

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

_____)	
	)	Chapter 11
In re:)	
	)	Case No. 17-11444-SAH
EATERIES, INC., <i>et al.</i> ¹)	
	)	Jointly Administered
Debtors.)	
_____)	

**DEBTORS’ MOTION FOR AN ORDER (A) ESTABLISHING
 BIDDING PROCEDURES IN CONNECTION WITH THE SALE
 OF SUBSTANTIALLY ALL OF THE DEBTOR’S ASSETS (B) APPROVING
 THE FORM AND MANNER OF NOTICES, (C) SCHEDULING DATES FOR
 AN AUCTION AND SALE HEARING, (D) AUTHORIZING AND
 APPROVING THE FORM OF A STALKING HORSE ASSET PURCHASE
 AGREEMENT; AND (E) APPROVING PROCEDURES TO DETERMINE
 CURE AMOUNTS RELATED TO THE ASSUMPTION AND ASSIGNMENT
 OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES
AND NOTICE OF OPPORTUNITY FOR HEARING**

NOTICE OF OPPORTUNITY FOR HEARING

Your rights may be affected. You should read this document carefully and consult your attorney about your rights and the effect of this document. If you do not want the Court to grant the requested relief, or you wish to have your views considered, you must file a written response or objection to the requested relief with the Clerk of the United States Bankruptcy Court for the Western District of Oklahoma, 215 Dean A. McGee Avenue, Oklahoma City, OK 73102 **no later than 14 days from the date of filing of the motion.** You should also serve a file-stamped copy of your response or objection to the undersigned movant/movant’s attorney [and others who a required to be served] and file a certificate of service with the Court. A hearing on the motion has been set for **August 16, 2017 at 9:30 am** before the Honorable Sarah A. Hall, in the ninth floor courtroom of the United States Bankruptcy Court for the Western District of Oklahoma, 215 Dean A. McGee Avenue, Oklahoma City, OK 73102. If no response or objection is timely filed, the Court may grant the motion without further notice.

¹ The affiliated Debtors are Eateries, Inc. and GRP of Zanesville, LLC, Case No. 17-11445-SAH. Although there are multiple Debtors in this case, for ease of reference the term “Debtor” used in this pleading shall refer to all of the affiliated Debtor entities.

**NOTICE OF HEARING
(TO BE HELD IF A RESPONSE IS FILED)**

Notice is hereby given that if a response to the Debtor's Motion is filed, the hearing on the matter will be held on August 16, 2017, at 9:30 a.m. in the 9th floor courtroom of the United States Bankruptcy Court for the Western District of Oklahoma, 215 Dean A. McGee Avenue, Oklahoma City, OK 73102. If no response is timely filed and the court grants the requested relief prior to the above-referenced hearing date, the hearing will be stricken from the docket of the Court.

Eateries, Inc. ("Eateries") and GRP of Zanesville, LLC ("Zanesville"), debtors and debtors-in-possession in the above-captioned case (collectively, the "Debtor") files this motion (the "Bid Procedures Motion") for entry of an order (the "Bidding Procedures Order") (a) establishing bidding procedures (the "Bidding Procedures") in connection with the sale of substantially all of the Debtor's assets (the "Purchased Assets"), (b) approving the form and manner of notices of the Sale, (c) scheduling dates for an auction ("Auction") and hearing to approve the Sale (the "Sale Hearing"), (d) authorizing and approving the form of a Stalking Horse Asset Purchase Agreement (the "Stalking Horse APA"), and (e) Approving Procedures to Determine Cure Amounts Related to the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases.²

Debtor has filed, in conjunction with the Bid Procedures Motion, a Motion for an Order (a) Approving the Sale of the Assets Free and Clear of All Liens, Claims and Encumbrances to the Winning Bidder; and (b) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases of the Debtor (the "Sale Motion"). The Sale Motion lays out the terms of the proposed Sale and seeks this Court's approval of the sale process.

In support of the Bid Procedures Motion, the Debtor respectfully represents as follows:

² Capitalized terms used herein and not otherwise defined have the meaning set forth in the Stalking Horse APA or the Bidding Procedures, as applicable.

JURISDICTION AND VENUE

1. This Court has jurisdiction over the Bid Procedures Motion pursuant to 28 U.S.C. §§ 1334 and 157. This Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. The statutory bases for the relief requested herein are sections 105, 363, 364, and 365 of Title 11, United States Code (the “Bankruptcy Code”), and Rules 2002, 4001, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

BACKGROUND

3. On April 18, 2017 (the “Petition Date”), the Debtor filed a voluntary petition for relief pursuant to Chapter 11 of Title 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Oklahoma (the “Bankruptcy Court”). The Debtor continues to operate and manage its business as debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. As of the date hereof, an official committee of unsecured creditors (the “Creditors Committee”) has not yet been appointed in the Case. No request has been made for the appointment of a trustee or examiner.

4. A description of the Debtor’s businesses, the reasons for filing these Chapter 11 Cases and the relief sought from the Bankruptcy Court to allow for a smooth transition into operations under Chapter 11 of the Bankruptcy Code is set forth in the First Day Affidavit of William C. Liedtke, III [Dkt. No. 10] (the “First Day Affidavit”). The Debtor hereby adopts and incorporates the First Day Affidavit as if fully set forth herein.

5. Immediately prior to the filing of this bankruptcy, Eateries (directly or through its various subsidiaries, including Zanesville) operated a chain of 15 restaurants located in nine states, and employed more than 450 people. These restaurants are located in various shopping malls whose business is directly related to the volume of shoppers visiting the anchor tenants in such malls. The continued increase in online shopping has left brick-and-mortar shopping

centers to fight over a smaller group of consumers. As a result, over the last year, certain segments of the retail shopping industry have experienced a significant downturn resulting in announcements by Macy's, Sears, and, most recently, JCPenney that they have or will close hundreds of these anchor stores. This downturn has had a direct impact on this business of those restaurants located in shopping malls experiencing decreased business.

6. As a result of the decreased business, Eateries has been attempting to renegotiate its lease terms with many of its landlords without success. Indeed, the downturn has resulted in the closure of four of Eateries' restaurant locations in advance of the filing of this bankruptcy, leaving 11 locations in operation in six states, employing approximately 375 people, at the time of the filing of this case.

RELIEF REQUESTED

7. By this Bid Procedures Motion, the Debtor respectfully requests entry of the Bidding Procedures Order (a) establishing the Bidding Procedures in connection with the Sale of the Purchased Assets, (b) approving the form and manner of notices of the Sale, (c) scheduling dates for the Auction and Sale Hearing, (d) authorizing and approving the form of the Stalking Horse APA, and (e) approving the procedures to determine cure amounts related to the assumption and assignment of certain executory contracts and unexpired leases.

I. THE STALKING HORSE ASSET PURCHASE AGREEMENT

8. Debtor has been unable to raise sufficient capital to continue operating and developing its assets because of the Debtor's current capital structure and the decline in the shopping mall based restaurant business. As a result, the Debtor has reached an agreement to sell the Purchased Assets, subject to higher and better offers, to Fresh Capital LLC, Fiesta Holdings, Inc., and Practical Investors LLC or their nominee (collectively, the "Purchaser").

9. SpiritBank, an Oklahoma Banking Corporation ("DIP Lender") provided debtor-

in-possession financing (the “DIP Facility”) in an amount not to exceed \$500,000.00 to the Debtor pursuant to this Court’s Order entered May 15, 2017 [Doc. 122] (the “DIP Order”).

10. Accordingly, the Debtor proposes to sell, subject to the terms of the Stalking Horse APA between the Debtor and the Purchaser³ (the Purchaser being referred to herein as the “Stalking Horse Bidder”), the Purchased Assets, which constitute substantially all of the Debtor’s assets and are defined in the Stalking Horse APA, excluding the Excluded Assets (as defined in the Stalking Horse APA) in accordance with sections 363 and 365 of the Bankruptcy Code and pursuant to the entry of the Sale Order, in exchange for an offer in the amount of \$1,100,000 by the Stalking Horse Bidder (the “Sale”). Such Sale will be free and clear of all liens, claims, encumbrances, and interests to the fullest extent permitted by section 363 of the Bankruptcy Code. A copy of the Stalking Horse APA will be filed with the Court at least 7 days in advance of the hearing on the Bid Procedures Motion.

