

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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In re:

MASTROIANNI BROS., INC.  
d/b/a MASTROIANNI BAKERY,

Debtor.

Case No. 16-11536

(Chapter 11)

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**DEBTOR'S MOTION PURSUANT TO SECTION 363(f) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 6004 TO (i) AUTHORIZE THE SALE OF THE DEBTOR'S INTELLECTUAL PROPERTY, FREE AND CLEAR OF ALL LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES, AND (ii) AUTHORIZE AND APPROVE THE STALKING HORSE BID AND BREAK UP FEE**

Mastroianni Bros., Inc. d/b/a Mastroianni Bakery, by its attorneys, Hodgson Russ LLP, seeks relief under 11 U.S.C. §363 and alleges:

1. Mastroianni Bros., Inc. d/b/a Mastroianni Bakery (hereinafter "the Debtor") filed for voluntary relief pursuant to Chapter 11 on August 25, 2016.
2. The Debtor is not operating.
3. The Debtor's lease for its premises, 51 Opus Boulevard, Schenectady, New York, 12306, has expired and the Debtor is continuing use and occupancy of the premises pursuant to the Court Order which terminates on December 31, 2016.
4. The Debtor has received an offer to sell all of its intellectual property (the "Intellectual Property") (excluding personal pictures of Armond Mastroianni) to Koffee Kup Bakery, Inc. for \$50,000.00, subject to higher and better offers, pursuant to the terms of the

Letter of Intent (the “LOI”) annexed hereto as Exhibit A. Exhibit A to the LOI contains a more particular description of the Intellectual Property.

5. Upon information and belief, the liens and claims of Berkshire Bank and New York Business Development Corp. were paid in full prior to the bankruptcy filing. These entities, as well as the other creditors listed on the annexed Exhibit B, will be given notice of this sale of the Intellectual Property free and clear of all liens, claims, interests and encumbrances pursuant to 11 U.S.C. §363(f).

6. The Debtor’s Landlord 51 Opus Realty, LLC has liens filed against it by TD Bank, N.A. a successor by merger to TD Banknorth, N.A. (TD Bank). The Debtor does not believe that those liens encumber any of the Intellectual Property being sold and notes that TD Bank’s UCC notices filed against the Debtor have been terminated. Notice is being given to TD Bank because the sale of the Debtor’s Intellectual Property is free and clear of all liens, claims and encumbrances, pursuant to 11 U.S.C. §363(f) (See Exhibit “B” annexed hereto).

7. The Debtor seeks approval of this Application to sell its Intellectual Property in a §363(f) sale by auction subject to the terms of the contract with Koffee Kup Bakery, Inc. dated October 27, 2016 (See Exhibit “A”).

8. In accordance with Section 1(c) of the LOI, Koffee Kup Bakery, Inc. has remitted to the Debtor’s attorneys, Richard Weisz of Hodgson Russ LLP, a deposit in the amount of \$5,000 (the “Deposit”) by wire transfer. Hudson Russ will hold the Deposit in its IOLA client trust account. If the Debtor obtains approval of this Motion, and Koffee Kup Bakery, Inc. is the successful bidder, the Deposit will be applied to the purchase price of \$50,000. If (i) the Debtor does not obtain approval of this Motion, or (ii) Koffee Kup Bakery, Inc. is not the successful

bidder, then the Deposit will be returned forthwith to Koffee Kup Bakery, Inc. However, if the Debtor obtains approval for the Motion, Koffee Kup Bakery, Inc. is the high bidder, and Koffee Kup Bakery, Inc. is unable or unwilling to close on its purchase of the Intellectual Property, then the Debtor shall retain the Deposit, as liquidated damages, and its sole remedy.

9. The Debtor seeks approval of an auction to be conducted at the United States Bankruptcy Court on **November 30, 2016**, with the Intellectual Property to be removed from the Debtor's premises by December 31, 2016.

