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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

SUFFOLK READY MIX, LLC,

Debtor.

Chapter 7

Case No. 09-75473-reg

Hearing Date: September 13, 2010 at
9:30 a.m.

Related Doc: Docket # 133

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**FINANCIAL FEDERAL CREDIT INC.'S LIMITED OBJECTION TO THE INTERIM
TRUSTEE OF THE CHAPTER 7 ESTATE OF SUFFOLK READY MIX, LLC'S
APPLICATION FOR AN ORDER APPROVING THE SALE OF CERTAIN EQUIPMENT
FREE OF AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES**

**TO: THE HONORABLE ROBERT E. GROSSMAN,
UNITED STATES BANKRUPTCY JUDGE:**

Financial Federal Credit Inc.'s ("FFCI"), by its attorneys, Platzer, Swergold,
Karlin, Levine, Goldberg, & Jaslow, LLP, hereby submits its objection to the application
(the "Application") of R. Kenneth Barnard, Esq., Interim Trustee ("Trustee") of the
Chapter 7 Estate of Suffolk Ready Mix, LLC (the "Debtor") for an order approving the
sale of certain assets free and clear of all liens, claims and encumbrances pursuant to
11 U.S.C. § 363 of Title 11 of the United States Code (the "Bankruptcy Code") and sets

forth as follows:

RELIEF SOUGHT BY THE TRUSTEE

1. Pursuant to 11 U.S.C. §§ 105, 363(b) and 363(f). The Trustee seeks the Bankruptcy Court's approval for the sale of non-receivable assets ("Assets") located at 131 Old Northport Road, Kings Park, New York, which includes certain pieces of equipment and vehicles, generally described within the Trustee's Application (Docket #133)

GENERAL BACKGROUND

2. On July 24, 2009 (the "Filing Date"), the Debtor its voluntary bankruptcy petition for relief pursuant to Chapter 11, Title 11 of the United States Code (the "Bankruptcy Code").

3. Prior to the Filing Date, the Debtor entered into certain promissory note(s) (the "Note(s)") with FFCI, which obligated the Debtor to pay monthly payments, and which such obligations were secured by all of the Debtor's assets, including specific equipment and vehicles, and all of the Debtor's "goods, inventory, equipment, accounts receivables, chattel paper, documents, instruments, contract rights, general intangibles, investment property, securities entitlements, deposit accounts, fixtures, and other property, wherever located, now or hereafter acquired, and all proceeds of the same (collectively, the "General Collateral")

4. Prior to the Filing Date, FFCI perfected its security interest in the Collateral, including the specific equipment and vehicles, described within FFCI's UCC-1 financing statements filed with the New York Secretary of State on 10/5/04, 11/26/04, 11/10/05 and 2/3/09 , as continued by FFCI's filed UCC-3 continuation statements, as

follows (the “Specific Collateral”) (collectively, the General Collateral and the Specific Collateral, the “Collateral”):

<u>Quantity</u>	<u>Year</u>	<u>Model</u>	<u>Description of Collateral</u>	<u>Serial Number</u>
one (1)	2005		Advanced Front Mixer	5DG8AC4T250010248
one (1)	2005		Advanced Front Mixer	5DG8AC4T850010285
one (1)	2005	379	Peterbilt Tractor	1XP5DB0X35N860552
one (1)	2005		East Tri-Axle Dump Trailer	1E1D1N38X5RH35390
one (1)	1996		Advance 4 Axle Mixer	1A 9TAC4S9T0007366
one (1)	1996		Advance 4 Axle Mixer	1A9TAC4S2T0007368
one (1)	2001		Advance Mixer	5DG8AC4T810008319
one (1)	1999		Advance Mixer	1A9TAC4S0X0007343
one (1)	1999		Advance Mixer	1A9TAC4S7X0007064
one (1)	1999		Advance Mixer	1A9TAC4S1X0007206

5. By the Court’s order (the “November 10th Order”), dated November 10, 2009, (Docket # 52), the Court approved the Debtor’s use of FFCI’s Cash Collateral, and approved as adequate protection for the use of FFCI’s Cash Collateral, the granting to FFCI of a first priority and perfected security interest in the Debtor’s now owned and hereafter acquired Goods, Inventory, Chattels, machinery, equipment, vehicles, accounts, chattel paper, notes, receivables, accounts receivables, furniture, fixtures, general intangibles, causes of action, documents and property of every kind” and the proceeds of the same.

6. Pursuant to Paragraph 8 of the November 10th Order, FFCI’s security Interest in FFCI’s collateral is senior to any and all rights of the Debtor or any successor trustee in a Chapter 7 proceeding may have with respect to both pre-petition and post-petition collateral, and that no cost of expense of administration would be imposed against FFCI or FFCI’s collateral, pursuant to any provision of the Bankruptcy Code.

7. Pursuant to Paragraph 24 of the November 10th Order, the November 10th

Order's terms and provisions, as well as the priorities, liens and security interested created under the November 10th Order shall survive the appointment of any trustee or examiner , or conversion of the Debtor's bankruptcy case to a case under Chapter 7 of the bankruptcy Code.

