

United States Bankruptcy Court  
Western District of Michigan  
One Division Ave., N.  
Room 200  
Grand Rapids, MI 49503

<p><b>IN RE:</b> Debtor (name used by the debtor in the last 8 years, including married, maiden, trade, and address):</p> <p><b>Cherry Growers, Inc.</b> PO Box 90 Grawn, MI 49637 Tax ID: 38-0416406</p> <p style="text-align: right;">Debtor</p>	<p><b>Case Number 17-04127-swd</b></p> <p><b>Chapter 11</b></p> <p><b>Honorable Scott W. Dales</b></p>
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**NOTICE TO CREDITORS AND OTHER PARTIES IN INTEREST**

**DEBTORS MOTION FOR AN ORDER (A) AUTHORIZING PROCEDURES FOR THE SALE OF THE EQUITY INTEREST OF NORTH BAY, S.A OF THE DEBTOR FREE AND CLEAR OF LIENS, AND (B) GRANTING RELATED RELIEF**

Please take notice that the above-referenced motion has been filed with the Bankruptcy Court. **Your rights may be affected.** You should read these papers carefully and discuss them with your attorney. (If you do not have an attorney, you may wish to consult one.)

If you want the court to consider your view on this matter, attend the hearing scheduled for March 28, 2018 at 10:00 AM at the United States Bankruptcy Court, One Division Ave., N., 2nd Floor, Courtroom A, Grand Rapids, MI 49503.

You or your attorney may wish to file a response explaining your position. Such response should be **received** at least five business days prior to the scheduled hearing. A copy should also be served upon the party who has filed the motion and to his/her attorney.

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion and may enter an order granting that relief.



DANIEL M. LAVILLE  
CLERK OF BANKRUPTCY COURT

**Dated:** February 23, 2018

/S/ \_\_\_\_\_  
Kathy Trapp  
Deputy Clerk

Notice returned to Perry G. Pastula, Esq. for appropriate service: (2/23/18-kmt )

NOTICE IS HEREBY GIVEN that the court may, in its discretion, orally continue or adjourn the above hearing on the record in open court. If this occurs, parties in interest will not be given further written notice of the new hearing date. If an entity is not present at the originally scheduled hearing, information regarding the time, date and place of an orally continued or adjourned hearing may be accessed through the Bankruptcy Court's web site ([www.miw.uscourts.gov](http://www.miw.uscourts.gov)) provided the person has a PACER login and password, or by visiting the Clerk's Office of the United States Bankruptcy Court located at One Division Avenue North, 2nd Floor, Grand Rapids, Michigan 49503. Information about a PACER login and password may be obtained by either calling PACER service center between 8:00 a.m. and 5:00 p.m. Monday through Friday, CST at (800) 676-6856 or via its web site at <http://pacer.psc.uscourts.gov>.

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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In Re:

Case No. 17-04127

CHERRY GROWERS, INC.

Chapter 11; Filed 8/31/17

Debtor.

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Hon. Scott W. Dales

**DEBTOR’S MOTION FOR AN ORDER (A) AUTHORIZING  
PROCEDURES FOR THE SALE OF THE EQUITY INTEREST OF  
NORTH BAY, S.A OF THE DEBTOR FREE AND CLEAR  
OF LIENS, AND (B) GRANTING RELATED RELIEF**

The above-captioned Debtor hereby files this motion (the “Motion”) pursuant to Sections 363 of Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the “Bankruptcy Code”) and Rules 2002, 6004, 6006, and 9006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), requesting (I) an order approving procedures for the sale of its equity interest in that certain company known as North Bay Produce, S.A. (“North Bay”), and (II) an order authorizing the sale of the North Bay equity interest, free and clear of liens, claims, interests, and encumbrances pursuant to Section 363(f) of the Bankruptcy Code, subject to final Court order, and (III) granting further related relief to all of the foregoing. The North Bay equity interest is described as one (1) share of North Bay Produce, S.A. , representing 6.56% of the outstanding shares of North Bay. There are eight other shareholders and all of them will be notified of this Motion and provided an opportunity to overbid if they wish. North Bay is an entity organized and registered in the Santiago, Peru. On information and belief, North Bay does not have a Stock Redemption Agreement or any other restrictions on the transfer of the Debtor’s shares. The copy of the North Bay stock certificate is attached hereto as **Exhibit A**.