10. **Any other bidder who seeks to make a higher bid proposal at the hearing to be held on November 30, 2016 shall be required to present a non-refundable deposit to the Debtor of at least \$6,000.00 (10% of the purchase price) to be sent to the Debtor's attorneys to be held in escrow in order to be allowed to bid at the hearing. Higher bids shall start at Sixty Thousand Dollars (\$60,000.00).**

11. Because the Debtor's use and occupying rights expire on December 31, 2016, the Debtor believes that a sale pursuant to 11 U.S.C. §363(f) is needed because it will take substantially longer than December 31, 2016 to confirm a liquidable plan. Also, the Debtor believes that its Intellectual Property will not have any value if it is not sold promptly.

12. Bankruptcy Code Section 363(b)(1) permits a Chapter 11 Debtor to use property of the estate "other than in the ordinary course of business" after notice and a hearing. 11 U.S.C. §363(b)(1). This Court may authorize use of estate property outside the ordinary course of business if a Debtor demonstrates a sound business justification for it. *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (business judgment rule requires finding that good business



reason exists to grant debtor's application under section 363 (b)); In re Delaware Hudson Ry. Co., 124 B.R. 169, 179 (Bankr. D.Del. 1991).

13. This "business judgment" test is premised on the Debtor's business judgment that the proposed use of property of the estate would be beneficial to the estate. In re Orion Pictures Corp., 4 F.3d 1095, 1099 (2d Cir. 1993) (analyzing business judgment standard under section 365). To a Bankruptcy Court, " 'business judgment' ...is just that -- a judgment of the sort a businessman would make." Id.

14. Once the Debtor articulates a valid business justification, the business judgment rule creates "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company." In re Integrated Resources, Inc., 147 B.R. 650, 656 (S.D.N.Y. 1992) (citation omitted). The Debtor's business judgment "should be approved by the court unless it is shown to be 'so manifestly unreasonable that it could not be based upon sound business judgment, but only on bad faith, or whim or caprice.'" In re Aerovox, Inc., 269 B.R. 74, 81 (Bankr. D.Del. 2001) (quoting In re Interco, Inc., 128 B.R. 229, 234 (Bankr. E.D. Mo. 1991)). "Courts are loath to interfere with corporate decisions absent a showing of bad faith, self-interest or gross negligence." Integrated Resources, 147 B.R. at 656.

15. It is therefore respectfully submitted that the Debtor's decision to sell the Intellectual Property free and clear by an auction for \$50,000.00, subject to higher and better offers, is well within its exercise of business judgment, particularly because the Debtor is not operating and has lost its lease.

16. Similarly, the Debtor submits its proposed Breakup Fee of \$5,000.00, which Koffee Kup Bakery, Inc. shall receive if it is not ultimately the Successful Bidder at the Sale Hearing, is both fair and reasonable. Given the likelihood that the bid of Koffee Kup Bakery, Inc. will encourage, rather than hinder, other prospective bidders to come forward and submit bids in excess of its bid, there should be no question that the Breakup Fee is appropriate in these circumstances. As the Debtor has made clear in its Application to sell its Intellectual Property, even if Koffee Kup Bakery, Inc. proves to be the only bid for the Debtor's Intellectual Property the Debtor's estate still will benefit by \$50,000.00. An auction may yield more funds to the estate depending on its results.

17. Concomitantly, to the extent that other serious bidders emerge, and the Koffee Kup Bakery, Inc. proposal is topped -- an initial topping bid must be for at least \$60,000.00 -- the Debtor's estate and creditors will receive more than they would have received under the Koffee Kup Bakery, Inc. proposal. Even once the Breakup Fee to Purchaser of \$5,000.00 is subtracted from an initial topping bid of \$60,000.00, the net to the estate is at least \$55,000.00 which is more than the initial guaranteed Koffee Kup Bakery, Inc. proposal. By the standards of Integrated Resources, the Debtor's proposed Breakup Fee to Purchaser is a fair and valid exercise of its business judgment, and this Court should approve it in the context of an auction sale at the Sale Hearing, where the Purchaser's Bid will be subject to higher and better offers.

