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VINH PHAT SUPERMARKET, INC.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

VINH PHAT SUPERMARKET, INC.,
Debtor.

Case No. 16-24672

Chapter Number: 11

Docket Control No. DB-015

**MOTION FOR ORDER: (1) APPROVING
PROPOSED SALE OF SUBSTANTIALLY
ALL OF THE DEBTOR'S ASSETS UNDER
AND IN CONJUNCTION WITH ITS PLAN
OF REORGANIZATION; (2)
AUTHORIZING THE ASSUMPTION AND
ASSIGNMENT OF UNEXPIRED LEASE;
AND (3) GRANTING RELATED RELIEF**

Date: January 24, 2017

Time: 10:30 a.m.

Dept: C, Ctrm. 35

U.S. Courthouse
501 I Street, 6th Flr.
Sacramento, CA 95814

Judge: Hon. Christopher M. Klein

Debtor Vinh Phat Supermarket, Inc. ("Debtor" or "Vinh Phat"), by and through its attorneys of record, hereby moves this Court pursuant to sections 105, 363 and 365 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure, for entry of an order: (1) approving the sale of substantially all of

1 the Debtor's assets free and clear of liens, claims, interests and encumbrances (the "Sale") under
2 and in conjunction with its Chapter 11 plan of reorganization; (2) authorizing the assumption and
3 assignment of the unexpired lease for the supermarket located at 6105 Stockton Boulevard, and
4 the assumption and assignment of the Debtor's rights to occupy and use the warehouse space
5 located at 5892 Lemon Hill Avenue, Sacramento, California; and (3) granting related relief. In
6 support of this motion, the Debtor respectfully represents the following:

7 **I. JURISDICTION AND VENUE**

8 1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and
9 1334. This matter is a core proceeding within the meaning of 28 U.S.C. §157(b). Venue is
10 proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicate for the
11 relief requested is contained in Bankruptcy Code sections 105, 363 and 365, and Bankruptcy
12 Rules 2002, 6004 and 6006.

13 **II. GENERAL BACKGROUND**

14 2. On July 18, 2016 (the "Petition Date"), the Debtor commenced this bankruptcy
15 case by filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The
16 Debtor continues to manage its assets and operate its business as a debtor-in-possession pursuant
17 to sections 1107 and 1108 of the Bankruptcy Code.

18 3. The Debtor is owned by shareholders Sau Vong, Suying Plaskett, Cham Ly, and
19 Muoi Lam, as trustee. At the corporate level, the President of the corporation is Suying Plaskett,
20 and the Board members are Eric Vong, Sau Vong, Ms. Plaskett, and Mr. Ly.

21 4. The Debtor owns and operates an Asian supermarket located at 6105 Stockton
22 Boulevard, Sacramento, California, with recent monthly sales of approximately \$1.3 - \$1.4
23 Million, and has approximately 60 employees. The supermarket is operated pursuant to a lease
24 with Good Faith Building, LLC which expires in the fall of 2018 (the "Supermarket Lease").
25 Good Faith Building, LLC is owned by three of the four Vinh Phat shareholders, Ms. Lam having
26 previously sold her interest to the other shareholders.

27 5. In addition to the supermarket, the Debtor also uses warehouse space for storage
28 and its operations located at 5892 Lemon Hill Avenue, Sacramento, California (the

“Warehouse”). There does not appear to be a written agreement regarding the use of the Warehouse. Title to the Warehouse is held by the four Vinh Phat shareholders as tenants-in-common. In exchange for use of the Warehouse, the Debtor pays the expenses associated with the Warehouse, such as the property taxes, utilities, and upkeep, and it paid the mortgage.

III. THE ASSET PURCHASE AGREEMENT

6. On December 8, 2016, the Debtor filed Vinh Phat Supermarket, Inc.’s Plan of Reorganization, Dated December 8, 2016 (“Plan”). (See Dkt. No. 147.) The Plan provides for payments to creditors to be funded from cash on hand and by the sale of the business assets of the Debtor. The hearing on confirmation of the proposed Plan is scheduled for January 24, 2017 at 10:30 a.m.

