

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

| | | |
|---------------------------------------|---|---------------------------------|
| GENERAL ELECTRIC CAPITAL CORPORATION, |) | |
| |) | |
| |) | No. 3:08-cv-01229 |
| Plaintiff, |) | Judge Trauger |
| |) | Magistrate Judge Griffin |
| vs. |) | |
| |) | |
| VIVID RESTAURANT CONCEPTS, LLC, |) | |
| |) | |
| Defendant. |) | |

RECEIVER’S MOTION FOR AN ORDER (I) AUTHORIZING THE SALE OF CERTAIN ASSETS FREE AND CLEAR OF LIENS, CLAIMS, AND ENCUMBRANCES, (II) APPROVING BID PROCEDURES AND BREAK-UP FEE, (III) APPROVING FORM AND MANNER OF NOTICE OF SALE, (IV) SETTING A HEARING TO CONFIRM SALE, AND (V) GRANTING RELATED RELIEF AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Kevin T. O’Halloran, in his official capacity as the duly appointed receiver for Vivid Restaurant Concepts, LLC (the “Receiver”), respectfully moves the Court for entry of an Order Approving Bidding Procedures, Break-Up Fee, and Form and Notice of Sale and Setting Sale Confirmation Hearing substantially similar to the proposed order attached hereto as Exhibit A (and submitted concurrently herewith): (i) authorizing the sale of assets associated with certain of the operations of Vivid Restaurant Concepts, LLC (“VIVID”) free and clear of liens, claims, encumbrances and interests of any kind in accordance with the terms set forth in the Asset Purchase Agreement between the Debtor and J.H.S. Holdings, L.L.C., as purchaser, attached as Exhibit B hereto; (ii) approving bid procedures and a break-up fee; (iii) approving the form and manner of notice of sale; (iv) setting a hearing to confirm said sale; and (v) granting such other

relief as the Court deems appropriate and just (the “Sale Motion”). For the reasons and upon the authority stated below, the Receiver respectfully submits that the Court may enter the proposed Order Approving Bidding Procedures, Break-Up Fee, and Form and Notice of Sale and Setting Sale Confirmation Hearing on an expedited and *ex parte* basis. In support of the proposed sale generally and the specific request for entry of the proposed Order Approving Bidding Procedures, Break-Up Fee, and Form and Notice of Sale and Setting Sale Confirmation Hearing , the Receiver states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this Sale Motion pursuant to 28 U.S.C. §§ 2001 *et. seq.* and the Court’s equitable authority and discretion in receivership proceedings. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a)(2).

BACKGROUND

2. On or about December 30, 2008, General Electric Capital Corporation (“GECC”) brought an action in this Court against VIVID, a Tennessee limited liability company, seeking damages and the appointment of a receiver (the "Receivership Proceeding") for VIVID’s default under loans and security agreements by which GECC agreed to provide to VIVID acquisition financing for restaurants in Tennessee and Mississippi doing business as “Amerigo” and “Char”, and the later acquisition of additional Amerigo restaurants in Louisville, Kentucky, and Knoxville, Tennessee.¹

3. On or about January 8, 2009, GECC and VIVID filed a Joint Motion for Expedited Approval of Agreed Order for Appointment of Receiver. By Order entered on January 9, 2009 (and subsequently amended on January 12, 2009)(the “Receiver Order”), this Court appointed Kevin T. O’Halloran of Newbridge Management, LLC as receiver.

¹ Some or all of the restaurants are referred to herein as the “Restaurants”

4. The power and authority given by this Court to the Receiver included:

To operate, manage, maintain, lease, sell, convey or transfer the Receivership Property, in whole or in part, as may be in the best interests of the receivership estate, provided that such sale, conveyance or transfer, if any, is approved and confirmed by this Court after notice to all parties in interest and a hearing, and by GECC, to the extent such consent would have otherwise been required by the Loan Documents ...

RECEIVER ORDER at ¶ 2(b).

5. Following his appointment, the Receiver continued to operate the Restaurants. Consistent with the authority granted by the Receiver Order, the Receiver determined that continued operation of the Amerigo restaurant in Knoxville, Tennessee, was not in the best interests of the receivership estate, due to continuing losses. That restaurant was closed effective April 28, 2009. Operations at the other Restaurants are on-going.

RELIEF REQUESTED

6. The Receiver has located a prospective buyer that is ready, willing and able to purchase the assets utilized in operation of certain of the Restaurants, if sold promptly, at a price acceptable to GECC. An early sale will terminate the receivership with its incidental costs and expenses.

