to effectuate, consummate and/or implement the terms of this Sale Order. To the extent of any discrepancies between this Order and the Sale Motion, this Order shall control.

Debtor: HFIG Freehold, LLC a/k/a Club Metro Freehold

Case No.: 15-33591

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4. Pursuant to the terms set forth in the Sale Motion, the Purchaser shall pay \$180,000 at closing, which shall be disbursed as follows:

i.	Acme - (landlord) (towards deficiency) -	\$70,000
ii.	United – (equipment lease) (towards deficiency) -	\$55,000
iii.	State of New Jersey – (sales tax) (priority tax) -	\$40,000
iv.	Carve-out (Debtor’s professionals)	<u>\$15,000</u>
		\$180,000

In addition to the disbursement set forth above, Acme shall be entitled to retain and apply and setoff and recoup, the \$50,000 security deposit it is holding in connection with the Debtor’s lease. The Buyer will pay \$50,000 directly to Acme to replenish the security deposit.

5. Pursuant to sections 105(a) and 363(f) of the Bankruptcy Code, the Transferred Assets shall be transferred to the Buyer, and, except as otherwise expressly provided in this Sale Order, upon consummation (the "Closing") shall be free and clear of all Adverse Interests and other Liens, Liabilities, claims and encumbrances of any kind or nature whatsoever, and such Adverse Interests and other Liens, Liabilities, claims and encumbrances have been and shall be terminated and declared to be unconditionally released, discharged and terminated, and such termination and release shall be binding upon and govern the acts of all entities, including all filing agents, filing officers, administrative agencies or units, governmental departments or units, secretaries of state, federal, state and local officials and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register or

Debtor: HFIG Freehold, LLC a/k/a Club Metro Freehold

Case No.: 15-33591

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otherwise record or release any documents or instruments, or who may be required to report or insure any title in or to the Transferred Assets conveyed to the Buyer, provided that all liens and encumbrances shall attach to the sale proceeds with the same validity, and in the same priority, immediately prior to closing.

6. The Transferred Assets shall not include the Debtor's interest in membership contracts at the gym facility nor shall it include the Debtor's interest in members' customer information or personally identifying information.

7. The Closing shall occur on or before the date that is twenty one (21) days from the hearing at which the Court granted the Debtor's Revised Sale Motion (the "Closing Window") which Closing shall take place at the offices of Debtor's counsel, or at some other place as agreed by the parties. The Buyer may take title or assignment of one or more of the Transferred Assets through one or more designees. All due diligence and contingencies must be completed and resolved within the Closing Window. To the extent all due diligence and contingencies are not completed and/or resolved within the Closing Window, same shall be deemed waived, which waiver is acknowledged and conceded by the Purchaser. All disbursements due to Acme, United or ABC pursuant to the terms of this Order shall be made within two (2) days of the Closing. To the extent the Closing does not occur by the conclusion of the Closing Window and the Closing Window is not extended on the consent of the Debtor, Acme and United, or by Court order, the Debtor shall be authorized to-retain the Buyer's deposit of \$15,000.

Debtor: HFIG Freehold, LLC a/k/a Club Metro Freehold

Case No.: 15-33591

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8. Subject to the terms and conditions of this Order, and specifically subject to the payment of the net proceeds of sale at closing as set forth in paragraph 4, *supra*, Acme and United consent to the sale pursuant to this Order for purposes of Section 363(f)(2) of the Bankruptcy Code. The transfer of the Transferred Assets to the Buyer pursuant to the Sale Motion constitutes a legal, valid, and effective transfer of the Property, and shall vest the Buyer with all right, title, and interest of the Debtor and to the Property, free and clear of all Adverse Interests and free and clear of any successor liability. The Debtor and the Buyer are authorized to effect the sale and transfer of Property pursuant to the terms of this Order and the Revised Sale Motion, and compliance with State or local bulk sales and similar laws and regulations, if any, is hereby waived.

Approval of the Assumptions and Assignments

9. The proposed assumption of the nonresidential real property lease between the Debtor and Acme dated March 5, 2013, as amended by the First Amendment to Sublease dated May 22, 2014 with regard to the real property located at 202 Mounts Corner Drive, Freehold, New Jersey shall be and hereby is approved and the parties are authorized to consummate the assumption and assignment. The parties may elect to voluntarily amend or modify the lease subsequent to the Closing.

10. Acme shall be entitled to retain the \$50,000 security deposit previously posted by the Debtor and, apply same to the Debtor's deficiency under the lease and "cure" obligations under 11 U.S.C. §365(b)(1)(A). Acme shall also receive at least \$70,000 from the proceeds of

Debtor: HFIG Freehold, LLC a/k/a Club Metro Freehold

Case No.: 15-33591

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sale towards said lease deficiency/cure obligations. The Buyer shall also make payment of \$50,000 directly to Acme to replenish the security deposit. To the extent the parties consummate the assumption and assignment of the lease, the aforesaid payment(s) shall be deemed good and sufficient cure in connection with the assumption and assignment of Acme lease. Any existing personal guarantees of the Acme lease shall not be affected or modified by (i) this Sale Order or (ii) the assumption and assignment of the Acme lease.

11. The proposed assumption and assignment of the equipment lease between the Debtor and United dated March 19, 2014 with regard to the gym equipment located at the Debtor's facility shall be and hereby is approved and the parties are authorized to consummate the assumption and assignment. The parties may elect to amend or modify the payment schedule under the equipment lease subsequent to assumption and assignment. Upon the Closing and United and the Buyer consummating the assumption and assignment as contemplated herein, United releases the Debtor and its principals from any further liability under the lease and any guaranty(ees), other than as provided in this Order.