7. In conjunction with and in order to effectuate the Plan, the Debtor has negotiated an Asset Purchase Agreement (the “APA”) with a stalking horse purchaser Aloha Hawaii Supermarket, Inc. (the “Proposed Purchaser”). The Proposed Purchaser is owned by shareholders Joseph Cantrelle, Jr., Eric Vong, and Aaron Ly, who are the children of Vinh Phat shareholders Suying Plaskett, Sau Vong, and Cham Ly respectively. Eric Vong is also a current general manager of the supermarket owned and run by the Debtor, and a member of the Debtor’s Board of Directors. Thus, the Proposed Purchaser is an insider.

8. A copy of the APA will be filed with the Court once it is executed. The principal terms of the APA are summarized in the following chart:¹

APA PROVISION	SUMMARY DESCRIPTION
APA Parties	Seller: Vinh Phat Supermarket, Inc. Buyer: Aloha Hawaii Supermarket, Inc.
Purchase Price	1. \$425,782.00 in cash; plus 2. \$350,000.00 payable pursuant to an unsecured promissory note bearing interest at an annual rate equal to the short term applicable federal rate in effect five (5) Business Days prior to the Closing and providing for twelve (12) equal quarterly payments of principal and interest commencing on the first day of the calendar quarter commencing after the Effective Time (as defined in the APA); plus

¹ This summary is provided for the convenience of the Court and parties in interest. To the extent there is any conflict between this summary and the APA, the latter governs in all respects.

	3. the value of the Debtor's inventory determined pursuant to an inventory count payable pursuant to an unsecured promissory note bearing interest at an annual rate equal to the short term applicable federal rate in effect five (5) Business Days prior to the Closing and providing for four equal quarterly payments of principal and interest commencing on the first day of the calendar quarter commencing after the Effective Time. The Debtor estimates that the value of the inventory is in excess of \$450,000.00. ²
Purchased Assets	The APA sets forth the assets to be purchased by the Proposed Purchaser (defined in the APA as the "Purchased Assets"), including, without limitation, the Debtor's right, title and interest in all supply inventories relating to the Debtor's business that are owned by the Debtor, all fixed assets located at the supermarket or otherwise used in connection with the business, the Supermarket Lease and the Debtor's rights to use the Warehouse, permits to the extent assignable, and all inventory that is in good and saleable condition.
Excluded Assets	The APA sets forth the assets that will not be purchased by the Proposed Purchaser, including all accounts receivable, cash and cash equivalents, and all preference or avoidance claims and actions the Debtor may have against its shareholders.
Assumed Liabilities	1. All liabilities arising out of, incurred in connection with or related to the ownership of the Purchased Assets or operation of the business from and after the close; 2. all liabilities associated with assumed contracts and leases accruing, arising out of or related to the period from and after the close; and 3. liabilities, obligations and claims arising out of employment or termination of employment of Hired Employees (as defined in the APA) from and after the closing date.
Retained Liabilities	The APA sets forth the liabilities that will not be assumed by the Proposed Purchaser.
Assumption of Executory Contracts and Unexpired Leases and Assignment to the Proposed Purchaser	The Supermarket Lease and the Debtor's rights to use the Warehouse are proposed to be assigned to the Proposed Purchaser pursuant to Section 365 of the Bankruptcy Code in connection with the Sale.
Bid Protections	The APA provides that in the event there is a higher bid than the Proposed Purchaser and the Proposed Purchaser is not declared to be the Successful Bidder, the Proposed Purchaser shall be entitled to expense reimbursement up to a maximum of \$50,000.00, and a break-up fee equal to 1.5% of the Purchase Price (as defined in the APA).
Deposit	\$85,265.82

² The value of grocery inventory excluding meat, fish and vegetables listed in the Debtor's Schedules is \$586,823.30. See Doc. No. 14. Based on the average sales price mark up from cost, the value of this inventory at cost would be approximately \$481,195.

9. With the floor provided by the APA, the Debtor seeks to effectuate the Sale to the Proposed Purchaser, subject to a competitive bidding process conducted pursuant to bidding procedures that the Debtor has requested the Court approve in a separate motion filed concurrently herewith. The bidding procedures are intended to permit a fair and efficient competitive sale process, consistent with the timeline of this small business bankruptcy case, to confirm that the Proposed Purchaser has made the best offer, or to promptly identify a higher alternative offer.