11. Under the terms of the Stalking Horse APA, Purchaser has agreed to deposit \$12,500.00 (the “Initial Deposit”), to be held in trust account of the Debtor’s counsel. Following entry of the Bidding Procedures Order by the Bankruptcy Court and the approval of the Stalking Horse APA, Purchaser has agreed to deposit an additional \$12,500.00 (the “Additional Deposit”) in a segregated DIP Account. If the Closing occurs, as contemplated in the Stalking Horse APA, the Initial Deposit and the Additional Deposit shall be applied to the Purchase Price. Should Stalking Horse bidder not be approved as the Purchaser by the Bankruptcy Court and the Stalking Horse APA is terminated in accordance with its terms, the Initial Deposit and Additional Deposit shall be returned to the Stalking Horse Bidder.

12. Further, Debtor seeks approval for the payment of a fee (the “Break-Up Fee”) to

³ Collectively, the Purchaser and the Debtor shall be referred to herein as the “Parties.”

Purchaser in the amount of a sum equal to 3% of the winning bid, plus reasonable documented costs incurred by Purchaser not to exceed \$25,000.00, in the event that the Purchased Assets are sold to another purchaser, other than the Stalking Horse Bidder, for a higher price. The Break-Up Fee and the expense reimbursement shall be allocated pro rata among the Purchased Assets based upon the allocated purchase price assigned to the Assets. The purpose of the Break-Up Fee is: (a) to induce Purchaser to incur the cost associated with its due diligence; (b) to reimburse Purchaser for the expenses Purchaser has and will continue to incur in connection with the proposed Sale and (c) to compensate Purchaser for the substantial time and effort Purchaser has and will continue to expend as a prequalified purchaser to establish a safety net against which competing bids can be measured. The Break-Up Fee and expense reimbursement are Purchaser's exclusive remedy in the event a sale is not consummated with Purchaser as contemplated in the Stalking Horse APA. The Debtor's request for approval of the Break-Up Fee is an appropriate exercise of Debtor's business judgment. The Break-Up Fee represents 3% of the total value of the transaction to Debtor's estate and its creditors, and Debtor submits is well within the range of reasonable fees that have been approved by courts in connection with similar transactions. Moreover, the Break-Up Fee payment will be more than offset by the increased Purchase Price.

13. Debtor has negotiated the terms of the Asset Purchase Agreement to induce Stalking Horse Bidder to make a firm agreement to purchase the Assets and to maximize the possibility of other potential bidders making competing bids. Accordingly, Debtor requests authority to enter into the Asset Purchase Agreement and this Court's approval of a competitive bidding process that includes buyer protection provisions and other specific bidding procedures typical for transactions of this nature, all of which are designed to ensure a fair and efficient

process that will facilitate the submission of easily comparable bids while at the same time providing Stalking Horse Bidder with reasonable protections for assuming the role of a pre-qualified cash purchaser of the Assets.

II. SALE AND BIDDING PROCEDURES

14. The Debtor believes that it is in the best interests of the Debtor's estate and creditors to pursue a sale of the Purchased Assets under sections 105, 363 and 365 of the Bankruptcy Code. The Debtor believes that marketing for higher and better offers and conducting the Auction will enable the Debtor to maximize value for all creditors.

15. The Debtor intends to implement the procedures included within the Bidding Procedures attached hereto as **Exhibit "1"** with respect to Qualified Bidders (defined below) and conducting an Auction. The Debtor believes that the proposed procedures are appropriate and will maximize recoveries for the Debtor's estates.

16. The Debtor proposes that any person who wishes to participate in the bidding process⁴ (a "Potential Bidder") should submit a bid satisfying the requirements set forth in the Bidding Procedures (a "Qualified Bid"), as determined by the Debtor. A Qualified Bidder is a person who, among other things:

- a. Sets forth an initial purchase price equal to no less than the sum of \$1,100,000.00 in cash which is the Purchase Price set forth in the Stalking Horse APA, *plus* \$60,000.00 in cash, or other form of consideration (the "Initial Competing Bid Amount");
- b. Does not condition its bid on obtaining financing or on the outcome of unperformed due diligence, unless otherwise consented to by the Debtor;
- c. Submits to the Seller an executed confidentiality agreement in form and substance acceptable to the Seller;

⁴ In the event of conflict between the Bidding Procedures attached hereto as Exhibit 1, and the summary of the Bidding Procedures as set forth in this Motion, the Bidding Procedures in Exhibit 1 shall control.

- d. Fully discloses the identity of each entity, including all persons owning directly or indirectly 20% or more of such entity, that will be bidding for the assets or otherwise participating in connection with such bid and the complete terms of any such participation;
- e. Submits a bid in the form of cash denominated in United States Dollars (a “Cash Bid”);
- f. Submits to the Seller an irrevocable offer in the form of an executed asset purchase agreement (the “Modified Agreement”) (A) without financing, regulatory or due diligence contingencies, unless otherwise consented to by the Seller, and without board (or comparable) approval or other contingencies, (B) containing a satisfactory Cash Bid, and (C) on the same terms as those contained in the Stalking Horse APA, subject to certain necessary revisions to reflect the correct purchase price and buyer;
- g. Makes a cash deposit in the form of a cashier’s check or wire transfer into an interest-bearing escrow account (the “Escrow Account”) in an amount not less than 10% of the competing bid amount, which deposit shall immediately become non-refundable and credited toward the purchase price if and when the Qualified Bidder making such deposit is declared to be the winning bidder (the “Winning Bid” and “Winning Bidder”) at the Sale Hearing. In the event a Qualified Bidder is not the Winning Bidder, such Qualified Bidder’s deposit shall be refunded as set forth in the Bidding Procedures Order;
- h. Provides reasonably satisfactory written evidence, in the discretion of the Seller and its advisors, of its financial ability to (a) fully and timely perform and close the Sale pursuant to the Modified Agreement if it is declared to be the Winning Bidder, (b) repay the DIP Obligations in full upon the closing of the Sale, and (c) provide adequate assurance of future performance of all executory contracts and unexpired leases to be assigned to it; and
- i. Is not entitled to any overbid fee, break-up fee, expense reimbursement, termination fee or similar type of payment or bid protection.

17. The Stalking Horse Bidder shall be deemed to have satisfied the foregoing requirements.

18. Under the Bidding Procedures, the Debtor does not seek the ability to sell its assets in different lots, referred to as “Piecemeal Bids”.

19. A bidder that desires to make a bid shall deliver written copies of its bid by mail,

facsimile, or email so as to be received no later than **September 6, 2017**, at **3:00 p.m.** (prevailing Central Time) (the "**Bid Deadline**") and submit such bid to (i) counsel to the Debtor, Crowe & Dunlevy, 500 Kennedy Building, 321 South Boston Avenue, Tulsa, Oklahoma 74103, Attn: Mark A. Craige and Lysbeth L. George; and (ii) the United States Trustee, 215 Dean A. McGee Avenue, 4th Floor, Oklahoma City, Oklahoma 73102, Attn: M.J. Creasey. Any person who intends to bid at the Auction but who does not submit a Qualified Bid by the Bid Deadline shall not be permitted to attend or participate in or bid at the Auction.

III. NOTICE PROCEDURES

20. The Debtor proposes to serve the *Notice of Auction and Sale Hearing* (the "**Sale Notice**"), in substantially the form attached hereto as **Exhibit "2"**, the Motion, the Stalking Horse APA, the proposed Sale Order, the Bidding Procedures, and a copy of the Bidding Procedures Order within three business days after the entry of Bidding Procedures Order, on (i) all parties that expressed interest in the possible purchase of any of the Purchased Assets; (ii) counsel for the United States Trustee; (iii) counsel for the Stalking Horse Bidder; (iv) all entities known by the Debtors to have filed a notice of appearance or a request for receipt of chapter 11 notices and pleadings filed in the Debtors' Chapter 11 cases as of the date hereof; (v) all federal, state and local regulatory and taxing authorities and recording offices which have a known interest in the relief requested in this Sale Motion; (vi) all parties (and their counsel, if known) which hold liens on or security interests in any of the Purchased Assets; (vii) the United States Attorney's Office for the Western District of Oklahoma; (viii) the Attorney General's Office for the State of Oklahoma; (ix) the United States Securities and Exchange Commission; (x) the Oklahoma Corporation Commission; (xi) all other parties on the Debtors' Master Service List; (xii) any entity known or reasonably believed to have asserted a security interest in or lien against any of the Purchased Assets; (xiii) the Internal Revenue Service; and (xiv) such other

entities as may be reasonably requested by the Stalking Horse Bidder (collectively, the “Notice Parties”). The Debtor requests authority to serve such documents on the Notice Parties via electronic mail. Such documents will also be made publicly available on the website maintained by the Debtor at: <http://www.eateriesinc.com>.