8. As per paragraph 2 of the November 10th Order, the amount owing by the Debtor to FFCI, as acknowledged by the Debtor, was \$175, 311.00 with accrued interest, late charges, fees, costs and attorney fees. As of the date of this limited objection, FFCI asserts a fully secured claim in the approximate amount of \$131,158.25 plus interest, costs and fees as may be properly accrued (the "Indebtedness").

9. By order dated August 9, 2010 (Docket # 120) , the Debtor's bankruptcy case was converted to one under Chapter 7 of the Bankruptcy Code by the Court .

10. As per the filed notice (Docket # 122) the Trustee was appointed by the United States Trustee as interim trustee.

**FFCI'S LIMITED OBJECTION TO THE SALE OF FFCI'S COLLATERAL:
The Debtor has not satisfied the requirements of 11 U.S.C. A 363(f)(1) through (5),
and as such does not have the statutory right to sell any of FFCI's Collateral.**

11. FFCI has a perfected security interest in all of the Debtor's assets, including the collateral that the Trustee is now seeking to sell, pursuant to an order the Trustee seeks within its Application

12. The Trustee has not met Trustee's burden with respect to Section 363(f) of the Bankruptcy Code and any of FFCI's Collateral, the Trustee is seeking to sell.

13. Section 363(f) of the Bankruptcy Code permits a sale of property of the

estate free and clear of an interest in the property, including a lien, under certain circumstances.

Section 363(f) states in relevant part as follows:

The Trustee may sell property under subsection (b) and (c) of this section free and clear of any interest in such property other than the estate, only if --

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

14. The Trustee's Application does not clearly state which of the conditions of Section 363(f) it is claiming to have met with respect to any of FFCI's Collateral. The "statutory conditions for selling estate property free and clear of liens are written in the disjunctive, and only one of these conditions must be satisfied for sale to proceed." In re Takeout Taxi Holdings, Inc, 307 B.R. 525, 529 (Bankr. E.D. Va., 2004)

15. With respect to Section 363(f)(1), the Trustee has not cited to any applicable state law which would allow the Debtor to sell any of the Collateral without FFCI's consent, nor does FFCI believe any such case law exists.

16. With respect to Section 363(f)(2), the FFCI has not consented to the sale of any of FFCI's Collateral. Within the Application, the Trustee does not claim that FFCI has consented to the sale of any of FFCI's Collateral.

17. With respect to Section 363(f)(3), the Trustee has not offered any evidence showing whether or not the proposed sale amount for any of the subject Collateral, in sum or otherwise, is equal to or greater than the amounts owing under any Note(s) to FFCI. Further, the Trustee's Application fails to state what the expected proposed sale price for any of FFCI's Collateral will be or that the sale is subject to any sale reserve price, nor does it state that the net sale proceeds will be paid to FFCI.

18. The Trustee's Application does not establish that the Collateral's sale price will be greater than the aggregate value of all the liens. See In re WDH Howell, LLC, 298 B.R. 527, 534 (D. N.J., 2003)(held that the meaning of "value" as used in Section 363(f)(3) means "face value" of the claims secured by a lien on the property) (Chapter 11 debtor-in-possession could not sell their real property free and clear of liens for less than the aggregate face value of the claim secured by lien, even if proposed price was fair and the "economic value of the collateral.); In re Terrace Chalet, 159 B.R. 821, 825-828 (N.D.I.L, Eastern Division, 1993)(Section 363(f)(3) protects the face amount of claim secured by the lien). Additionally, FFCI's security interest in the Collateral also attaches to all sales proceeds.

19. With respect to Section 363(f)(4), the Trustee has not offered any evidence that there is any *bona fide* dispute with respect to FFCI's interest in any of the Collateral, nor is there any alleged dispute stated within the Trustee's Application.

20. With respect to Section 363(f)(5), the Trustee's Application is silent and does not show how or in what manner FFCI could be compelled in "a legal or equitable proceeding", to accept a money satisfaction of its interest in any of FFCI's Collateral. See In re Haskell, L.P., 321 B.R.1,9 (Bankr. D. Mass, 2005)(held: with respect to

Section 365(f)(5), “the estate, trustee or debtor-in-possession must do more than show that it is theoretically possible to compel a party to accept a money satisfaction of its interest.”).

21. Based on the forgoing, the Trustee has not met its burden with respect to Section 363(f) of the Bankruptcy Code, concerning any of FFCI’s Collateral and the Trustee’s Application should be denied as it relates to FFCI’s Collateral.

22. FFCI is however, willing to discuss with the Trustee the consensual sale of its Collateral conditioned upon:

a. sufficient evidence to be provided to FFCI which would demonstrate that the aggregate sale price of the assets would substantially exceed the Indebtedness;

b. the Trustee’s agreement that in the event a sufficient minimum sale price was not achieved for a specific asset subject to FFCI’s lien, said asset would not be sold at sale;

c. the Trustee’s consent to FFCI’s right to credit bid at the sale pursuant to section 363(k) of the Bankruptcy Code;

d. disclosure to FFCI of the costs and expenses associated with the Trustee’s sale of assets; and

e. payment of the Indebtedness from the proceeds of sale at closing.