18. In Integrated Resources, the District Court noted that in assessing Breakup Fees, Courts had three questions to consider: "(1) is the relationship of the parties who negotiated the breakup fee tainted by self-dealing or manipulation; (2) does the fee hamper, rather than encourage, bidding; (3) is the amount of the fee unreasonable relative to the proposed purchase



price?” *Integrated Resources*, 147 B.R. at 657. For the reasons set forth above, the Debtor submits that the parties have negotiated the Breakup Fee at arms-length; the Breakup Fee encourages, and does not hinder, additional bidding; and the Breakup Fee is reasonable (less than 4%). For all of these reasons, this Court should authorize the Breakup Fee as a valid exercise of the Debtor’s business judgment under *Integrated Resources, supra*.

19. The Debtor seeks to sell the Intellectual Property to Koffee Kup Bakery, Inc. free and clear of all liens, claims, interests, charges, encumbrances, or successor liability. Koffee Kup Bakery, Inc. will not be assuming any of the Debtor’s liabilities. Bankruptcy Code Section 363(f) allows the Debtor to sell property free and clear of any interest, liens, claims or encumbrances in the property if non-bankruptcy law allows such sale, the holder of the interest consents, and the interest is a lien and the selling price is greater than the sum of all liens on the property. It is respectfully submitted that all secured credits have been paid, and the sale of the Debtor’s assets, free and clear of liens, encumbrances and claims of creditors, can and should be approved by this Court.

20. Bankruptcy Code Section 363(m) protects a good faith purchaser at an approved bankruptcy sale from appeals by specifically stating that a subsequent reversal or modification of the Order approving sale under an appeal will not affect the validity of the sale. The LOI was negotiated in good faith with both parties represented by their own attorneys. On that basis, and for the reasons set forth in this Motion, the Debtor requests that the Order approving this Motion include a provision finding that Koffee Kup Bakery, Inc. is a “good faith” purchaser within the meaning of Section 363(m) of the Bankruptcy Code. A copy of the proposed Order is annexed hereto as Exhibit “C”.

21. The Debtor filed its Chapter 11 Petition to protect the value of its assets, and generate an auction of its assets. It has been unable to obtain new financing or an investor. The Debtor's proposed sale of its Intellectual Property by a §363(f) sale auction with a minimum yield of \$50,000.00 is the optimum vehicle for maximizing the value of its assets, and enables creditors to benefit from a sale of said Intellectual Property, whether through Koffee Kup Bakery, Inc. or to another bidder offering a higher and better proposal.

22. A Section 363(f) sale is an entirely appropriate way for the Debtor to use its most valuable (and, perhaps, only) asset for the benefit of unsecured creditors. The Breakup Fee compensates Koffee Kup Bakery, Inc. for its time and effort invested in making its bid for the Intellectual Property, and preparing the LOI, and is accordingly a valid exercise of the Debtor's business judgment..

23. In order to allow the realization of value from the Intellectual Property consistent with its liquidation goals, the Debtor requests that the Order approving this Motion be effective immediately, notwithstanding the 14 day stay opposed by Fed.R.Bankr.P. 6004(h). An expedient sale process will inure to the benefit of the Debtor's estate and creditors.

24. The Debtor also asks the Court to approve a bidding requirement that the next highest bid be at least \$60,000.00, and bidding thereafter proceed in increments of not less than \$2,500.00.

**WHEREFORE**, The Debtor respectfully requests that this Court authorize it to sell its Intellectual Property to Koffee Kup Bakery, Inc. pursuant to 11 U.S.C. §363(f) free and clear of all liens, claims, interests, charges, encumbrances, or successor liability on the terms of the LOI, with Koffee Kup Bakery, Inc. not assuming any of the Debtor's liabilities, and subject to higher and better offers, to be conducted at a hearing held at the Bankruptcy Court, and that the Court also authorize the proposed Breakup Fee in the event Koffee Kup Bakery, Inc. is not the highest bidder at the auction, and to schedule the auction to take place at the United States Bankruptcy Court, located within the James T. Foley Courthouse, 445 Broadway, Room 306, Albany, New York, 12207, on November 30, 2016 at 11:00 a.m., and ensure that the Debtor, its estate and its creditors will receive the highest possible price for its assets.