21. Under Bankruptcy Rule 2002(a) and (c), a debtor is required to notify its creditors of any proposed sale of its assets, including a disclosure of the time and place of an auction, the terms and conditions of the sale, and the deadline for filing any objections. The Debtor submits that the Sale Notice fully complies with Bankruptcy Rule 2002(c) and includes information in the Bidding Procedures necessary to enable interested parties to participate in the Auction.

22. The Debtor submits that the notice to be provided through the Sale Notice, the extensive post-petition marketing efforts of the Debtor, and the method of service proposed herein constitute good and adequate notice of the Bidding Procedures, the Auction and the subsequent proceedings related thereto. Therefore, the Debtor respectfully requests that this Court approve the foregoing notice procedures.

IV. THE AUCTION

23. The Stalking Horse Bidder’s offer to purchase the Purchased Assets set forth in the Stalking Horse APA is deemed to be a Qualified Bid. If the Debtor does not receive at least one Qualified Bid with respect to the Purchased Assets (other than the Stalking Horse Bid), an Auction **will not be** conducted and the Debtor will seek approval to sell the Purchased Assets to the Stalking Horse Bidder pursuant to the Stalking Horse APA. If at least one Qualified Bid in addition to the Stalking Horse Bidder’s Qualified Bid is received, the Debtor will conduct an Auction on **September 11, 2017 at 11:00 a.m.** (prevailing Central Time) at the offices of Crowe & Dunlevy, 324 North Robinson Avenue, Oklahoma City, OK 73102, or such other time or other place to be determined by the Debtor. After the Bid Deadline, but at least one business day prior

to the Auction, the Debtor shall provide each Qualified Bidder with a copy of all Qualified Bids.

24. The Auction procedures provide:
 - a. Only Qualified Bidders that have submitted Qualified Bids shall be entitled to make a bid at the Auction. The Stalking Horse Bidder is deemed to be a Qualified Bidder;
 - b. Each Qualified Bidder shall appear in person or have an authorized representative appear on the Qualified Bidder's behalf;
 - c. Each Qualified Bidder participating in the Auction will be required to confirm that it has not engaged in any collusion with respect to the bidding or the Sale;
 - d. The Debtor, in its business judgment, based in part, on the terms of the Qualified Bids received, the number of Qualified Bidders participating in the Auction, and such other information as may be relevant, will conduct the Auction in the manner that they determine will best promote the goals of the bidding process and will achieve the maximum value for the Purchased Assets;
 - e. At the Auction, Qualified Bidders will be permitted to increase their Qualified Bids (such increased Qualified Bid, a "Qualified Overbid"), provided that such Qualified Overbid shall exceed the next highest bid by at least \$25,000.00 in cash; provided, however the Stalking Horse Bidder need only need meet the last incremental bid;
 - f. Qualified Bidders may then submit successive bids in increments of at least \$25,000.00 higher in cash, *provided, however*, that the Debtor shall retain the right to modify, in its business judgment, the bid increment requirements at the Auction;
 - g. At the conclusion of the Auction or, if no other Qualified Bids are received by the Bid Deadline, then as soon as practicable after the Bid Deadline, the Debtor shall review each Qualified Bid on the basis of financial and contractual terms and the factors relevant to the bidding process, including those factors affecting the speed and certainty of consummating the Sale, and liabilities being assumed, and identify the highest, best and/or otherwise financially superior offer for the Purchased Assets (the "Winning Bid" and the entity submitting such Winning Bid, the "Winning Bidder"). There may be only one Winning Bid. The Debtor shall also name the entity presenting the next highest bid (the "Next Highest Bid") and the entity presenting same (the "Next Highest Bidder"). At the Sale Hearing (as defined below), the Debtor shall present the Winning Bid and Next Highest Bid to the Court for approval. The Debtor's presentation of the announced Winning Bid to the Court for

approval does not constitute the Debtor's acceptance of such Winning Bid. The Debtor shall have accepted a Winning Bid only when the Court has approved such bid;

- h. The Debtor may continue the Auction from time to time, adjourn the Auction at any time, and re-open the Auction at any time prior to the commencement of the Sale Hearing; and
- i. The Debtor reserves all rights to terminate the bidding process at any time if the Debtor determines, in its business judgment that the bidding process will not maximize the value of the Debtor's bankruptcy estate. In addition, the Debtor reserves all rights not to submit any bid that is not acceptable to the Debtor for approval to the Court. Without limiting the generality of the foregoing, the Debtor may reject at any time before entry of a Sale Approval Order approving a Qualified Bid any bid that, in the Debtor's discretion, is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code or the Bidding Procedures, or (iii) contrary to the best interests of the Debtor, their estate, and their creditors.

V. ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

25. Under the terms of the Stalking Horse APA, executory contracts and unexpired leases that are to be assumed and assigned by Stalking Horse Bidder as set forth on schedules to the Stalking Horse APA (the "Assumed Executory Contracts"). Further, the Stalking Horse Bidder may from time to time in its sole discretion add or remove any Assumed Executory Contract from the schedule of Assumed Executory Contracts. At the Sale Hearing, the Debtor shall seek to assume and assign to the Stalking Horse Bidder the Assumed Executory Contracts. Accordingly, as part of this Sale Motion, the Debtor seeks approval of procedures to determine cure amounts (the "Cure Costs"), if any, related to the Assumed Executory Contracts.

26. The Debtor will serve the *Notice Of Intent To Assume And Assign Executory Contracts And Unexpired Leases And Cure Amount Related To Such Assumption* (the "Cure Notice"), in substantially the form attached hereto as **Exhibit "3"**, upon each counterparty to the Assumed Executory Contracts no later than 14 days prior to the Sale Hearing via United States

Postal Service, first class delivery. If a Qualified Bidder other than the Stalking Horse Bidder is determined to be the Winning Bidder, then, within one day of such Qualified Bidder being determined the Winning Bidder, the Debtor shall file with the Court a list of the Assumed Executory Contracts and serve the Cure Notice upon each counterparty to an Assumed Executory Contract to the extent such party did not already receive the Cure Notice from the Debtor.

27. The Cure Notice will provide notice of the (i) intent to assume and to assign to Stalking Horse Bidder the Assumed Executory Contracts; (ii) the Cure Costs with respect to each Assumed Executory Contract; (iii) the procedures governing the filing and service of objections, if any, to the proposed Cure Costs (the “Cure Cost Objection”) and the provision of adequate assurance of future performance under any Assumed Executory Contract (the “Adequate Assurance Objection”), and (iv) the procedures governing resolution of disputes, if any, regarding Cure Costs (the “Cure Cost Procedures”).

28. If no Cure Costs Objection or Adequate Assurance Objection is timely filed by the contract counterparty, the Assumed Executory Contract shall be assumed by the Debtor and assigned to Stalking Horse Bidder (or the Winning Bidder) effective on the Closing Date. The Cure Costs set forth in the Cure Notice shall be controlling and the counterparty to such Assumed Executory Contract shall be forever barred from asserting any other claims arising under or with respect to such Assumed Executory Contract against the Debtor, the Stalking Horse Bidder (or the Winning Bidder, if different) or the property of either of them.

29. If a Cure Cost Objection is filed, the Debtor proposes that such objection must identify a specific default that must be cured and claim a specific monetary amount that differs from the amount in the Cure Notice. Any Cure Cost Objections or Adequate Assurance

Objections must be filed no later than the earlier of (i) 14 days from the date of service of the Cure Notice to the counterparty to an Assumed Executory Contract or (ii) 2 days prior to the Sale Hearing; provided, however, that if the Stalking Horse Bidder is not the Winning Bidder at the Auction, any contract counterparty may raise at the Sale Hearing an objection to the assumption and assignment of the Assumed Executory Contract solely with respect to the Winning Bidder's ability to provide adequate assurance of future performance under the Assumed Executory Contract.