## **BACKGROUND**

### **A. The Chapter 11 Filing**

1. On August 31, 2017 (the "Petition Date"), the Debtor commenced its reorganization case by filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330, *et seq.* (the "Bankruptcy Code").

2. The Debtor is continuing in possession of its property and are operating and are operating and managing its business as a debtor-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. Roy Hackert ("Hackert"), is the proposed stalking horse bidder. Mr. Hackert's opening bid is \$100,000, subject to higher and better bids.

4. Debtor now files this Motion in order to provide clear procedures for bidding and completing such a 363 Sale.

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

6. The statutory predicates for the relief requested herein are sections 105(a) and 363 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, and 6006.

### **B. Background and Business Operations**

7. The Debtor operates a for-profit business organized and incorporated as a cooperative corporation under Michigan law. The Debtor was incorporated in May, 1939. The Debtor prospered and became a major packer of both cherries and apples. In the mid-1960's the Debtor built the Grawn plant in addition to its plants in Bailey, Michigan and Hartford, Michigan.

Unfortunately, this rapid expansion led to financial distress which caused members to sell the physical assets of the company in July, 1968 to the Duffy-Mott Corporation. The Debtor became a supply cooperative, supplying raw product to Duffy-Mott. In May, 1972 the Debtor negotiated a repurchase of the Grawn plant from Duffy-Mott when Duffy-Mott announced it would no longer purchase raw product and process fruit in Michigan. From the late 1970's through the early 1990's, the Debtor acquired and sold various other satellite plants to support the fruit growers throughout the lower peninsula of Michigan. In May, 1990, the Debtor purchased its current plant #2 located in southern Leelanau County. The Leelanau County plant #2 receives cherries and apples seasonally and stores frozen finished products in its freezer, and raw product in its controlled atmosphere rooms and coolers. Since 2011, CGI has been producing applesauce into single-serve, resealable pouches under an exclusive joint venture with Materne North America Group.

8. As indicated above, the Debtor currently operates from two facilities. Plant #1 being the Grawn Facility consisting of 476.6 acres of land and buildings totaling 327,029 square feet. Plant #2 being the Traverse City plant is its freezer plant to freeze and store finished fruit products. Plant #2 consists of 34.94 acres and 31,826 square feet of building space.

9. The Debtor has filed, or intends to file in the immediate future, a separate motion for a 363 sale of its Grawn real estate and certain pieces of equipment to Materne North America. In addition, the Debtor has filed, or intends to file, motions for the appointment of auctioneers for the sale via auction of the Plant #2 real estate in Traverse City, Michigan, and the machinery and equipment located in the Plant #1 Grawn, Michigan facility. Furthermore, the Debtor has filed, or intends to file, a Liquidation Plan of Reorganization and Disclosure Statement which will incorporate the provisions setting forth the various §363 sales of its assets.

### **C. Pre-petition Debt and Capital Structure**

10. The Debtor obtained four loans from Huntington National Bank, together with its participant, the Michigan Economic Development Corporation. In addition, Huntington National Bank funded a \$3 million loan to the Debtor as a part of the New Market Tax Credit structure to assist in the construction of the facility where Materne conducts its business operations. As of the Petition Date, the amount owing to Huntington National Bank is approximately \$8.1 million. Furthermore, the Debtor granted liens in favor of Huntington National Bank in all of its real estate, its machinery and equipment, and a pledge of the leverage loan documents executed in connection with the New Market Tax Credit transaction.

