

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

In re:)	
EATERIES, INC., et al. ¹)	BK-17-11444-SAH
)	Chapter 11
)	Jointly Administered
Debtor.)	

RESPONSE OF THE UNITED STATES TRUSTEE TO THE DEBTOR’S MOTION FOR 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

[Docket #142]

The United States Trustee (“UST”) offers the following response relating to the debtor’s motion to establish bidding procedures (“Bidding Procedures Motion”):

1. The UST has no objection to the general concept of the sale of the debtor’s assets².
2. As part of the sale motion, the debtor has proposed the approval of a Stalking Horse Asset Purchase Agreement (“Stalking Horse APA”) with Fresh Capital LLC, Fiesta Holdings, Inc., and Practical Investors LLC (“Insider Purchasers” or “Stalking Horse Bidder”). Docket #141-1.
3. The three parties that make up the Stalking Horse Bidder are insiders of this debtor (Para 14 of Debtor’s Motion for order approving the sale of assets - Docket #141). In fact, the principals of said insider entities have been familiar with the operations of debtor for years by virtue of their equity membership of debtor, either directly or indirectly, and their management of debtor.

¹ The debtors in these chapter 11 cases include: Eateries, Inc. (above styled) and GRP of Zanesville, LLC;17-11445 SAH.

Break-Up Fee:

4. The UST contends this Court should review and approve the proposed “break-up fee” contained in the Stalking Horse APA only if the Court finds the fee will not chill the bidding procedure, and is an “actually necessary” expense under 11 U.S.C. § 503(b) to preserve value for this estate. *In re Reliant Energy Channelview LP*, 594 F.3d 200, 205-09 (3d Cir. 2010) (citing and readopting the analysis in the decision of *Calpine Corp. v. O’Brien Env’tl. Energy, Inc. (In re O’Brien Env’tl. Energy, Inc.)*, 181 F.3d 527, 534-35 (3d Cir. 1999)); *In re Tama Beef Packing, Inc.*, 290 B.R. 90, 96-98 (B.A.P. 8th Cir. 2003) (allowing administrative expense but noting that administrative expenses diminish the recovery to creditors and other claimants); *In re Twenver, Inc.*, 149 B.R. 954, 956-57 (Bankr. Colo. 1992) (denying 10% “topping fee,” when 1% to 2% is reasonable, as not in the best interests of the estate). Docket #99 at p. 4, ¶ 11.
5. The *Reliant Energy Channelview* and *O’Brien Environmental Energy* decisions both reviewed the claim of a bidder who entered into an asset purchase agreement with the debtor but who was not the successful purchaser of the debtor’s assets. In each case, the unsuccessful bidder sought an administrative claim in the form of a break-up fee.
6. The Bidding Procedures Motion states: “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.” Docket #144 at p. 6. However, there is no statement that without the proposed break-up fee the Stalking Horse Bidder would not agree to the Stalking Horse APA. *Reliant Energy Channelview LP*, 594 F.3d at 206.
7. The *Reliant Energy Channelview* and *O’Brien Environmental Energy* decisions hold that an administrative claim may be appropriate only if the unsuccessful stalking horse bidder can demonstrate to the Court that the “assurance of a break-up fee promoted more competitive bidding, such as inducing a bid that otherwise would not have been made and without which bidding would have been limited.” *Calpine Corp. v. O’Brien Env’tl.*

² It is curious as to why the debtor seeks to sell all its assets via a §363 sale rather than through a plan when a plan could provide additional remedies, including the injunctive relief the debtor is seeking in its sale motion (Docket #141).

Energy, Inc. (In re O'Brien Envtl. Energy, Inc.), 181 F.3d 527, 537 (3d Cir. 1999).

8. There is no mention in the debtor's motion of what, if any, steps were taken to market the debtor's assets to other parties. In fact, upon the filing of this case it was represented to the UST that a plan was already in place for the three insider entities to purchase the assets of debtor. Given the Insider Purchasers familiarity with this debtor's history and inner workings it seems duplicitous that the Insider Purchasers would also need a break-up fee for their due diligence. In short, there appears to be an appearance of self-dealing.
9. The UST contends the Court should not "pre-approve" the proposed break-up fee but simply allow the request for an administrative claim if and when appropriate.
10. Moreover, there is an issue with respect to the calculation of the break-up fee. The Stalking Horse APA provides that the purchase price will be payable as follows:
 - a. Payment in cash as the First Closing in an amount sufficient to pay off all DIP obligations owing by Seller in this case;
 - b. Buyer's assumption of Seller's post-petition trade payables incurred in connection with the operation of the Restaurant Locations;
 - c. Buyers assumption of all allowed administrative claims in this Case; and
 - d. Payment of the remaining balance of the Purchase price as a credit against the secured indebtedness owing by the Seller to the Buyer.
11. However, the debtor's Bidding Procedures Motion states that the fee will represent a percentage of the total value of the transaction to Debtor's estate (Page 6, para. 12). Breakup fees are typically calculated based on the purchase price, not the "value" of the transaction. The conflicting language in the Stalking Horse APA and the Bidding Procedures Motion needs to be cleared up so that it is clear as to how exactly the breakup will be calculated.
12. Moreover, breakup fees typically don't include noncash transactions such as assumption of liabilities. See *In re: Tama Beef Packing, Inc.*, 312 B.R. 192 at 196 (Bankr. N.D. Iowa 2004). In this Case, the Stalking Horse APA provides that the purchase price consists solely of the assumption of liabilities and a credit bid. No new money will be provided to this estate.

Expense Reimbursement:

13. The Stalking Horse APA also contains a \$25,000 expense reimbursement provision. The UST similarly contends that the \$25,000 associated expense reimbursement simply augments the break-up fee contained in the Stalking Horse APA raising the potential break-up fee to over 5%. In addition, there is no requirement that the expenses be presented to this Court for review and approval, or that the expenses satisfy 11 U.S.C. § 503(b).
14. Similar to the arguments set out above, any expense reimbursement payable to the Stalking Horse Bidder should be paid within the context of the administrative expense analysis under 11 U.S.C. § 503(b). As stated above, it is puzzling why the Insider Purchasers would need the expense reimbursement for their due diligence when the Insider Purchasers are and have been intimately familiar with the debtor's operations as controlling persons of said operations.
15. Alternatively, the Court should withhold approval of the break-up fee and the proposed expense reimbursement, subject to a future motion and hearing for approval of an administrative expense filed by the Stalking Horse Bidder, if the unsuccessful bidder at auction, pursuant to 11 U.S.C. § 503(b).
16. If the Court determines protection of the Stalking Horse Bidder is necessary under the sale motion, then it may be appropriate to approve the allowance of a break-up fee, or expenses, but not both and, in any event, either allowance should be approved only if it rises to the level of an administrative expense under 11 U.S.C. § 503(b).

WHEREFORE, based on the foregoing, the UST contends that this Court should only allow a break-up fee if it is an "actually necessary" expense under 11 U.S.C. § 503(b) to preserve value for this estate; similarly, this Court should only allow reimbursement of actual expenses that are "actually necessary" under 11 U.S.C. § 503(b) to preserve value for this estate; alternatively, deny the request for a break-up fee or reimbursement of expenses subject to a future opportunity for the Stalking Horse Bidder, if the unsuccessful bidder at auction, to seek an appropriate administrative expense under 11 U.S.C. § 503(b); and for such other and further relief as this Court deems just, equitable, and proper.

Respectfully submitted,

s/ Marjorie J. Creasey

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