IV. RELIEF REQUESTED

10. By this Motion, the Debtor seeks entry of an order (1) approving the sale of the Debtor's business assets free and clear of liens, claims, interests and encumbrances to the Proposed Purchaser pursuant to the APA, or to such other potential purchaser that is determined to be the successful bidder at the conclusion of an auction to be held in accordance with bid procedures to be approved by the Court (the "Successful Bidder"); (2) authorizing the assumption and assignment of the unexpired Supermarket Lease and the Debtor's rights to occupy and use the Warehouse to the Proposed Purchaser or Successful Bidder; and (3) granting related relief.

V. BASIS FOR RELIEF REQUESTED

A. The Court Should Authorize the Debtor to Sell the Business Assets to the Proposed Purchaser or Other Successful Bidder in Accordance with the Terms of the APA.

11. Bankruptcy Code section 363(b) provides that a debtor "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." Courts have found that a debtor's sale of assets outside the ordinary course of business should be approved if the debtor can demonstrate a sound business justification for the proposed transaction. *See, e.g., In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986) (implicitly adopting the "sound business judgment" test of *Lionel Corp.* and requiring good faith).

12. Courts have applied the following four factors in analyzing whether a sound business justification exists: (a) whether a sound business reason exists for the proposed transaction; (b) whether fair and reasonable consideration is provided; (c) whether the transaction

1 has been proposed and negotiated in good faith; and (d) whether adequate and reasonable notice
2 is provided. *See In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 175 (Bankr. D. Del. 1991); *In*
3 *re Titusville Country Club*, 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991). The Debtor submits that
4 the Sale to the Proposed Purchaser or the Successful Bidder consistent with the terms of the APA
5 comports with each of these four criteria.

6 **Sound Business Justification**

7 13. The Debtor has a number of business justifications for proposing to sell the
8 business. First and foremost, the proposed sale provides an immediate influx of cash to the
9 bankruptcy estate necessary to pay creditors through its proposed Chapter 11 plan. Second, the
10 proposed sale preserves the business so that it can continue operating for the benefit of the
11 employees and the customers, while ensuring that the Debtor receives fair value for that business
12 in order to pay creditors of the estate.

13 14. Since the bankruptcy case was filed, some of the vendors have threatened to stop
14 doing business with the Debtor despite the fact that the Debtor is operating COD. In addition, the
15 Debtor has been informed that someone has contacted some of Vinh Phat's vendors attempting to
16 damage the integrity and trustworthiness of the current owners and management of the Debtor,
17 which in turn threatens the Debtor's ability to continue doing business with these vendors. A sale
18 of the business will help preserve necessary vendor relationships, so someone can continue
19 operating the business. This arrangement benefits the creditors of the estate, the employees, and
20 the customers of the business.

21 **Fair and Reasonable Purchase Price**

22 15. In order to ensure that any sale is for fair and reasonable consideration, the Debtor
23 obtained court approval to employ Murphy Business and Financial (the "Murphy Firm") to serve
24 as business broker and to provide valuation and asset marketing services. The Murphy Firm
25 prepared a Broker's Opinion of Market Value estimating a business selling price of \$851,565 for
26 the assets proposed to be sold in the APA. Although the final purchase price proposed in the
27 APA will depend on the inventory count, based on the Debtor's estimate of the value of the
28 inventory, the purchase price proposed in the APA is approximately \$1.2 million, with a portion

1 paid up front, and a portion paid over time within three years of the sale. As the proposed
2 purchase price exceeds the Broker's Opinion of the value of the assets being sold by more than
3 \$300,000, the consideration proposed in the APA is fair and reasonable.

4 16. Furthermore, the Murphy Firm has listed the Debtor's business for sale on four
5 business listing websites, thereby exposing the Sale to thousands of potential purchasers in
6 California and nationally. To date, the Murphy Firm has received inquiries from seven potential
7 purchasers, none of which have yet resulted in an offer. The Debtor will continue listing the
8 business for sale on these websites until the deadline set by the Court for submission of bids
9 pursuant to the concurrently filed bidding procedures motion.