11. Additionally, the Debtor, as borrower, is indebted to Cherry Central Cooperative, Inc. and CherrCo/Wells Fargo Bank per notes and security agreements granting liens on specific equipment as to Cherry Central and on fruit inventory and/or intangible assets.

12. As of the Petition Date, the amount owed to Huntington National Bank is approximately \$8.1 million. The Debtor does not believe Huntington National Bank or any other creditors holds a security interest in the North Bay, S.A. stock interest.

### **D. Events Leading to a Chapter 11 Filing and Negotiation of Sale Agreement**

13. The Debtor's sales have been in a steady decline since 2014. Various factors have impacted the Debtor's business operations including market programs, centralized selling efforts, and world wide supplies that enhance imports of cherries into the United States, have all affected the Debtor's competitive advantage such that its attraction as a cooperative for tart cherry growers has been minimized. The most acute event occurred in the 2012 cherry and apple crop failures in Michigan. Northwest Michigan produced just 2.5 million pounds of tart cherries that year compared

to a three year average (2009 through 2011) of 117 million pounds. Apples were also severely impacted and Michigan reported production in 2012 of 2.7 million bushels versus the prior three year average production in the State of Michigan of 18.25 million bushels. The decimation of the apple crop was particularly harmful to the Debtor who had only one year earlier, entered into a long term supply agreement for fresh apples at a fixed price with Materne. At the time the agreement called for the Debtor to source for Materne, 44 million pounds of apples. As a result, the Debtor purchased millions of pounds of fresh apples from available suppliers in the western United States for as much as 25¢ per pound over the contracted agreed price to Materne of 9¢ per pound for that year. While the Materne Supply Agreement was amended prior to the next crop, the Debtor's financial stability had been so badly damaged from the Materne Supply Agreement obligations, that growers were reluctant to sell their apples to the Debtor from the 2013 crop, further crippling its ability to meet the Supply Agreement commitment to Materne.

14. Some additional factors for the declining sales that started in 2014 and general industry trends regarding the fluctuations in fruit crops, are the pricing standards dictated pursuant to the Federal Marketing Order administered by the U.S. Department of Agriculture, which mandate inventory restrictions and sale volumes. The declining sales have deprived the Debtor of the liquidity necessary for the capital and infrastructure improvements in the Grawn Facility necessary to update the Grawn Facility structural condition.

15. As a result of the factors described above, in late 2015, the Debtor and its management team began evaluating a number of options to respond to their operational and liquidity issues. To this end, the Debtor engaged professionals to evaluate the Debtor's business and to propose potential strategies, including but not limited to, the raising of additional capital, a sale of

some or all assets, or a restructuring transaction.

16. One of the Debtor's trade creditors filed a complaint and after trial, obtained a judgment in the Michigan State Courts, against the Debtor, in the summer of 2017. That Judgment was due to become final and non-appealable on September 5, 2017.

17. In order to avoid the consequences of this judgment creditor's execution, and after consultation with its advisors, the Debtor decided on a Chapter 11 bankruptcy and investigated a sale process for the best benefit of its creditors.

18. The Debtor, led by its principal officer, Mr. Eric MacLeod, since the filing of the Chapter 11 petition on August 31, 2017, has met with multiple potential buyers of the Debtor's business or assets. Over 18 specific contacts were involved. The contacts range from national competitors, to local fruit operators. Unfortunately given the age and condition of the company's infrastructure, a viable offer could not be obtained to compete with the Materne offer.

19. Lacking any other firm offers for the business assets, the Debtor engaged in good faith negotiations with Materne for the sale and purchase of the Grawn Facility, and two auctioneers with respect to the sale of its machinery and equipment and the Traverse City Plant #2 facility which will allow the Debtor to propose a Liquidation Plan of Reorganization. Roy Hackert, as the proposed stalking horse for the sale of the North Bay, S.A. stock, is not seeking a breakup fee or expense reimbursement in connection with its bid. Roy Hackert has submitted a bid of \$100,000.

