

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE: §
§ Case No. 17-10151-TMD
YIDNEKACHEW FANTU, §
§ Chapter 11
Debtor-in Possession. §

**MOTION OF THE DEBTOR-IN-POSSESSION FOR
APPROVAL, PURSUANT TO SECTION 363(b), (f),
OF SALE OF PROPERTY OF THE BANKRUTPCY ESTATE
FREE AND CLEAR OF LIENS, CLAIMS, AND ENCUMBRANCES**

TO THE HONORABLE TONY M. DAVIS,
UNITED STATES BANKRUPTCY JUDGE:

COMES NOW Yidnekachew Fantu, the Debtor and Debtor-in-Possession (the "Debtor") in the above-captioned Chapter 11 bankruptcy case (the "Bankruptcy Case"), and files this *Motion of the Debtor-in-Possession for Approval, Pursuant to Section 363(b), (f), of Sale of Property of the Bankruptcy Estate Free and Clear of Liens, Claims, and Encumbrances* (the "Motion"), and in support hereof, respectfully states as follows:

I. SUMMARY OF RELIEF REQUESTED

1. The key remaining non-exempt asset in the Debtor’s Bankruptcy Case is his 100% membership interest in Habesha Restaurant LLC (the "Membership Interest"). Habesha Restaurant LLC owns and operates an Ethiopian restaurant named Habesha Restaurant and Bar located at 6019 I-35 North, Austin, Texas 78723 (the "Restaurant").¹ The Debtor and his non-filing spouse, Selam Abebe Getahun ("Abebe Getahun"), are currently employed by the Restaurant. Abebe Getahun is the head chef. The Debtor serves as general manager.

¹ There are also claims being pursued by the Debtor under chapter 5 of the Bankruptcy Code.

2. As set forth in detail below, pursuant to 11 U.S.C. § 363(b), the Debtor requests that this Court authorize and approve the sale of the Membership Interest. The proposed purchase price is a cash payment of \$24,000 to the bankruptcy estate. The proposed purchaser is Habesha Acquisition, Inc. (“HAI”), an entity formed for the purpose of acquiring the Membership Interest. The Debtor’s brother, Beniam Fantu (“B. Fantu”), is currently the sole officer and director of HAI. The Debtor’s spouse, Abebe Getahun, is a 1% shareholder in HAI. The shareholders of HAI are: (1) B. Fantu 49.5%; (2) Beza Mekonen 49.5%; and (3) Abebe Getahun 1%. Ms. Mekonen is Abebe Getahun’s niece.² In addition to holding a 1% interest in HAI, it is contemplated that Abebe Getahun will be employed by HAI as the chef and manager of the restaurant. The Debtor will not be employed by HAI, will receive no interest in HAI, and will receive no compensation, now or in the future, from HAI. HAI was represented by attorney Stephen M. Schultz (“Schultz”) in connection with its formation and the negotiations regarding the proposed purchase.

3. Summary of Transaction:

Seller: Debtor
Buyer: HAI
Asset to be Sold: 100% Membership Interest
Purchase Price: \$24,000 Cash Payment

The proposed contract is expressly subject to approval of the Bankruptcy Court. A true and correct copy of the offer to purchase is attached hereto as Exhibit “A.”

II. JURISDICTION, VENUE, AND STATUTORY PREDICATES

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This is a "core" proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is properly in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

² Specifically, Mekonen is the daughter of Abebe Getahun’s sister. Mekonen was raised by Abebe Getahun’s mother, but it is unclear whether she was legally adopted by Abebe Getahun’s mother.

5. The statutory predicates for the relief requested herein are § 363(b), (f) of Title 11 of the United States Code, §§ 101 *et seq.* ("Bankruptcy Code"), and Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") 4001 and 9014.

III. RELEVANT BACKGROUND

A. Procedural Background

6. On February 7, 2017 (the "Petition Date"), the Debtor filed his voluntary petition for relief under Chapter 13 of the Bankruptcy Code, thereby initiating this Bankruptcy Case. On July 10, 2017, this case was ordered converted to one under Chapter 11 of the Bankruptcy Code. As of the date of filing of this Motion, no committee or trustee has been appointed in the Bankruptcy Case. The Debtor is managing his affairs as a Debtor-in-Possession pursuant to 11 U.S.C. §§ 1107 and 1108.

B. Factual Background

7. As noted above, and as scheduled on his original and amended Bankruptcy Schedules, the debtor owns the 100% Membership Interest. The Membership Interest is not exempt. Abebe Getahun asserts a community interest in the Membership Interest, which was acquired during the marriage. The full Membership Interest is property of the bankruptcy estate pursuant to 11 U.S.C. § 541(a)(2)(A), and, with her consent, may be sold free and clear of Abebe Getahun's interest pursuant to 11 U.S.C. § 363(f)(2). Abebe Getahun does not oppose the Motion and does not intend to assert rights under 11 U.S.C. § 363(i) or (j).

8. Prior to the commencement of the Bankruptcy Case, the Debtor obtained a valuation of the Restaurant. A true and correct copy of that valuation is attached hereto as Exhibit "B." Pursuant thereto, the Restaurant was valued at approximately \$37,000. This was comprised of an estimated asset value of \$11,000 and an estimated intangible value of \$26,000. The valuation was based upon 2014 and 2015 tax returns, a 2016 P&L Statement, as well as general information

from the Debtor. The Debtor utilized the valuation in scheduling the Membership Interest on his bankruptcy schedules at \$37,000.