DATED: November 9, 2016

HODGSON RUSS LLP  
Attorneys for Debtor

By: 

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RICHARD L. WEISZ

677 Broadway, Suite 301  
Albany, New York 12207  
(518) 465-2333



# **EXHIBIT “A”**



436 RIVERSIDE AVE.  
BURLINGTON, VT 05401  
TEL. 802-863-2696  
FAX 802-860-0116

October 27, 2016

VIA EMAIL

Richard L. Weisz  
Hodgson Russ LLP  
677 Broadway  
Albany, NY 12207

**Re: Mastroianni Bros, Inc. – Chapter 11 Case No. 16-11536-rel**

Dear Mr. Weisz:

This letter (this "Letter") is intended to summarize the principal terms of a proposal being considered by Koffee Kup Bakery, Inc. (the "Buyer") regarding its possible acquisition of certain intellectual property assets (the "Purchased Assets") as more particularly described on the attached Exhibit A, owned by the chapter 11 bankruptcy estate of Mastroianni Bros., Inc., (the "Seller"), as approved by the United States Bankruptcy Court for the Northern District of New York, Albany Division (the "Court"), Case No. 16-11536-rel. The possible acquisition of the Purchased Assets is referred to as the "Transaction" and Buyer and Seller are referred to collectively as the "Parties."

1. Acquisition of Purchased Assets and Purchase Price.

(a) Subject to the satisfaction of the conditions described in this Letter, at the closing of the Transaction, Buyer would acquire the Purchased Assets, free and clear of all liens, claims, encumbrances, and other interests of any kind or nature whatsoever, including rights or claims based on any successor or transferor liability, pursuant to 11 U.S.C. Section 363(f), at the purchase price set forth in Section 1(b).

(b) The purchase price for the Purchased Assets would be \$50,000 USD in cash, certified or wired funds (the "Purchase Price"), payable at closing.

(c) Upon acceptance of the proposal set forth in this Letter, the Buyer will remit to the Seller's attorneys, Richard Weisz of Hodgson Russ LLP, a deposit in the amount of \$5,000 (the "Deposit") by wire transfer. Hudson Russ will hold the deposit in its IOLA client trust account. If the Seller obtains approval of the Transaction from the Court, and Buyer is the successful bidder, the deposit will be applied to the Purchase Price. If (i) the Seller does not

Handwritten initials, possibly "RW", enclosed in a circular scribble.

obtain approval of the Transaction from the Court, or (ii) the Buyer is not the successful bidder, then the Deposit will be returned forthwith to the Buyer. However, if the Seller obtains approval for the transaction from the Court, the Buyer is the high bidder, and the Buyer is unable or unwilling to close the Transaction, then the Seller shall retain the Deposit, as liquidated damages, and its sole remedy.

2. Proposed Motion and Order. As soon as reasonably practicable after the execution of this Letter, the Parties will commence to negotiate (i) a motion to sell the Purchased Assets to the Buyer pursuant to 11 U.S.C. Section 363(f) (the "Sale Motion"), and (ii) the form of a proposed order (the "Sale Order") approving the Sale Motion. The Sale Motion and the Sale Order would include the terms summarized in this Letter and such other representations, warranties, conditions, covenants, indemnities and other terms that are customary for transactions of this kind and are not inconsistent with this Letter. The Parties will also commence to negotiate ancillary agreements to be drafted by Buyer's counsel, including (i) bill(s) of sale, and (ii) assignment and assumption agreement(s).

3. Conditions. Buyer's obligation to close the proposed Transaction will be subject to customary conditions, including:

(a) the Parties' successful negotiation of the Sale Motion and the Sale Order and any ancillary agreements;

(b) Buyer's satisfactory completion of due diligence; and

(c) Entry of the Sale Order and the later of (i) expiration of the 14-day appeal period after entry of the Sale Order, unless waived in the Sale Order, or (ii) entry of a final appellate decision affirming the Court's denial of any objection to the Sale Motion.

4. Due Diligence. From and after the date of this Letter, Seller will authorize its management to allow Buyer and its advisors full access to its facilities, records, key employees and advisors for the purpose of completing Buyer's due diligence review.