7. On or about May 27, 2009, the Receiver entered into an Asset Purchase Agreement with J.H.S. Holdings, L.L.C., subject to the approval of and, ultimately, confirmation by this Court, for the sale of certain assets related to and used in the operation of five of the VIVID restaurants (the "Asset Purchase Agreement").² The principals of J.H.S. Holdings,

² As stated herein, the Receiver shut down the Amerigo restaurant in Knoxville, Tennessee, effective as of April 28, 2009, due to continued losses from operations. The personalty from the Knoxville location was moved to the Amerigo restaurant in Nashville, Tennessee, and are included in the sale proposed herein. The assets of the Amerigo restaurant in Louisville are not included in the proposed sale. Assets specifically excluded from this sale are described in more detail as Excluded Assets at Section 2.2 of the Asset Purchase Agreement.

L.L.C. are the current managers of VIVID's Jackson, Mississippi and Nashville, Tennessee locations.

8. The Asset Purchase Agreement includes a provision for consideration of competing bids and a break-up fee to J.H.S. Holdings, L.L.C. in the event the Receiver receives and accepts a higher bid for the Assets, as defined in the Asset Purchase Agreement.

9. The Receiver requests that the Court authorize the sale of Assets and assignment of certain unexpired real estate leases to J.H.S. Holdings, L.L.C. or such other entity as makes the winning bid according to the bidding procedures outlined below ("Buyer"), pursuant to the terms of the Asset Purchase Agreement (the "Sale").

10. In connection with the Sale, the Receiver proposes to assign to the Buyer the real estate leases currently in place for the following restaurants:

| <u>Restaurants</u> | <u>Property Address</u> |
|---------------------------|---|
| Amerigo | 1239 Ridgeway Road, Memphis, TN |
| Amerigo | 1920 West End Ave., Nashville, TN |
| Amerigo | 1656 Westgate Circle, Brentwood, TN |
| Amerigo | 6592 Old Canton Road, Ridgeland, MS |
| Char | 4500 I-55 North, Suite 142, Jackson, MS |

11. The Receiver also proposes to assign to the Buyer the leases for parking lots adjacent to certain of the Restaurants. A supplemental Exhibit C to this Sale Motion will be filed identifying the landlords to the restaurant and parking lot leases.

12. The Receiver proposes to assign the restaurant and parking lot leases on a going-forward basis with: (i) the Buyer to assume all lease obligations following the closing of the sale; and, (ii) any amounts due for pre-receivership rent or other obligations to be treated as a claim

against the receivership estate. The Receiver reserves the right to reject some or all of the unexpired real estate leases should the bid of the Successful Bidder (as defined in the bidding procedures described herein) not include a provision for assignment of the leases.

13. The Receiver further requests that the Court set a hearing on confirmation of the proposed sale (the "Sale Confirmation Hearing") to occur after the described notice and procedures for conducting the sale (the "Bidding Procedures"). Because the described Bidding Procedures provide for the Receiver to conduct an auction among other Qualified Bidders, if any, immediately prior to the Sale Confirmation Hearing, the Receiver respectfully requests the Court set the Sale Confirmation Hearing for such afternoon time as is convenient for the Court prior to or by no later than June 30, 2009.

14. Pursuant to the terms of the Asset Purchase Agreement, J.H.S. Holdings, L.L.C. will buy substantially all of the assets used or useful in the operation of the Amerigo restaurants located in Memphis, Nashville, and Brentwood, Tennessee and Ridgeland, Mississippi, and the Char restaurant located in Jackson, Mississippi (the "Assets" as more particularly defined in Section 2.1 of the Asset Purchase Agreement). The purchase price of the Assets is Six Million and 00/100 Dollars (\$6,000,000).³

15. To ensure that the Receiver receives the highest and best offer for the Assets, the Receiver seeks authority to receive further bids in advance of the Sale Confirmation Hearing in accordance with the following bidding procedures (the "Bidding Procedures"), which would allow him to consider competing bids, and accept or decline same in his sole discretion and in his business judgment, without additional court approval:

³ This Sale Motion generally describes the terms and conditions of the proposed sale as described in the Asset Purchase Agreement. To the extent of any inconsistency between this Sale Motion and the Asset Purchase Agreement, the Asset Purchase shall control.