20. The Debtor believes that the best way to maximize the value of the North Bay stock interest for the benefit of creditors is to conduct a 363 sale as soon as practicable.

21. The Debtor's schedules identify the original cost basis for the North Bay stock at \$77,500.

## **RELIEF REQUESTED**

22. The Debtor seeks the entry of the following order in connection with the sale of the North Bay stock. At the time of the Sale Hearing, an order in the form and substance mutually agreeable to the Debtor and the winning bidder at the auction (the “Sale Order”) approving the sale of assets free and clear of lien, claims, and encumbrances.

23. The Debtor requests that this Court set a hearing on the Motion for March 28, 2018. At the hearing on the Motion the Debtor will solicit additional bids. If no competing bids are received at the hearing, the Debtor respectfully requests that the Court enter an order approving the sale to Hackert.

24. The proposed Bidding Procedures are:

- a. Any additional bids shall be in increments of at least \$5,000 or greater than the opening bid of Hackert at \$100,000.
- b. The successful bidder shall pay the entire purchase price within seven (7) days of entry of the order approving the sale.

## **BASIS FOR RELIEF AND APPLICABLE AUTHORITY**

### **A. The Sale**

25. Section 363(b)(1) of the Bankruptcy Code provides that “[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. §363(b)(1). Section 363(b), does not provide an express standard for determining whether the Court should approve any particular purchase or sale.

26. A broad consensus of courts, including the Sixth Circuit and this District, hold that a debtor may sell property of the estate outside of the ordinary course of its business where such use



represents an exercise of the debtor's sound business judgment. *Stephens Industries, Inc. v. McClung*, 789 F.2d 386, 390 (6<sup>th</sup> Cir. 1986) (“We adopt the Second Circuit’s reasoning in *In re Lionel Corporation, supra*, and conclude that a bankruptcy court can authorize a sale of all a Chapter 11 debtor’s assets under § 363(b)(1) when a sound business purpose dictates such action”); citing, *Committee of Equity SEC Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *In re Quality Stores, Inc.*, 272 B.R. 643, 647-48 (Bankr. W.D. Mich. 2002)(“[A] sale of assets is appropriate if all provisions of § 363 are followed, the bid is fair, and the sale is in the best interests of the estate and its creditors.”) quoting, *In re Embrace Systems Corp.*, 178 B.R. 112, 124 (Bankr. W.D. Mich 1995) (“In this circuit, a bankruptcy court can authorize a sale of all of a chapter 11 debtor’s assets under Section 363(b)(1) when a sound business purpose dictate such action.”).

27. Courts often consider the following factors in determining whether a proposed sale satisfies the sound business purpose standard: (a) whether a sound business justification exists for the sale, (b) whether accurate and reasonable notice of the sale was given to interested parties, (c) whether the sale will produce a fair and reasonable price for the property and (d) whether the parties have acted in good faith. *In re Titusville Country Club*, 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991); *In re Daufuskie Island Props., LLC*, 431 B.R. 626, 637 (Bankr. D.S.C. 2010) (citing same four factors).

28. In *Stephens Industries*, the Sixth Circuit concluded the standards for approving a sale were satisfied where the facts showed “[t]he trustee had been unable to operate the radio station at a profit . . . [and] the trustee faced the prospect of ceasing [the debtors’] operations.” *Stephens Industries*, 789 F.2d at 390.

29. Indeed, some courts have held the approval of a proposed transaction “should only be withheld if the debtor’s judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code . . .” *Richmond Leasing Co. V. Capital Bank, N.S.*, 762 F.2d 1303, 1309 (5<sup>th</sup> Cir. 1985) (quoting *Allied Technology, Inc. v. R.B. Brunemann & Sons*, 25 Bankr. 484, 495 (Bankr. S.D. Ohio 1982). Similarly in *Quality Stores*, this court approved the sale of substantially all assets and noted it was in part “[d]eferring to the business judgment of the Debtor, the Committee and the Lenders,” all of whom supported the sale. *Quality Stores*, 272 B.R. at 647-48.

