

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

_____)	
)	Chapter 11
In re:)	
EATERIES, INC., ET AL., ¹)	Case No. 17-11444-SAH
)	
Debtor.)	(Jointly Administered)
_____)	
)	

DECLARATION OF DAVID R. PAYNE IN SUPPORT OF DEBTOR’S MOTION FOR AN ORDER (A) APPROVING THE SALE OF THE ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS TO THE WINNING BIDDER; AND (B) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES OF THE DEBTOR

COMES NOW Eateries, Inc. (“Debtor”) and hereby files the Declaration of David R. Payne.

Dated this 26th day of September, 2017.

Respectfully submitted,

s/ Mark A. Craige

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¹ The affiliated Debtors are Eateries, Inc. and GRP of Zanesville, LLC, Case No. 17-11445-SAH..

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COUNSEL FOR DEBTOR

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I, David R. Payne, pursuant to section 1746 of title 28 of the United States Code, declare under penalty of perjury as follows:

1. I was retained as the Debtors’ Bankruptcy Financial Advisor (“BFA”) prior to initiation of the above-captioned bankruptcy cases (this “Chapter 11 Case”) in order to evaluate strategic restructuring alternatives and to maximize recoveries to the Debtors’ estate. I make this declaration in support of the Debtor’s Motion for an Order (a) Approving the Sale of the Assets Free and Clear of All Liens, Claims, Encumbrances, and Interests to the Winning Bidder; and (b) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases of the Debtor (the “Motion”)² [Dkt. No. 141].

2. The Debtor and its professionals marketed the Purchased Assets and conducted the marketing and sale process as set forth in and in accordance with the Motion and this Court’s order (the “Bidding Procedures Order”) [Dkt No. 173] and the bidding procedures for the sale of substantially all of its assets (the “Bidding Procedures”) approved therein.

¹ The affiliated Debtors are Eateries, Inc. and GRP of Zanesville, LLC, Case No. 17-11445-SAH.

² Capitalized terms not otherwise defined herein shall be given same meaning as in the Motion.

3. Information regarding the proposed sale, the Offering Summary (attached hereto as Exhibit 1), the Notice of Auction and Sale Hearing, and the Bidding Procedures were mailed and/or e-mailed to 162 prospective purchasers.

4. The Debtors provided all creditors and other parties in interest and all prospective purchasers a reasonable and fair opportunity to bid for the Purchased Assets.

5. The Auction conducted by the Debtors, including the methodology for determination of the highest and best offers and the back-up bids, was conducted in a manner that was reasonably calculated to achieve the highest and best offers for the Purchased Assets. The Auction was conducted in a non-collusive, fair and good faith manner and a reasonable opportunity has been given to any interested party to make a higher or otherwise better offer for the Purchased Assets.

6. After the conclusion of the Auction held on September 25, 2017, the Debtors determined in accordance with, in a valid and sound exercise of its business judgment that (i) the highest and best Qualifying Bid (the "Winning Bid") for the Purchased Assets was that of Fresh Capital LLC, Fiesta Holdings, Inc., and Practical Investors LLC or their nominee (collectively the "Winning Bidder"). The Winning Bid consisted of \$1,100,000.00 payable as a credit against the Secured Indebtedness *plus* (1) Cash sufficient to pay (a) the DIP Facility in full and (b) all Cure Amounts; (2) the assumption of all of the (a) Seller's Administrative Costs, (b) Seller's Post Petition Liabilities, (c) obligations of Seller to employees hired by Purchaser with respect to unused vacation and personal time accrued prior to the Effective Transfer Date by such employees in their employment with Seller, (d) Post Petition obligations of the Seller to be performed under each Assigned Liquor License; (e) all Post Petition obligations of the Seller to be performed under the Assigned Permits, (f) all obligations remaining under (i) the Gift Cards sold post-petition, and (ii) all coupons and promotional offers issued post-petition and

outstanding as of the Closing for each Transferable Restaurant, and (g) all obligations for Transfer Taxes all as defined in and more specifically set forth in detail in that certain Asset Purchase Agreement dated August 9, 2017 (together with all ancillary documents, as may be amended, modified or supplemented, the “APA”); and (ii) that were no other bidders. The Winning Bid is payable as follows:

- Payment in cash in an amount sufficient to pay off the DIP Facility;
- Stalking Horse Bidder’s assumption of Debtor’s Post-Petition trade payables incurred in connection with the operation of the Purchased Assets;
- Stalking Horse Bidder’s assumption of all allowed administrative claims in this Case; and
- Payment of the remaining balance of the Purchase Price as a credit against the secured indebtedness owing by the Debtor to the Stalking Horse Bidder.

7. Subject to the entry of an order approving the Sale (the “Sale Order”), the Debtor: (i) has full power and authority to execute the APA and all other documents contemplated thereby; (ii) has all of the power and authority necessary to consummate the transactions contemplated by the APA (collectively, the “Transactions”), and (iii) has taken all company action necessary to authorize and approve the APA and the sale of the Purchased Assets, and any actions required to be performed by the Debtor in order to consummate the Transactions contemplated in the APA. No consents or approvals, other than those expressly provided for in the APA or any Sale Order, are required for the Debtor to consummate the Sale.