30. If a Cure Costs Objection is timely filed, and such Cure Costs Objection cannot be resolved consensually prior to the Sale Hearing, the Debtor will reserve sufficient cash to satisfy the disputed portion of such Cure Costs pending resolution. If the parties are unable to resolve the disputed Cure Costs, the Debtor will request that the Court set a hearing to determine the correct Cure Cost.

31. The Winning Bidder shall be responsible for satisfying any requirements regarding adequate assurance of future performance that may be imposed under section 365(b) of the Bankruptcy Code in connection with the proposed assignment of any Assumed Executory Contract. The Debtor proposes that the Court make its determinations concerning adequate assurance of future performance at the Sale Hearing.

32. Except to the extent otherwise specifically provided in the Stalking Horse APA or the purchase agreement of any Winning Bidder, subject to the payment of any Cure Amounts, the Winning Bidder will not be subject to any liability to the assigned contract counterparty that accrued or arose before the Closing Date of the sale of the Purchased Assets and the Debtor shall be relieved of all liability accruing or arising thereafter pursuant to section 365(k) of the Bankruptcy Code.

BASIS FOR RELIEF REQUESTED AND APPLICABLE AUTHORITY

I. ENTRY INTO THE STALKING HORSE APA IS A PROPER EXERCISE OF THE DEBTOR’S BUSINESS JUDGMENT.

33. The Stalking Horse APA is, in the business judgment of the Debtor, an agreement that allows the Debtor to preserve, maintain, and improve the marketability of the Purchased Assets, while at the same time allowing the Debtor to seek higher and better bids.

34. 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). A sale of a debtor’s assets outside the ordinary course should be authorized pursuant to section 363 of the Bankruptcy Code if a sound business purpose exists for doing so. *See Institutional Creditors of Continental Air Lines vs. Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986) (applying reasonable business judgment standard to sale of assets under section 363(b) of the Bankruptcy Code); *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2nd Cir. 1983) (same); *In re Donohue*, 410 B.R. 311, 315 (Bankr. D. Kan. 2009) (requiring “sound business reason” for authorization of sale under section 363(b) of the Bankruptcy Code); *In re Buerge*, 479 B.R. 101, 106 (Bankr. D. Kan. 2012) (requiring “sound business reason”); *In re Med. Software Solutions*, 286 B.R. 431, 439-40 (Bankr. D. Utah 2002) (requiring “sound business reason”). In addition to a sound business purpose, courts require that there be adequate and reasonable notice of the sale and a fair and reasonable price and good faith negotiations with the Buyer. *See In re Abbotts Dairies*, 788 F.2d 143, 147 (3d Cir. 1986); *Buerge*, 479 B.R. at 106; *In re JL Bldg., LLC*, 452 B.R. 854, 859 (Bankr. D. Utah 2011); *Med. Software Solutions*, 286 B.R. at 439-40; *In re Tempo Tech Corp.*, 202 B.R. 363, 367 (D. Del. 1996).

35. Courts have made clear that a debtor’s business judgment is entitled to substantial deference with respect to the bid procedures to be used in selling assets of the estate. *See, e.g.*,

Official Committee of Subordinated Bondholders v. Integrated Resources, Inc. (In re Integrated Resources, Inc.), 147 B.R. 650, 656-57 (Bankr. S.D.N.Y. 1992) (noting that overbid procedures and break-up fee arrangements that have been negotiated by a debtor are to be reviewed according to the deferential “business judgment” standard, under which such procedures and arrangements are “presumptively valid”). Here, the proposed Bidding Procedures are reasonable, appropriate, and within Debtor’s sound business judgment because they will serve to maximize the value of the Debtor’s estates.

36. The paramount goal of any proposed sale of property of a debtor is to maximize the value received by the estate. *See, e.g., Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 107 F.3d 558, 564-65 (8th Cir. 1997) (with reference to bankruptcy sales, “a primary objective of the Code [is] to enhance the value of the estate at hand.”); *In re Buerge*, 479 B.R. at 106 (“The trustee’s duty is to maximize the value obtained from a sale.”); *In re C.W. Min. Co.*, 08-20105 JAB, 2010 WL 841395 (Bankr. D. Utah Mar. 2, 2010) (courts “must always scrutinize whether a trustee has fulfilled his duty to maximize the value obtained from a sale”); *In re Psychrometric Sys., Inc.*, 367 B.R. 670, 674 (Bankr. D. Colo. 2007); *Integrated Resources*, 147 BR. at 659 (“It is a well-established principle of bankruptcy law that the Debtor’s duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.”) (quoting *Cello Bag Co. v. Champion Int’l Corp. (In re Atlanta Packaging Prods., Inc.)*, 99 B.R. 124, 131 (Bankr. N.D. Ga. 1988)).

37. To that end, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and therefore are appropriate in the context of bankruptcy sales. *See, e.g., Integrated Resources*, 147 B.R. at 659 (such procedures “encourage bidding and maximize the value of the debtor’s

assets”); *In re Psychrometric Sys., Inc.*, 367 B.R. 670, 676 (Bankr. D. Colo. 2007) (recognizing the “strong policy favoring competitive bidding” for sales in bankruptcy proceedings).

38. Furthermore, Debtor’s payment of a Break-Up Fee as part of the Sale is a widely accepted practice in bankruptcy court sales. Termination fees should be allowed when the fee is necessary to preserve the value of the estate. *In re O’Brien Environmental Energy, Inc.*, 181 F.3d 527, 534 (3d Cir. 1999). Whether a fee is “necessary” is judged under the business judgment rule. *Id.*; *Cottle v. Storer Communications, Inc.*, 849 F.2d 570 (11th Cir. 1988); *In re Integrated Resources, Inc.*, 147 B.R. 650, 657 (S.D.N.Y. 1992), appeal dismissed by 3 F.3d 49 (2d Cir. 1993).

39. Under the business judgment rule, a debtor’s decision to enter into a termination fee is proper so long as the following conditions are satisfied: (a) the relationship of the parties who negotiated a breakup fee is not tainted by self-dealing or manipulation; (b) the termination fee does not hamper bidding; and (c) the amount of the termination fee is not unreasonable relative to the proposed purchase price. *Integrated Resources*, 147 B.R. at 657. To determine whether a termination fee encourages rather than hampers bidding, courts will look to see whether the fee: (i) attracts or retains a potentially successful bid; (ii) establishes a bid standard or minimum for other bidders to follow; or (iii) attracts additional bidders. *Id.* at 662.

40. A termination fee should constitute a fair and reasonable percentage of the proposed purchase price and should be reasonably related to the prospective purchaser’s risk, effort, and expenses. *Id.* at 662; *see also In re 995 Fifth Ave. Assoc., L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989).

41. Application of the business judgment test, as set forth above, illustrates that Debtor should be authorized to pay the Break-Up Fee in connection with the Sale of the

Purchased Assets. The Break-Up Fee results from extended good faith, arms-length negotiations between Debtor and Stalking Horse Bidder and is fair and reasonable in amount, particularly in view of Stalking Horse Bidder's agreement to serve as a "safety net" for the bidding process. The payment of the Break-Up Fee is critical to the continuing obligation of the Stalking Horse Bidder to purchase the Purchased Assets. Without provision for the Break-Up Fee, in the event a third party comes forward subsequent to the filing of the Sale Motion and offers more for the Purchased Assets, Stalking Horse Bidder would not have agreed to enter into the Sale Agreement and invest a substantial amount of time and money in evaluating the Purchased Assets. The proposed Break-Up Fee was in fact necessary to secure the firm agreement from Stalking Horse Bidder to purchase the Purchased Assets.

42. The Debtor believes that the Bidding Procedures proposed herein are intended to maximize the value received by the estate. The proposed procedures establish the parameters under which the value of the Purchased Assets may be tested at the Auction. Such procedures will increase the likelihood that the Debtor's estate will receive the greatest possible consideration for the Purchased Assets because they will ensure a competitive and fair bidding process. Additionally, such process will be conducted in good faith and at arm's length, be subject to proper notice, and will yield the highest and best offer for the Purchased Assets. Accordingly, the Debtor submits the sale of the Purchase Assets is an appropriate exercise of the Debtor's business judgment and, as such, requests this Court's approval of the form of Stalking Horse APA.

II. THE DEBTOR'S PROPOSED PROCEDURES TO DETERMINE CURE AMOUNTS RELATED TO THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES ARE PROPER.