30. The Debtor has sound business justification for the sale of the North Bay stock at this time pursuant to the contents of this Motion outlined above. As set forth above, the Debtor has experienced declining sales for several years due to several factors including the general economy and specific trends in the fruit industry. The Debtor’s management team believes that in order to prevent further losses and to maximize the value of the North Bay stock, a sale of the North Bay stock conducted under Section 363 of the Bankruptcy Code is in the best interest of all interested parties.

31. The Debtor has acted in good faith and the proposed sale process and bid procedures will provide accurate and reasonable notice of the sale to interested parties.

32. The Debtor and the Creditors Committee support the terms of this Motion. The Debtor has therefore determined based upon its sound business judgment, that the most viable option for maximizing the value of its estate is through a sale of the North Bay stock based upon this Motion.

**B. Sale “Free and Clear of Liens, Claims and Encumbrances”**

33. The Debtor seeks permission to sell the Assets free and clear of all liens, claims and encumbrances (collectively, the “Liens”), with such Liens attaching to the proceeds applicable the Assets encumbered by the Liens. Section 363(f) of the Bankruptcy Code provides that property may be sold free and clear of any interest in the property if:

- a. applicable nonbankruptcy 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 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).

34. The Debtor need only satisfy one of the noted conditions. *In re Wolverine Radio Co.*, 930 F.2d 1132, 1148 (6<sup>th</sup> Cir. 1991). The Debtor believes the Secured Lenders will consent to the proposed sale.

35. Otherwise, Section 363(f)(5) allows a debtor to sell property free and clear of liens when a legal or equity proceeding exists that will force the lien holder to accept less than full money satisfaction for its interest. *In re James*, 203 B.R. 449, 453 (W.D. Mo. 1997), *In re Grand Slam USA, Inc.*, 178 B.R. 460, 463-64 (E.D. Mo. 1995). Courts considering this issue have held that the “cram down” provision under the Bankruptcy Code constitutes such a “legal or equitable proceeding” and permits a sale under Section 363(f)(5) where a secured creditor may receive less

than the value of its claim. *Grand Sale USA, Inc.* 178 B.R. at 464; *In re Terrace Chalet Apartments, Ltd.*, 159 B.R. 821, 829 (N.D. Ill. 1993); *WPRV-TV, Inc.*, 143 B.R. at 321; *In re Healthco International, Inc.*, 174 B.R. 174, 176 (Bankr. D. Mass. 1994).

36. The Debtor proposes that any valid Liens shall attach to the sales proceeds attributable to the Debtor's interest in the North Bay stock, and in the same priority as such liens.

**C. Form and Manner of Notice**

37. The Debtors will provide the Sale Notice to any parties who have previously expressed an interest in the North Bay stock or who may be interested in purchasing the North Bay stock and all creditors of the Debtor, in accordance with Bankruptcy Rule 2002(a)(2), by mailing such notice more than twenty-one (21) days prior to the Sale Hearing.

38. The Debtor submits that the form and manner of service of the Sale Notice is appropriate under the circumstances and complies with all applicable Bankruptcy Rules.

39. Finally, the Debtor requests that the Court waive any 14-day stay that might be imposed under Bankruptcy Rules 6004(h) and 6006(d) for any order authorizing the sale of the property such that the Debtor can close the Sale promptly after entry of the Sale Order.

WHEREFORE, the Debtor respectfully requests the Court grant the relief requested in this Motion, including (a) at the conclusion of the Sale Hearing, entry of the Sale Order, and (b) granting such other and further relief as is necessary.

Respectfully Submitted,

DUNN, SCHOUTEN & SNOAP, P.C.

Dated: February 21, 2018

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