10 17. Finally, where there is a court-approved auction process, a full and fair price is
11 presumed to have been obtained for the assets sold because the best way to determine value is
12 exposure to the market. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. La Salle St. P'ship*, 536 U.S.
13 434, 457 (1999); *In re Trans World Airlines, Inc.*, 2001 WL 1820326, *4 (Bankr. D. Del. 2001).
14 Here, the APA expressly provides that it is subject to the Debtor's right to accept a superior bid at
15 an auction undertaken in accordance with bidding procedures to be approved by the Bankruptcy
16 Court. In light of the Proposed Purchaser's stalking horse bid establishing a price floor well
17 above the Broker's Opinion of the value of the assets, the fact that the Debtor is continuing to
18 market the assets through the Murphy Firm, and the fact that the Sale will be subject to a court-
19 approved bidding process, the Debtor submits that the proposed Sale will result in a purchase
20 price that provides fair value to the Debtor.

21 **Good Faith**

22 18. Courts in the Ninth Circuit have held that a good faith buyer is one who buys in
23 good faith and for value. "[L]ack of good faith is [typically] shown by 'fraud, collusion between
24 the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of
25 other bidders.'" *In re Filtercorp, Inc.*, 163 F.3d 570, 577 (9th Cir. 1998) (quoting *In re Ewell*,
26 958 F.2d 276, 281 (9th Cir. 1992)). This standard for determining good faith is applicable even
27 where the buyer is an insider. *Id.*

28 19. Although the Proposed Purchaser is comprised of insiders, the Debtor has

1 negotiated the APA and proposed the Sale in good faith. The APA was intensively negotiated
2 with both the Debtor and the Proposed Purchaser represented by independent counsel.³
3 Additionally, there can be no dispute that the Proposed Purchaser has offered fair value, given
4 that the purchase price in the APA substantially exceeds the asset value set forth in the Broker's
5 Opinion obtained by the Debtor. Furthermore, the Debtor has openly marketed the assets for sale
6 to the public and will comply with the bidding procedures approved by the Court. Based on the
7 foregoing, the Debtor requests that the Court find the Proposed Purchaser and/or any Successful
8 Bidder constitutes a good faith purchaser entitled to all of the protections afforded by Section
9 363(m) of the Bankruptcy Code. The Debtor will provide further evidence of good faith once a
10 Successful Bidder is determined following the overbid process at the Sale Hearing.

11 **Adequate and Reasonable Notice**

12 20. Bankruptcy Code Section 363(b)(1) provides the Debtor may sell property of the
13 estate, other than in the ordinary course of business, "after notice and a hearing." Bankruptcy
14 Rule 6004(a) provides, in pertinent part, that notice of a proposed sale not in the ordinary course
15 of business must be given pursuant to Bankruptcy Rule 2002(a)(2), (c)(1), (i) and (k), and if
16 applicable, in accordance with Bankruptcy Code section 363(b)(2). Rule 2002(a)(2) requires at
17 least 21 days' notice by mail of a proposed sale of property outside the ordinary course of
18 business. Bankruptcy Rule 2002(c)(1) requires that the notice of a proposed sale include the date,
19 time and place of any public sale, the terms and conditions of any private sale, and the time fixed
20 for filing objections. It also provides that the notice of sale of property is sufficient if it generally
21 describes the property. Bankruptcy Rules 6004(c) provides that a motion for authority to sell
22 property free and clear of liens or other interests must be made in accordance with Bankruptcy
23 Rule 9014 and must be served on the parties who have liens or other interests in the property to be
24 sold.

25 21. The Debtor has complied with all of the above provisions of the Bankruptcy Code
26 and the Bankruptcy Rules in filing and serving notice of this Motion. Thus, the Debtor has
27

28 ³ The Proposed Purchaser is represented by Mark Gorton of Boutin Jones, Inc.

provided accurate and reasonable notice of the Sale Motion in compliance with the APA and all applicable Bankruptcy Rules.