43. A court should approve the assumption or rejection of an unexpired lease or

executory contract where a debtor's business judgment has been reasonably exercised. *See, e.g., In re J. H. Land & Cattle Co., Inc.*, 8 B.R. 237, 238 (Bankr. W.D. Okla. 1981) ("The test for court approval of a debtor's (trustee's) proposed rejection of an executory contract or lease under § 365 is one of 'business judgment'") (internal citation omitted); *In re III Enterprises, Inc. V*, 163 B.R. 453, 469 (Bankr. E.D. Pa. 1994) ("Generally, a court will give great deference to a debtor's decision to assume or reject an executory contract. A debtor need only show that its decision to assume or reject the contract is an exercise of sound business judgment—a standard which we have concluded many times is not difficult to meet."), *aff'd sub nom., Pueblo Chem., Inc. v. III Enters, Inc.*, 169 B.R. 551 (E.D. Pa. 1994); *In re W. Wood Products, Inc.*, 11-12-10057 JS, 2013 WL 1386285 (Bankr. D.N.M. Apr. 4, 2013) ("Generally, the Court should not interfere with the debtor in possession's exercise of business judgment to reject a lease or executory contract unless the decision is 'so manifestly unreasonable that it could not be based on sound business judgment[.]') (citation omitted).

44. Further, Section 365(b)(1) of the Bankruptcy Code authorizes the assumption and assignment of executory contracts if defaults under the executory contracts are cured and adequate assurance of future performance is given. *See In re Valley View Shopping Ctr., L.P.*, 260 B.R. 10, 24 (Bankr. D. Kan. 2001); *In re Health Science Prods., Inc.*, 191 B.R. 895, 909 (Bankr. N.D. Ala. 1995) (ability to make current payments on contract combined with projected future financial stability constituted "adequate assurance"); *In re Mako, Inc.*, 102 B.R. 818, 821 (Bankr. E.D. Okla. 1988) (willingness and ability to cure defaults and projected cash flows sufficient to meet obligations under the contract met the "adequate assurance" requirement).

45. The Debtor submits that assumption and assignment of the Assumed Executory Contracts is a sound exercise of the Debtor's business judgment. Assumption and assignment of

the Assumed Executory Contracts is necessary for consummation of the Sale and the Debtor will no longer have use for the Assumed Executory Contracts following the closing of the sale. Accordingly, assumption and assignment is appropriate and in the best interest of the estate.

46. The assumption procedure outlined herein provides for proper notice to those parties subject to Assumed Executory Contracts and provides the cure of any default under the Assumed Executory Contracts and for the provision of adequate assurance of future performance. Therefore, the Debtor requests that the Court approve of the cure procedures set forth herein.

NOTICE PROCEDURES

47. Within three (3) business days upon entry of the Bidding Procedures Order, the Debtor or its authorized representative shall serve a copy of the Motion, the Stalking Horse APA, the proposed Sale Order, the Bidding Procedures, and a copy of the Bidding Procedures Order on the Notice Parties.

48. The Debtor submits that under the circumstances no further notice is necessary and that such notice both satisfies the requirements of Rule 2002 and is adequate and reasonable notice of the Sale.

CONCLUSION

WHEREFORE, Debtor prays that this Court:

- A. Enter an order approving the Bid Procedures and Cure Procedures and authorizing Debtor to enter into the Asset Purchase Agreement;
- B. Find that notice of this Bid Procedures Motion is adequate under the circumstances and that any further notice of this Bid Procedures Motion is excused for good cause shown;
- C. Schedule a hearing as soon as possible, to consider the Bid Procedures set forth in this Bid Procedures Motion;
- D. Provided that the Court approves this Bid Procedures Motion, schedule the Auction and Sale Hearing no more than 30 days after entry of the Procedures Order;
- E. Authorize Debtor to give notice of the Sale Motion and Procedures Order in accordance with this Bid Procedures Motion;
- F. Require that all objections to the Sale Motion, if any, be filed and served via email (in addition to regular mail) upon Debtor, counsel for Plaintiff, and counsel for Stalking Horse Bidder on or before five (5) business days before the Sale Hearing; and
- G. Grant Debtor such additional relief as this Court deems equitable and just.

Respectfully submitted this 13th day of July, 2017.

Respectfully submitted,

CROWE & DUNLEVY

/s/ Mark A. Craige

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Counsel for Debtor

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA**

)	
In re:	)	Chapter 11
EATERIES, INC., <i>et al.</i> ¹	)	Case No. 17-11444-SAH
Debtors.	)	Jointly Administered
)	

BIDDING PROCEDURES

By motion dated July 14, 2017, (the “Motion”)², Eateries, Inc. and GRP of Zanesville, LLC, debtors and debtors-in-possession in the above-captioned case (the “Debtor”) sought approval of, among other things, the procedures through which they will determine the highest or otherwise best price for the sale (the “Sale”) of substantially all of their assets outside the ordinary course of business and the assumption and assignment of certain executory contracts and unexpired leases (collectively, the “Purchased Assets”) as described in the Asset Purchase Agreement, dated as of July 7, 2017, (the “Stalking Horse APA,” a copy of which is attached to the Motion as Exhibit “A”) to the Purchaser (the “Stalking Horse Bidder,” which shall be deemed a Qualifying Bidder for all purposes).

On July _____, 2017, the United States Bankruptcy Court for the Western District of Oklahoma (the “Court”) entered an order (the “Bidding Procedures Order”), which, among other things, authorized the Debtor to determine the highest or otherwise best bid for the Purchased Assets through the process and procedures set forth below (the “Bidding Procedures”).

The sale will be subject to competitive bidding as set forth herein and approval of the Court pursuant to sections 105, 363, and 365 of chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).

A. Participation Requirements

Subject to the restrictions specified herein, entities qualifying as “Qualified Bidders,” in the determination of the Debtor and its advisors, be permitted to submit competing offers or bids for the Purchased Assets or certain groups of the Purchased Assets as specified below. If one or more Qualified Bidders submits a bid for the Purchased Assets, the following rules (the “Overbid Procedures”) shall apply:

¹ The affiliated Debtors are Eateries, Inc. and GRP of Zanesville, LLC, Case No. 17-11445-SAH. Although there are multiple Debtors in this case, for ease of reference the term “Debtor” used in this pleading shall refer to all of the affiliated Debtor entities.

² Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to them in the Stalking Horse APA or the Motion, as applicable.

1. any competing bid shall:
 - a. be comprised of the purchase price in the initial minimum amount equal to no less than the sum of \$1,100,00.00 in cash, which is the Purchase Price set forth in the Stalking Horse APA, *plus* \$60,000.00, in cash (the “Initial Competing Bid Amount”) acceptable to the Debtor; and
 - b. not be conditioned on obtaining financing or on the outcome of unperformed due diligence by the Potential Bidder with respect to the assets that the bidder is seeking to Purchase, or have other material conditions or contingencies to closing, unless otherwise consented to by the Debtor.
2. each subsequent bid for the Purchased Assets shall be in increments of at least \$25,000.00, in cash; provided, however the Stalking Horse Bidder need only need meet the last incremental bid to become the Successful Bidder .

For purposes of considering competing offers or bids, the highest and best Qualified Bid (as defined below) shall be considered the opening bid at the Auction.

B. Bid Requirements

The Debtor shall determine whether a bid qualifies as a “Qualified Bid.”

Any entity wishing to participate in the bidding process (each a “Potential Bidder”) must submit a bid for the Purchased Assets. To be a Qualified Bid, a bid for the Purchased Assets must, among other things, be for an amount equal to at least the Initial Competing Bid Amount.