9. The Restaurant is now operating under a month-to-month lease, the primary term of the lease having expired. The landlord under the lease has informed the Debtor that if a new lease is not executed to take effect during March of 2018, the Restaurant will be forced to leave the premises. The restaurant has struggled throughout 2017. Without adequate resources to market and advertise for business, the Restaurant has seen its revenues decline, and has operated at a loss for much of the past year. The Debtor lacks resources to cover shortfalls. This has been particularly aggravated by the gambling losses that led to the filing of the Bankruptcy Case. The key asset of the Restaurant appears to be Abebe Getahun, who serves as its head chef and is responsible for the positive aspects of its operations: its menu and cuisine. Abebe Getahun has no employment contract, and currently serves as an at-will employee.

10. The Debtor has, throughout the Bankruptcy Case, considered how best to deal with the Membership Interest and the Restaurant. Originally, a chapter 11 reorganization was considered that would utilize salary and distributions from the Membership Interest and the Restaurant to pay claims over time. Due to the struggles of the Restaurant and the lack of capital, that does not appear feasible. A sale of the Restaurant has also been considered. Given the lack of a long-term lease, the decline in operations, and the status of Abebe Getahun, there believed to be no real market for the Restaurant or the Membership Interest to the public at large. Accordingly, to avoid a complete loss, the Debtor has encouraged his family to come up with an offer to purchase his interest. To be clear, none of the purchase price comes from the Debtor, his wife, or any assets of the Bankruptcy Estate.

11. Throughout this process, HAI has been represented by Schultz, and negotiations occurred entirely by and through Debtor's counsel and Schultz. The process was designed to avoid any actual or appearance of collusion. Schultz assisted and advised HAI in its formation and structure, and negotiated at arm's length with the undersigned on the purchase price. The process included a diligence and review period, and rounds of offers and counter-offers. While \$13,000 less than the valuation as of February 2017, the Debtor believes the proposed purchase price exceeds the actual fair market value of his Membership Interest. Included in this analysis are the following key facts: (1) the Restaurant's business declined by \$30,698.54 in 2017 as compared to 2016; (2) the Restaurant operated at break-even or a loss in nearly each month of 2017; (3) the valuation presumed "net discretionary cash" available in the amount of \$13,000, and there is no such discretionary cash; and (4) a new lease will need to be negotiated and signed by HAI, as the existing lease has expired.

IV. RELIEF REQUESTED AND BASIS THEREFOR

12. By this Motion, pursuant to 11 U.S.C. § 363(b), (f), the Debtor requests that this Court authorize the sale of the Membership Interest. In the Debtor's judgment, the proposed transaction confers a benefit to the estate and its creditors by obtaining a cash payment of \$24,000 for payment of claims. In the absence of this transaction, the value of the Restaurant and the Membership Interest would effectively be extinguished, preserving, at best, only the liquidation value of whatever a sale of the Restaurant equipment could generate at an auction, less equipment storage and auction costs. Notwithstanding the clear insider status of HAI, the Debtor and HAI have taken steps to ensure that the transaction would be negotiated at arm's length through independent counsel. The Debtor will retain no "hidden" interest in the Membership Interest. His spouse will draw a salary from HAI and will hold a 1% interest in HAI. However, that salary and her interest are derived not from her community interest in the Membership Interest. Instead, her

salary and 1% interest are in recognition of the services and value she independently will bring to the venture.

13. For these reasons, the Debtor submits that the Court's authorization of the proposed transaction is in the estate's best interest, as well as the interests of its creditors, and is amply supported by the Debtor's reasonable business judgment.

14. It is anticipated that following the Court's consideration of this Motion, the Debtor will move to convert the Bankruptcy Case to one under chapter 7. The proceeds from the sale of the Membership Interest would be held in the Debtor's DIP account (or the undersigned counsel's IOLTA trust account) and turned over to the chapter 7 trustee upon conversion. The Debtor would not utilize any such funds prior to conversion for living expenses.

WHEREFORE, PREMISES CONSIDERED, the Debtor respectfully requests that this Court enter an Order, in the form attached hereto and on an expedited basis: (i) granting this Motion; (ii) approving and authorizing the sale of the Membership Interest; and (iii) granting the Debtor such other and further relief to which he may show himself to be justly entitled.

Respectfully submitted on this 9th day of February 2018.

Respectfully Submitted,

Kell C. Mercer, P.C.
1602 E. Cesar Chavez Street
Austin, TX 78702
(512) 627-3512
(512) 597-0767 (fax)

By: /s/ Kell C. Mercer
Kell C. Mercer
State Bar No. 24007668
kell.mercer@mercerc-law-pc.com

ATTORNEY FOR DEBTOR

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February 2018, I personally caused to be served a true and correct copy of the above and foregoing document, including exhibits, by electronically filing it with the Court using the Court's CM/ECF system, which sent notification to all parties of interest receiving notice in this case through the CM/ECF system, and upon all parties shown on the attached Service List, via first class U.S. Mail.

/s/ Kell C. Mercer
Kell C. Mercer

Purchase Pg 1 of 1
THE SCHULTZ LAW FIRM
A TEXAS PROFESSIONAL CORPORATION

VIA ELECTONIC MAIL: kell.mercer@mercerc-law-pc.com

February 9, 2018

Mr. Kell C. Mercer
Kell C. Mercer, P.C.
1602 East Cesar Chavez
Austin, Texas 78701

In re *Yidnekachew Fantu*, Case Number 17-10151, United States Bankruptcy Court, Western District of Texas, Austin Division

Dear Kell:

Subject to the bankruptcy court's approval, my client, Habesha Acquisition, Inc. agrees to pay \$24,000 to purchase your client's interest in Habesha Restaurant LLC.

Very truly yours,

THE SCHULTZ LAW FIRM PC

By:



Stephen Matthew Schultz