B. The Court Should Authorize the Sale Free and Clear Pursuant to Section 363(f) of the Bankruptcy Code.

22. Bankruptcy Code Section 363(f) provides that the Debtor may sell property free and clear of any interest in such property of an entity other than the estate, only if:

- a. applicable non-bankruptcy law permits sale of such property free and clear of such interest;
- b. such entity consents;
- c. such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- d. such interest is in bona fide dispute; or
- e. such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

23. The Debtor maintains that one or more of the five subsections of section 363(f) will be satisfied, and therefore, the Debtor may sell the Purchased Assets free and clear of all liens, claims, and encumbrances. Specifically, the only lien of which the Debtor is aware on the Purchase Assets is that of secured creditor Ascentium Capital LLC. The amount of Ascentium Capital's claim is \$15,235.00. See Doc. No. 14. Thus, the proposed purchase price in the APA is greater than the aggregate value of all liens on the property. Accordingly, the Debtor requests that the Purchased Assets be transferred to the Proposed Purchaser or another Successful Bidder free and clear of all liens, claims, and encumbrances.

C. The Court Should Authorize the Debtor to Assume and Assign the Supermarket Lease and the Right to Use the Warehouse.

24. Under Bankruptcy Code section 365(a), a debtor "subject to the court's approval, may assume or reject an executory contract or unexpired lease." A debtor's decision whether to assume or reject a lease is a "summary proceeding" that involves only a cursory review of a trustee's or debtor-in-possession's decision to reject (or assume) the contract. Specifically, the

1 court applies the business judgment rule to evaluate the decision to assume or reject. *In re G.I.*
2 *Industries, Inc.*, 204 F.3d 1276, 1282 (9th Cir. 2000); *In re Pomona Valley Med. Group, Inc.*, 476
3 F.3d 665, 670 (9th Cir. 2007).

4 25. A debtor satisfies this standard if it shows in its reasonable business judgment that
5 rejection (or assumption) will benefit the estate. *Sharon Steel Corp. v. National Fuel Gas*
6 *Distribution Corp.*, 872 F.2d 36, 39-40 (3rd Cir. 1989). If the debtor exercised its business
7 judgment reasonably, the court should approve the proposed assumption or rejection. In fact, a
8 court evaluating the decision to assume or reject “should presume that the debtor-in-possession
9 acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken
10 was in the best interests of the bankruptcy estate.” *In re Pomona Valley Med. Group, Inc.*, 476
11 F.3d at 670.

12 26. Under Section 365(f) of the Bankruptcy Code, a debtor may after assuming a
13 contract, assign its rights under the contract to a third party. 11 U.S.C. § 365(f); *see also In re*
14 *Rickel Home Center, Inc.*, 209 F.3d 291, 299 (3d Cir. 2000) (“The Code generally favors free
15 assignability as a means to maximize the value of the debtor’s estate”); *In re Crow Winthrop*
16 *Operating Partnership*, 241 F.3d 1121, 1124 (9th Cir. 2001). Pursuant to section 365(f)(1), a
17 debtor may assign an executory contract or unexpired lease notwithstanding any provision in such
18 contract or lease that prohibits, restricts or conditions assignment of such contract or lease. In
19 order to assign such an executory contract or unexpired lease, the debtor must provide adequate
20 assurance of future performance by the assignee of such contract or lease. 11 U.S.C. § 365(f)(2).

21 27. Here, the APA requires the Debtor to assume and assign the Supermarket Lease
22 and its rights to use the Warehouse to the Proposed Purchaser, as those properties are both used
23 for the operation of the business being sold. If the Proposed Purchaser or another Successful
24 Bidder purchases the Debtor’s business according to the terms of the APA, then it will be able to
25 perform under the terms of the Supermarket Lease and will be able to continue paying the upkeep
26 costs of the Warehouse through the same means as the Debtor has always done, i.e., through
27 operation of the supermarket. Accordingly, the Court should authorize the Debtor to assume and
28 assign the Supermarket Lease and the Debtor’s rights to use the Warehouse to the Proposed

Purchaser or another Successful Bidder.

VI. CONCLUSION

WHEREFORE, the Debtor respectfully requests entry of an order (1) approving the sale of the Debtor's business assets free and clear of liens, claims, interests and encumbrances to the Proposed Purchaser or to another Successful Bidder pursuant to the APA; (2) authorizing the assumption and assignment of the unexpired Supermarket Lease and the Debtor's rights to occupy and use the Warehouse to the Proposed Purchaser or Successful Bidder; and (3) granting such other related relief as the court deems appropriate.

DATED: December 22, 2016

DOWNEY BRAND LLP

By: /s/ Kelly L. Pope
KELLY L. POPE
Attorney for Debtor
VINH PHAT SUPERMARKETS, INC.