A Potential Bidder that becomes a Qualified Bidder shall be permitted to participate in the Auction and to bid for the Purchased Assets upon substantially the same terms and conditions (other than the Purchase Price and as otherwise noted in these Bidding Procedures) as those set forth in the Stalking Horse APA. To participate in the process detailed by these Bidding Procedures and to otherwise be considered for any purpose hereunder, a Qualified Bidder is a person who before the Bid Deadline (as described below), among other things:

1. Does not condition its bid on obtaining financing or on the outcome of unperformed due diligence, unless otherwise consented to by the S;
2. Submits to the Seller an executed confidentiality agreement in form and substance acceptable to the Seller;
3. Fully discloses the identity of each entity, including all persons owning directly or indirectly 20% or more of such entity, that will be bidding for the assets or otherwise participating in connection with such bid and the complete terms of any such participation;
4. Submits a bid in the form of cash denominated in United States Dollars (a “Cash Bid”);

5. Submits to the Seller an irrevocable offer in the form of an executed asset purchase agreement (the “Modified Agreement”) (A) without financing, regulatory or due diligence contingencies, unless otherwise consented to by the Seller, and without board (or comparable) approval or other contingencies, (B) containing a satisfactory Cash Bid, and (C) on the same terms as those contained in the Stalking Horse APA, subject to certain necessary revisions to reflect the correct purchase price and buyer;
6. Makes a cash deposit in the form of a cashier’s check or wire transfer into an interest-bearing escrow account (the “Escrow Account”) in an amount not less than 10% of the competing bid amount, which deposit shall immediately become non-refundable and credited toward the purchase price if and when the Qualified Bidder making such deposit is declared to be the winning bidder (the “Winning Bid” and “Winning Bidder”) at the Sale Hearing. In the event a Qualified Bidder is not the Winning Bidder, such Qualified Bidder’s deposit shall be refunded as set forth in the Bidding Procedures Order;
7. Provides reasonably satisfactory written evidence, in the discretion of the Seller and its advisors, of its financial ability to (a) fully and timely perform and close the Sale pursuant to the Modified Agreement if it is declared to be the Winning Bidder, (b) repay the DIP Obligations in full upon the closing of the Sale, and (c) provide adequate assurance of future performance of all executory contracts and unexpired leases to be assigned to it; and
8. Is not entitled to any overbid fee, break-up fee, expense reimbursement, termination fee or similar type of payment or bid protection.

A “Qualified Bid” is a bid submitted by a Potential Bidder that satisfies the requirements of a competing bid in Section A.1 above and the requirements of this Section B, as determined by the Debtor. The Stalking Horse shall be deemed to have satisfied the requirements of Section A.1 above and the requirements of this Section B. For the avoidance of doubt, no waiver of any Bid Requirements shall be permitted without the Seller and the Stalking Horse.

The Debtor will promptly advise each Potential Bidder in writing whether or not the Potential Bidder is a Qualified Bidder. If a bid submitted on or prior to the Bid Deadline fails to meet all the requirements of a Qualified Bid, the Debtor is entitled to work with the Potential Bidder in an effort to cure any defects in the bid and to cause such bid to become a Qualified Bid prior to the commencement of the Auction. For purposes of these Bidding Procedures, the Stalking Horse Bidder is deemed to be a Qualified Bidder.

C. Bid Deadline

The Bid Deadline for submitting bids on the Purchased Assets by a Potential Bidder shall be _____, 2017 at __.m. (Prevailing Central Time).

A Potential Bidder that desires to make a bid must deliver written copies of its bid, by mail, facsimile, or email, so as to be received prior to the Bid Deadline, to (i) counsel for the Debtor, Crowe & Dunlevy, 500 Kennedy Building, 321 South Boston Avenue, Tulsa, Oklahoma 74103, Attn: Mark A. Craige and Lysbeth L. George; and (ii) the United States Trustee, 215 Dean A. McGee Ave. 4th Fl., Oklahoma City, Oklahoma 73102, Attn: M.J. Creasy.

After the Bid Deadline, but at least one business day prior to the Auction, the Debtor shall provide each Qualified Bidder that submits a Qualified Bid with a copy of all Qualified Bids.

D. Obtaining Due Diligence Access and Due Diligence Requests from Potential Bidders

Upon execution of a confidentiality agreement in a form acceptable to the Debtor, any Potential Bidder that wishes to conduct due diligence on the Debtor or their assets may be granted access to all material information that has been or will be provided to the Stalking Horse Bidder and other bidders. The due diligence period for Potential Bidders will end one business day prior to the Bid Deadline.

The Debtor shall coordinate all reasonable requests for additional information and due diligence access from Potential Bidders. No conditions relating to the completion of due diligence shall be permitted to exist after the Bid Deadline.

Each Potential Bidder shall comply with all reasonable requests for additional information by the Debtor or their advisors regarding such Potential Bidder's financial wherewithal to consummate and perform obligations in connection with the Sale. Failure by the Potential Bidder to comply with requests for additional information may be a basis for a determination that a bid made by the Potential Bidder is not a Qualified Bid.

E. "As Is, Where Is"

The Sale of the Purchased Assets shall be on an "as is, where is" basis and without representations or warranties of any kind, nature or description by the Debtor, its agents or estate, except to the extent set forth in the purchase agreement between the Debtor and a Winning Bidder or the assignment and bill of sale delivered pursuant to the purchase agreement. Except as otherwise provided in the Stalking Horse APA, all of the Debtor's rights, title and interest in and to the Purchased Assets shall be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options and interests thereon (collectively, the "Interests"), such Interests to attach to the net proceeds (if any) of the Sale of the Purchased Assets, with the same validity and priority as existed immediately prior to such Sale.

Each bidder, other than the Stalking Horse Bidder (whose acknowledgements and representations are contained in the Stalking Horse APA), shall be deemed to acknowledge and represent that it has had an opportunity to inspect and examine the Purchased Assets prior to making its offer, that it has relied solely upon its independent review, investigation and/or inspection of any documents in making its bid, and that it did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express, implied, by operation of law or otherwise, regarding the Purchased Assets or the completeness of

any information provided in connection with the bidding process, in each case except as expressly stated in the Stalking Horse APA.

F. The Auction

If a Qualified Bid(s) (other than the Stalking Horse APA) by a Qualified Bidder is received by the Bid Deadline, an auction (the "Auction") with respect to the sale of the Purchased Assets covered by such Qualified Bid(s) shall take place on _____, 2017 at _____. **Prevaling Central Time** (the "Auction Date") at the offices of Crowe & Dunlevy, 324 North Robinson Avenue, Oklahoma City, OK 73102, or such other place and time as the Debtor shall notify all Qualified Bidders and other invitees. If, however, no such Qualified Bid is received by the Bid Deadline, then the Auction will not be held and the Debtor may proceed to sell the assets pursuant to the Stalking Horse APA. The following rules shall apply at the Auction:

1. Only Qualified Bidders that have submitted Qualified Bids shall be entitled to make a bid at the Auction. The Stalking Horse Bidder is deemed to be a Qualified Bidder;
2. Each Qualified Bidder shall appear in person or have an authorized representative appear on the Qualified Bidder's or Preferential Purchase Right Holder's behalf;
3. Each Qualified Bidder participating in the Auction will be required to confirm that it has not engaged in any collusion with respect to the bidding or the Sale.
4. The Debtor, in its business judgment based in part, on the terms of the Qualified Bids received, the number of Qualified Bidders participating in the Auction and such other information as may be relevant, will conduct the Auction in the manner that they determine will best promote the goals of the bidding process and will achieve the maximum value for its assets;
5. At the Auction, Qualified Bidders will be permitted to increase their Qualified Bids (such increased Qualified Bid, a "Qualified Overbid"), provided that such Qualified Overbid for the Purchased Assets shall exceed the next highest bid by at least \$25,000.00 in cash. The Stalking Horse Bidder may match any Qualified Overbid and thereby become the high bidder.
6. Qualifying Bidders may then submit successive bids in the same increments as described in section F.5 above in cash, above the preceding Qualified Bid or Qualified Overbid, *provided, however*, that the Debtor shall retain the right to modify, in its business judgment, the bid increment requirements at the Auction.
7. At the conclusion of the Auction or, if no other Qualified Bids are received by the Bid Deadline, then as soon as practicable after the Bid

Deadline, the Debtor shall review each Qualified Bid on the basis of financial and contractual terms and the factors relevant to the bidding process, including those factors affecting the speed and certainty of consummating the Sale, and liabilities being assumed, and identify the highest, best and/or otherwise financially superior offer for the Purchased Assets (the "Winning Bid" and the entity submitting such Winning Bid, the "Winning Bidder"). There may be only one Winning Bid.