12. Upon consummation of the assumption and assignment, United shall be entitled to be paid \$55,000 from proceeds of closing and apply same to the Debtor's deficiency under the lease and "cure" obligations under 11 U.S.C. §365(b)(1)(A) for pre-April 2016 post-petition payments. To the extent the parties consummate the assumption and assignment of the lease, the aforesaid payment shall be deemed good and sufficient cure in connection with the assumption

Debtor: HFIG Freehold, LLC a/k/a Club Metro Freehold

Case No.: 15-33591

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and assignment of the gym/health club equipment presently utilized by the Debtor in connection with the operation of its health club facility.

13. The proposed assumption and assignment of the Franchise Agreement between the Debtor and CMUSA dated March 23, 2012 with regard to the operation of the Club Metro located at 202 Mounts Corner Drive, Freehold, NJ shall be and hereby is approved and the parties are authorized to consummate the assumption and assignment. Inasmuch as the Debtor's Franchise Agreement is part of a multi-unit agreement, it may be necessary for the parties to execute a new agreement to extricate this particular unit from the multi-unit arrangement, except that any new agreement will be on substantively similar terms as the existing agreement, unless otherwise agreed to by the parties. As of the consummation of assumption and assignment of the franchise agreement in connection with the Closing, the Debtor will no longer be a franchisee of CMUSA. The parties agree that CMUSA will have no claim for rejection or consequential damages against the Debtor and CMUSA agrees to release the Debtor from any further liability under the franchise agreement (related to the Club Metro Freehold facility).

14. The parties acknowledge that, as of the Petition Date, the Debtor was current to CMUSA with respect to payments due under the Franchise Agreement. To the extent there are franchise fees due in the post-petition period, CMUSA has agreed to waive same as part of this transaction only.

Debtor: HFIG Freehold, LLC a/k/a Club Metro Freehold

Case No.: 15-33591

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15. Effective as of the Closing, United and CMUSA hereby waive any claims against or collection from the Debtor for obligations incurred up through the date of this Order except to the extent of any distribution(s) received in the within bankruptcy case.

Miscellaneous Provisions

16. The Debtor shall be obligated to come current on its obligations to file monthly reports with the Office of the United States Trustee and to pay all quarterly fees due in a prompt manner. Specifically, the February 2016 and March 2016 reports shall be filed within one week of the entry of this Order and the quarterly fees for the first quarter of 2016 shall likewise be paid within one week of the entry of this Order. All other outstanding reports and quarterly fees shall be filed and/or paid within 30 days of the entry of this Order.

17. Each and every federal, state, and local governmental agency, department, or official is hereby directed to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the Sale Motion.

18. All entities that are presently, or on the Closing Date may be, in possession of some or all of the Transferred Assets are hereby directed to surrender possession of the Property to the Buyer on the Closing Date.

19. Following the Closing Date, no holder of a Claim against, Lien upon or Adverse Interest in the Transferred Assets or against the Debtor shall interfere with the Buyer's title to or use and enjoyment of the Transferred Assets based on or related to such Claim, Lien or Adverse Interests, or any actions that the Debtor may take in his Chapter 11 cases.

Debtor: HFIG Freehold, LLC a/k/a Club Metro Freehold

Case No.: 15-33591

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24. This Court shall retain jurisdiction to enforce and implement the terms and provisions of this Order, including, but not limited to, retaining jurisdiction to compel delivery of the Transferred Assets to the Buyer, interpret, implement, and enforce the provisions of this Order, and protect the Buyer against any Adverse Interests against the Debtor, the Transferred Assets and/or the proceeds of the Sale.

25. Nothing contained in any plan of reorganization or liquidation confirmed in the Debtor's Chapter 11 case or any order of this Court in this bankruptcy case shall conflict with or derogate from the terms of this Order. To the extent of any conflict, the terms of this Sale Order shall control.

26. As provided by Bankruptcy Rule 6004(h), this Order shall not be stayed for fourteen (14) days after the entry of the Order and shall be effective and enforceable immediately upon entry.

27. The transactions contemplated by the Revised Sale Motion are undertaken by the Buyer and the Debtor in good faith, as that term is used in section 363(m) of the Bankruptcy Code, and accordingly, the reversal or modification on appeal of the authorization provided herein to consummate the Sale shall not affect the validity of the Sale to the Buyer, unless such authorization is duly stayed pending such appeal. The Buyer is a Buyer in good faith of the Transferred Assets and is entitled to all of the protections afforded by section 363(m) of the Bankruptcy Code.

Debtor: HFIG Freehold, LLC a/k/a Club Metro Freehold

Case No.: 15-33591

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28. The terms and provisions of the Revised Sale Motion and this Order shall be binding in all respects upon, and shall inure to the benefit of, the Debtor, the Buyer, and their respective affiliates, successors and assigns, the Debtor's estate and creditors, and any affected third parties including, but not limited to, all persons asserting Adverse Interests upon or against the Transferred Assets to be sold to the Buyer pursuant hereto, notwithstanding any subsequent appointment of any trustee, responsible person, estate administrator, representative or similar person (a "Responsible Person") for or in connection with the Debtor's estate or affairs in this case or in any subsequent case under the Bankruptcy Code or State proceeding involving the Debtor, as to which Responsible Person(s) such terms and provisions likewise shall be binding in all respects.