8. The total consideration provided by the Purchaser for the Purchased Assets as reflected in the APA is the highest and best offer for the Purchased Assets. No other person or entity or group of persons or entities has offered to purchase the Purchased Assets for an amount that would provide greater value to the Debtor than the Purchaser. Approval of the Motion, the

APA, and the Transactions maximizes the Debtor's recovery for the Purchased Assets, and, thus, is in the best interests of the Debtor and its estate, creditors and all other parties in interest.

9. Entry into and consummation of the APA constitute the exercise by the Debtors of sound business judgments, and such acts are in the best interests of the Debtors, its estate and creditors, and all parties in interest.

10. Additionally: (i) the APA constitutes the highest and best offer for the Purchased Assets; (ii) the APA and the closing thereon presents the best opportunity to realize the maximum value of the Purchased Assets and avoid a decline and devaluation of the Purchased Assets; (iii) there is risk of deterioration of the value of the Purchased Assets if the Sale is not consummated promptly; and (iv) the APA and the closing thereon will provide a greater recovery for the Debtor's creditors than would be provided by any other presently available alternative. Compelling circumstances exist and a good, sufficient and sound business purpose and justification for the Sale prior to, and outside of, a plan of reorganization.

11. Compelling circumstances exist for the Sale outside: (a) the ordinary course of business, pursuant to section 363(b) of the Bankruptcy Code; and (b) a plan of reorganization, in that, among other things, the immediate consummation of the Sale to the Purchaser is necessary and appropriate to preserve and to maximize the value of the Debtor's estate. To maximize the value of the Purchased Assets and preserve the viability of the businesses to which the Purchased Assets relate, it is essential that the Sale occur promptly. Time is of the essence in consummating the Sale.

12. The APA was negotiated and is undertaken by the Debtors and the Purchaser at arm's length without collusion or fraud, and in good faith within the meaning of section 363(m) of the Bankruptcy Code. The Purchaser (i) recognized that the Debtor was free to deal with any other party interested in acquiring the Purchased Assets, (ii) complied with the Bidding

Procedures Order and (iii) willingly subjected its bid to the competitive Bidding Procedures approved in the Bidding Procedures Order. All payments to be made by the Purchaser and other agreements or arrangements entered into by the Purchaser in connection with the Sale have been disclosed, the Purchaser has not violated section 363(n) of the Bankruptcy Code by any action or inaction, and no common identity of directors or controlling stockholders exists between the Purchaser and the Debtor.

13. The APA was not entered into, and the Sale is not being consummated, for the purpose of hindering, delaying or defrauding creditors of the Debtor under the Bankruptcy Code or under the laws of the United States, any state, territory, possession thereof, or the District of Columbia, or any other applicable law. Neither the Debtor nor the Purchaser has entered into the APA or is consummating the Sale with any fraudulent or otherwise improper purpose.

14. The Debtor is the sole and lawful owner of the Purchased Assets.

15. The Purchaser would not have entered into the APA and would not consummate the transactions contemplated thereby if the Sale of the Purchased Assets to the Purchaser were not free and clear of any and all Interests pursuant to section 363(f) of the Bankruptcy Code, or if the Purchaser or the Purchased Assets would, or in the future could, be liable for any of such Interests.

16. I understand that the Debtor may sell the Purchased Assets free and clear of all Interests because, with respect to each creditor or other person or entity asserting an Interest, one or more of the standards set forth in section 363(f)(1)-(5) of the Bankruptcy Code has been satisfied.

17. The Purchaser is not holding itself out to the public as a continuation of the Debtor. In my opinion, the conveyance of the Purchased Assets does not amount to a consolidation, merger or *de facto* merger of the Purchaser and the Debtor and/or Debtor's estate,

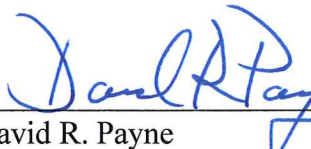
there is not substantial continuity between the Purchaser and the Debtor, there is no continuity of enterprise between the Debtor and the Purchaser, the Purchaser is not a mere continuation of the Debtor or its estate, and the Purchaser does not constitute a successor to the Debtor or its estate. The Purchaser will not have acquired the Purchased Assets unless the Sale is shall be free and clear of any “successor liability” claims of any nature whatsoever, whether known or unknown and whether asserted or unasserted as of the Closing; and that the Purchaser’s operations shall not be deemed a continuation of the Debtor’s business as a result of the acquisition of the Purchased Assets.

18. It is an exercise of the Debtor’s sound business judgment to assume and assign the Assigned Contracts to the Purchaser in connection with the consummation of the Sale of the Purchased Assets, and the assumption and assignment of the Assigned Contracts is in the best interests of the Debtor, its estate and creditors, and other parties in interest. The Assigned Contracts being assigned to the Purchaser are an integral part of the Sale of the Purchased Assets and, accordingly, their assumption and assignment are reasonable and an enhancement to the value of the Debtor’s estate.

19. The Purchaser has promised to perform the Debtor’s obligations under the Assigned Contracts for periods on and after the closing of the Sale.

20. In light of the overall facts and circumstances in this case, it is my opinion that the Sale is fair and reasonable; as such the same should be approved.

Dated this 26th day of September, 2017.



David R. Payne

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of September, 2017, I caused a true and correct copy of the foregoing and attached document to be transmitted to the Court Clerk for electronic filing and transmittal of a Notice of Electronic Filing to all ECF registrants in this case.

/s/Mark A. Craige

Mark A. Craige