8. The Debtor shall also name the entity presenting the next highest bid for the Purchased Assets (the "Next Highest Bid" and the entity presenting same (the "Next Highest Bidder"), which may be the Stalking Horse Bid.
9. At the Sale Hearing (as defined below), the Debtor shall present the Winning Bid and Next Highest Bid to the Court for approval. The Debtor's presentation of the announced Winning Bid to the Court for approval does not constitute the Debtor's acceptance of such Winning Bid. The Debtor shall have accepted a Winning Bid only when the Court has approved such bid.
10. The Debtor may continue the Auction from time to time, adjourn the Auction at any time, and re-open the Auction at any time prior to the commencement of the Sale Hearing.
11. The Debtor reserves all rights to terminate the bidding process at any time if the Debtor determines, in its business judgment, that the bidding process will not maximize the value of the Debtor's bankruptcy estates. In addition, the Debtor reserves all rights not to submit any bid that is not acceptable to the Debtor for approval to the Court. Without limiting the generality of the foregoing, the Debtor may reject at any time before entry of a Sale Approval Order approving a Qualified Bid any bid that, in the Debtor's discretion, is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code or the Bidding Procedures, or (iii) contrary to the best interests of the Debtor, their estates, and their creditors.

G. Other Terms

If a Qualified Bidder submits the high bid and the Stalking Horse Bidder is not the successful bidder for the Purchased Assets, the Debtor, on the fifth (5th) business day following the closing of the sale of the Purchased Assets to the prevailing Qualified Bidder and receipt of invoices reflecting the reasonable and actual fees and expenses of the Stalking Horse Bidder, shall pay to Stalking Horse Bidder a break-up fee in the amount of a sum equal to 3% of the winning bid, plus reimburse the Stalking Horse Bidder for all reasonable and actual out-of-pocket fees and expenses (the "Fee and Expense Reimbursement") incurred by the Stalking Horse Bidder in connection with the negotiation and execution of the Stalking Horse APA and the transactions contemplated thereunder, not to exceed \$25,000.00.

At the conclusion of the Auction, the Winning Bid shall be the bid made pursuant to the Bidding Procedures Order that represents the highest or otherwise best offer as determined by the Debtor. If an Auction is held, the Debtor shall be deemed to have accepted a Qualified Bid only when (i) such bid is declared the Winning Bid at the Auction, (ii) the Winning Bidder shall have paid any additional deposit required to cause the total deposit to be 10% of the Winning Bid (the “Additional Deposit”); and (iii) definitive documentation has been executed in respect thereof. The Winning Bidder shall make the Additional Deposit into the Escrow Account within one (1) business day after the conclusion of the Auction. Such acceptance by the Debtor of the Winning Bid is conditioned upon approval by the Court of the Winning Bid and the entry of an Order approving such Winning Bid. In the event that the Debtor is unable to close the transaction with the Winning Bidder then, at the option of the Debtor, the Debtor may elect to close the transaction with the Next Highest Bidder as contemplated by J.2 below in which case such Next Highest Bidder will be deemed the Winning Bidder for purposes of these Bidding Procedures.

For the avoidance of doubt, and notwithstanding anything herein that may arguably be construed to the contrary, any and all cash, cash equivalents, and other forms of consideration paid by the Winning Bidder to the Debtor upon the closing of the Sale must be used by the Debtor to (i) first repay the DIP Obligations in full, and (ii) second, held by the Debtor to be distributed in accordance with the separate order(s) of the Court consistent with the provisions of the Bankruptcy Code.

H. Sale Hearing

On **September 13, 2017 at 9:30 a.m. Prevailing Central Time**, the Court will hold a hearing (the “Sale Hearing”) to consider approval of the Sale of the Purchased Assets to the Winning Bidder (or to approve the Stalking Horse APA if no Auction is held), including (a) the sale and transfer of substantially all of the Debtor’s assets and (b) the assumption and assignment of certain executory contracts and unexpired leases.

I. Return of Deposit

Upon approval of the Sale by the Court, the Winning Bidder’s deposit shall become non-refundable. Within five (5) Business Days after the closing of the Sale to the Winning Bidder, the refundable deposits of all unsuccessful bidders shall be refunded. In the event a dispute arises about whether a deposit is refundable or non-refundable, the deposit shall remain in the Escrow Account pending a determination of the dispute by the Court.

J. Failure to Close

The transaction evidenced by the Winning Bid shall close not later than fifteen (15) days after entry of the Sale Order (the “Closing Date”) at which time the Winning Bidder shall pay the balance of the Winning Bid (the Winning Bid amount less the deposit) into the Escrow Account.

In the event a declared Winning Bidder fails to timely perform any of its obligations as set forth above or pursuant to the definitive agreements:

1. The declared Winning Bidder shall forfeit all deposits made without regard to the Debtor’s ultimate damages occasioned by such failure; such

deposits shall be applied to the Debtor's damages, if any, and shall not constitute liquidated damages; and, notwithstanding the foregoing, the Debtor and the bankruptcy estate shall retain all other rights, remedies, claims, counterclaims, and defenses, including the right to seek equitable or injunctive relief;

2. In the event there are two or more Qualified Bidders who submit bids, the Next Highest Bidder shall keep its final and highest bid open for a period of sixty days pending a closing of a transaction with the Winning Bidder. In the event that a transaction represented by any higher or better bid is not consummated by the Closing Date (unless the Closing Date is extended as set forth herein), the Next Highest Bidder shall be deemed the Winning Bidder without further order of the Court, and such bidder shall be required to consummate the transaction contemplated in its bid within ten (10) days of being deemed the Winning Bidder. Any deemed Winning Bidder who fails to timely perform shall forfeit all deposits made without regard to the Debtor's ultimate damages occasioned by such failure; such deposits shall be applied to the Debtor's damages, if any, and shall not constitute liquidated damages; and, notwithstanding the foregoing, the Debtor and the bankruptcy estates shall retain all other rights, remedies, claims, counterclaims, and defenses, including the right to seek equitable or injunctive relief. The Stalking Horse Bidder shall keep its bid open pending the closing of a transaction(s) with a Winning Bidder that is not the Stalking Horse Bidder; and
3. The Debtor may grant any declared Winning Bidder additional time to perform, and, to the extent necessary, extend the Closing Date.

K. Fees and Expenses

Any bidders presenting bids, except the Stalking Horse Bidder, shall bear their own fees and expenses in connection with the proposed sale, whether or not such sale is ultimately approved, in accordance with the terms of the purchase agreement. Further, by submitting a bid, a Potential Bidder shall be deemed to waive its right to pursue a substantial contribution claim under section 503 of the Bankruptcy Code or in any way related to the submission of its bid or the Bidding Procedures. Notwithstanding the foregoing, the Stalking Horse Bidder may recover fees and expenses in accordance with the provisions hereof and the Stalking Horse APA.

L. Reservations of Rights.

The Bidding Procedures may be modified by the Debtor at any time prior to or during the Auction if the Debtor determines that such modifications will better promote the goals of the Auction process and the maximization of value to the bankruptcy estates. The maximum of \$30,000.00 in aggregate in cure costs to be paid by the Debtor shall not be deducted from the Purchase Price to determine the net cash to the Debtor.

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA**

_____)	
	)	Chapter 11
In re:)	
	)	Case No. 17-11444-SAH
EATERIES, INC., <i>et al.</i> ¹)	
	)	Jointly Administered
Debtors.)	
_____)	

NOTICE OF AUCTION AND SALE HEARING

PLEASE TAKE NOTICE OF THE FOLLOWING:

1. On April 18, 2017 (the “Petition Date”), Eateries, Inc. (“Eateries”) and GRP of Zanesville, LLC (“Zanesville”), debtors and debtors-in-possession in the above-captioned case (the “Debtor”) filed voluntary petitions for relief pursuant to Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Western District of Oklahoma (the “Court”). In connection therewith, the Debtor filed a Motion for (i) entry of a bidding procedures order (the “Bidding Procedures Order”) (a) establishing bidding procedures (the “Bidding Procedures”) in connection with the sale (the “Sale”) of substantially all of the Debtor’s assets (the “Purchased Assets”), (b) approving the form and manner of notices of the Sale, (c) scheduling dates for an auction (“Auction”) and hearing to approve the Sale (the “Sale Hearing”), (d) authorizing and approving the form of a Stalking Horse Asset Purchase Agreement (the “Stalking Horse APA”), and (e) approving the procedures to determine cure amounts related to the assumption and assignment of certain executory contracts and unexpired leases [Dkt # ____] and a Motion for entry of an order (the “Sale Order”) (a) approving the Sale

¹ The affiliated Debtors are Eateries, Inc. and GRP of Zanesville, LLC, Case No. 17-11445-SAH. Although there are multiple Debtors in this case, for ease of reference the term “Debtor” used in this pleading shall refer to all of the affiliated Debtor entities.

of the Purchased Assets free and clear of all liens, claims, encumbrances and interests of any kind to the Winning Bidder² and (b) authorizing the assumption and assignment of certain executory contracts and unexpired leases of the Debtor that are to be assumed and assigned to the Winning Bidder in connection with the Sale (the “Sale Motion”) [Dkt # ____].