5. Covenants of Seller. During the period from the signing of this Letter through the closing of the Transaction, Seller will maintain the Purchased Assets to ensure they retain their current value, including the filing of any necessary renewals, protecting the Purchased Assets against infringement, maintaining the confidentiality of any trade secrets, and not permitting further encumbrances.

6. Termination. This Letter will automatically terminate and be of no further force and effect upon the earlier of (i) mutual agreement of the Parties, or (ii) November 4, 2016, if the Sale Motion has not been filed with the Court. Notwithstanding anything in the previous sentence, paragraphs 8 and 10 shall survive the termination of this Letter and the termination of this Letter shall not affect any rights any Party has with respect to the breach of this Letter by another Party prior to such termination.



7. Bid Expiration. This offer will remain in effect until October 28, 2016, unless accepted or rejected by Seller, or withdrawn by Buyer prior to that time.

8. Governing Law. This letter shall be governed by and construed in accordance with internal laws of the State of Vermont, without giving effect to any choice or conflict of law provision or rule (whether of the State of Vermont or any other jurisdiction) that would cause the application of laws of any jurisdiction other than those of the State of Vermont.

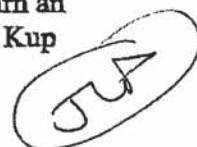
9. No Third Party Beneficiaries. Except as specifically set forth or referred to herein, nothing herein is intended or shall be construed to confer upon any person or entity other than the Parties and their successors or assigns, any rights or remedies under or by reason of this Letter.

10. Expenses. The Parties will each pay their own transaction expenses, including the fees and expenses of investment bankers and other advisors, incurred in connection with the proposed Transaction. Notwithstanding the foregoing, in the Sale Motion, the Seller will request a reasonable break-up fee for the Buyer in the proposed amount of \$5,000.00 in the event that the Buyer is outbid. The break-up fee will compensate the Buyer for its reasonable and necessary costs and expenses in making this offer.

11. No Binding Agreement. This Letter reflects the intention of the Parties, but for the avoidance of doubt neither this Letter nor its acceptance shall give rise to any legally binding or enforceable obligation on any Party. No contract or agreement providing for any transaction involving the Purchased Assets shall be deemed to exist between the Parties or any of their respective affiliates unless and until (i) the Parties have agreed on the form of the Sale Order, and (ii) the Sale Motion has been filed with the Court.

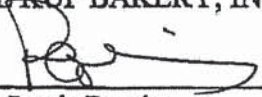
12. Miscellaneous. This Letter may be executed in counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one agreement. The headings of the various sections of this Letter have been inserted for reference only and shall not be deemed to be a part of this Letter.

If you are in agreement with the terms set forth above and desire to proceed with the proposed Transaction on that basis, please sign this Letter in the space provided below and return an executed copy to the attention of Jean-Louis Pernin, Chief Executive Officer, Koffee Kup Bakery, Inc., via email at [jlpernin1@optonline.net](mailto:jlpernin1@optonline.net).



Very truly yours,

KOFFEE KUP BAKERY, INC.

By:   
\_\_\_\_\_  
Jean-Louis Pernin  
Chief Executive Officer

MASTROIANNI BROS., INC.

By: \_\_\_\_\_  
Its duly authorized agent

Very truly yours,

KOFFEE KUP BAKERY, INC.

By: 

Jean-Louis Pernin  
Chief Executive Officer

MASTROIANNI BROS., INC.

By: Nathaniel H. Doffney, Trustee  
Its duly authorized agent



**EXHIBIT A**

**PURCHASED ASSETS**

All intellectual property owned by Mastroianni Bros., Inc. d/b/a Mastroianni Brothers Bakery, including, but not limited to: the name "Mastroianni Brothers Bakery;" all trade names and trademarks, whether registered or not; all telephone and fax numbers used in connection with the operation of its business; the URL and domain name registration used in connection with the operation of its website together with any related accounts, passwords and codes; all recipes; all copyrighted materials, whether registered or not; and all trade secrets relating to the foregoing.

All distribution agreements.