2. On July ____, 2017, the Bankruptcy Court entered an order approving the Bidding Procedures (the “Bidding Procedures Order”) [Dkt # ____]. Pursuant to the Bidding Procedures Order, an auction (the “Auction”) for the Acquired Assets shall take place on _____, 2017 at _: _ a.m (Prevailing Central Time). Such auction will be conducted by the Debtor at the offices of Crowe & Dunlevy, 324 North Robinson Avenue, Suite 100, Oklahoma City, OK 73102. Such auction will be conducted pursuant to the Bidding Procedures approved by the Bidding Procedures Order.

3. The hearing to consider approval of the Sale of the Acquired Assets (the “Sale Hearing”) to the Winning Bidder, free and clear of all liens, claims, and encumbrances, will be held before the Bankruptcy Court, Ninth Floor Courtroom, Old Post Office Building, 215 Dean A. McGee Avenue, Oklahoma City, Oklahoma at **9:30 a.m. (Prevailing Central Time) on September 13, 2017**, or at such other time thereafter as counsel may be heard. The Sale Hearing may be adjourned from time to time without further notice to creditors or parties in interest other than by announcement of the adjournment in open court on the date scheduled for the Sale Hearing.

4. **Objections**, if any, to the Sale or the relief requested in the Motion must (1) be in writing; (2) comply with the Bankruptcy Rules and the Local Rules of the Bankruptcy Court for the Western District of Oklahoma; (3) be filed with the clerk of the Bankruptcy Court for the

² Capitalized terms used herein and not otherwise defined have the meaning set forth in the Stalking Horse APA or the Bidding Procedures, as applicable.

Western District of Oklahoma on _____, 2017; and (4) be served upon (a) Counsel for the Debtor, Crowe & Dunlevy, 324 N. Robinson Avenue, Suite 100, Oklahoma City, Oklahoma, 73102, Attn: Mark A. Craige and Lysbeth L. George; and (b) the United States Trustee, 215 Dean A. McGee Avenue, 4th Floor, Oklahoma City, Oklahoma 73102, Attn: M.J. Creasey. UNLESS AN OBJECTION IS TIMELY SERVED AND FILED IN ACCORDANCE WITH THIS NOTICE, IT MAY NOT BE CONSIDERED BY THE BANKRUPTCY COURT AND THE BANKRUPTCY COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT CONSIDERATION OF SUCH OBJECTION.

5. This Notice and the Sale Hearing is subject to the fuller terms and conditions of the Motion and the Bidding Procedures Order, which shall control in the event of any conflict and the Debtor encourages parties-in-interest to review such documents in their entirety.

6. Parties interested in receiving more information regarding the sale of the Acquired Assets and/or copies of any related document, including the Stalking Horse APA, may make a written request to Counsel for the Debtor, Crowe & Dunlevy, 324 N. Robinson Avenue, Suite 100, Oklahoma City, Oklahoma, 73102, Attn: Mark A. Craige and Lysbeth L. George.

7. In addition, copies of the Motion, the Stalking Horse APA, the Bidding Procedures, the Bidding Procedures Order and this Notice can be found by visiting <http://www.eateriesinc.com> or www.pacer.gov.

Dated this ____th day of July, 2017.

Respectfully submitted,

CROWE & DUNLEVY

/s/ Mark A. Craige

Mark A. Craige, OBA No. 1992
500 Kennedy Building
321 South Boston Avenue

Tulsa, Oklahoma 74103
918.592.9800 Telephone Number
918.592.9801 Facsimile Number
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-and-

Lysbeth L. George, OBA No. 30562
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324 N. Robinson, Ste. 100
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lysbeth.george@crowedunlevy.com

Counsel for Debtor

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

_____)	
	)	Chapter 11
In re:)	
	)	Case No. 17-11444-SAH
EATERIES, INC., et al. ¹)	
	)	Jointly Administered
Debtors.)	
_____)	

NOTICE OF INTENT TO ASSUME AND ASSIGN EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND CURE AMOUNT RELATED TO SUCH ASSUMPTION

PLEASE TAKE NOTICE THAT:

1. Pursuant to the Order under 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 2002 and 9014 Approving (i) Bidding Procedures, (ii) Form And Manner Of Sale Notices, and (iii) Setting a Sale Hearing and Related Deadlines (the “Bidding Procedures Order”) entered by the United States Bankruptcy Court for the Western District of Oklahoma (the “Bankruptcy Court”) on _____, 2017, Eateries, Inc. (“Eateries”) and GRP of Zanesville, LLC (“Zanesville”), debtor and debtor-in-possession in the above-captioned case (the “Debtor”) hereby provides notice of its intent to assume and assign the executory contracts or unexpired leases (the “Assumed Contracts”) listed in column 1 of **Exhibit “A”** hereto to the Winning Bidder. Capitalized terms used but not otherwise defined in this notice shall have the meanings ascribed to them in the Bidding Procedures Order and Bidding Procedures.

2. On the Closing Date, or as soon thereafter as reasonably practicable, the Winning Bidder will pay the amounts that Debtor’s records reflect are owing for prepetition arrearages as set forth on column 3 of Exhibit A (the “Cure Amount”) for each corresponding Assumed

¹ The affiliated Debtors are Eateries, Inc. and GRP of Zanesville, LLC, Case No. 17-11445-SAH. Although there are multiple Debtors in this case, for ease of reference the term “Debtor” used in this pleading shall refer to all of the affiliated Debtor entities.

Contract. The Debtor's records reflect that all post-petition amounts owing under the Assumed Contracts have been paid and will continue to be paid until the assumption and assignment of the Assumed Contracts and that, other than the Cure Amount, there are no other defaults under the Assumed Contract.

3. Objections, if any, to the Cure Amount must (1) be in writing; (2) state with specificity the cure asserted to be required; (3) include appropriate documentation supporting the asserted Cure Amount; (4) conform to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Western District of Oklahoma; (5) be filed with the Bankruptcy Court; and (6) be served upon: (a) Counsel for the Debtor, Crowe & Dunlevy, 500 Kennedy Building, 321 South Boston Avenue, Tulsa, Oklahoma 74103, Attn: Mark A. Craige and Lysbeth L. George; and (b) the United States Trustee, 215 Dean A. McGee Avenue, 9th Floor, Oklahoma City, Oklahoma 73102, Attn: M.J. Creasey, on or before fourteen (14) days before the Sale Hearing, which is set for September 13, 2017 at 9:30 a.m.

4. If an objection to the Cure Amount or to the assumption of the Assumed Contract is timely filed, a hearing with respect to the objection will be held before the Honorable Judge Sarah Hall, United States Bankruptcy Judge, United States Bankruptcy Court for the Western District of Oklahoma, Ninth Floor Courtroom, Old Post Office Building, 215 Dean A. McGee Avenue, Oklahoma City, Oklahoma at the Sale Hearing or such date and time as the Court may schedule. A hearing regarding the Cure Amount, if any, may be continued at the sole discretion of the Debtor until after the Closing Date. Any counterparty may raise at the Sale Hearing an objection to the assumption and assignment of the Assumed Executory Contract solely with respect to the Winning Bidder's ability to provide adequate assurance of future performance under the Assumed Executory Contract.

5. The failure of any objecting person or entity to timely file its objection shall be a bar to the assertion, at the Sale Hearing or thereafter, of any objection to the Sale Motion, the Sale, or the Debtor's consummation and performance of the Agreement (including the transfer of the Assets and the Assumed Contracts free and clear of all Interests), if authorized by the Court.

6. Prior to the Closing Date, the Debtor may amend its decision with respect to the assumption and assignment of the Assumed Contract and provide a new notice amending the information provided in this Notice.

Dated this ___th day of July, 2017.

Respectfully submitted,

CROWE & DUNLEVY

/s/ Mark A. Craige

Mark A. Craige, OBA No. 1992
500 Kennedy Building
321 South Boston Avenue
Tulsa, Oklahoma 74103
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Counsel for Debtor