- A. **The Sale Confirmation Hearing.** At the Sale Confirmation Hearing, the Receiver (identified in the Asset Purchase Agreement as “Seller”) will seek entry of an order, *inter alia*, approving and confirming the sale of the Assets: (i) if no other Qualified Bid (as hereinafter defined) is received, to the Buyer pursuant to the terms and conditions set forth in the Asset Purchase Agreement, or (ii) if another Qualified Bid is received by Seller, to the Buyer or such other Qualified Bidder as Seller, in the exercise of his business judgment may determine to have made the highest or otherwise best offer to purchase the Assets, consistent with these Bidding Procedures (the “Successful Bidder”).
- B. **Determination of Seller.** Seller shall: (i) determine whether any person is a Qualified Bidder, (ii) coordinate the efforts of Qualified Bidders in conducting their respective due diligence investigations regarding the Assets, (iii) receive offers from Qualified bidders, and (iv) negotiate any offer made to purchase the Assets (collectively, the “Bidding Process”). Any person who wishes to participate in the Bidding Process must be a Qualified Bidder. Seller shall not be obligated to furnish any information of any kind whatsoever relating to Seller to any person who is not a Qualified Bidder.
- C. **Participation Requirements.** Unless otherwise ordered by the Receivership Court for cause shown, to participate in the Bidding Process, each person (a “Potential Bidder”) must deliver (unless previously delivered) to Seller:
- (a) An executed confidentiality agreement in form and substance satisfactory to Seller; and
 - (b) Current financial statements or other financial information sufficient to satisfy Seller, in Seller’s sole discretion, of such Potential Bidder’s ability to close a sale of its purchase of the Assets. If the Potential Bidder is an entity formed for the purpose of acquiring the Assets, Seller may, at Seller’s sole discretion, require comparable financial information from the equity holder(s) of the Potential Bidder or such other form of financial disclosure acceptable to Seller and its advisors.
- A Qualified Bidder is a Potential Bidder that delivers the documents described in subparagraphs (i) and (ii) above, whose financial information demonstrates the financial capability of the Potential Bidder to consummate the purchase contemplated, and that Seller determines is reasonably likely (based on financial capability, experience and other considerations) to be able to consummate a purchase of the Assets, if selected as the Successful Bidder with respect to such Assets.
- D. **Due Diligence.** Once Seller has identified Potential Bidders as Qualified Bidders, Seller shall afford the Qualified Bidders due diligence access to Seller. Seller will designate an employee or other representative to coordinate all reasonable requests for additional information and due diligence access from such bidders. Neither Seller nor any of its respective representatives is obligated to furnish any information relating to Seller to any person other than a Qualified Bidder.

- E. **Bid Deadlines.** A Qualified Bidder that desires to make a bid shall deliver three (3) written copies of its bid to Kevin O'Halloran, Newbridge Management, LLC, The Equitable Building, 100 Peachtree Street, Suite 1475, Atlanta, GA, 30303, not later than 12:00 noon (EDT) on June 22, 2009, (the "Bid Deadline"), who shall then distribute a copy of the bid to counsel for the Receiver and counsel for GECC
- F. **Bid Requirements.** A bid is a letter from a Qualified Bidder stating that: (i) the Bidder offers to purchase the assets sought to be acquired upon the terms and conditions set forth in a copy of the Asset Purchase Agreement, marked to show those amendments and modifications to the Asset Purchase Agreement, including price and terms, that the Qualified Bidder proposes (the "Marked Agreement") and (ii) the Bidder's offer is irrevocable until forty-eight hours after the closing. A Bidder shall accompany its bid with: (i) a certified check in the amount of \$450,000 (the "Good Faith Deposit") of the Purchase Price payable to the order of Seller; and (ii) written evidence of financial ability to consummate the transaction.

Seller will consider a bid only if the bid:

- (a) provides for a Purchase Price of a least \$110,000 over the Purchase Price bid in the Asset Purchase Agreement;
- (b) is on terms that, in Seller's business judgment, are not materially more burdensome or conditional than the terms of the Asset Purchase Agreement;
- (c) is not conditioned on obtaining financing or on the outcome of unperformed due diligence by the bidder with respect to the Assets but may be subject to the accuracy in all material respects at the closing of that transaction of specified representations and warranties or the satisfaction in all material respects at the closing of that transaction of specified conditions, none of which shall be materially more burdensome than those set forth in the Asset Purchase Agreement; and
- (d) does not request or entitle the bidder to any break-up fee, termination fee, expense reimbursement or similar type of payment.

A bid received from a Qualified Bidder that meets the above requirements is a "Qualified Bid." For purposes hereof, the Asset Purchase Agreement executed by the Buyer shall constitute a Qualified Bid.

- G. **"As Is, Where Is"**. The sale of the Assets shall be on an "as is, where is" basis and without representations or warranties of any kind, nature, or description by Seller, its agents or its estate, except to the extent set forth in the Asset Purchase Agreement or the Marked Agreement, as the case may be. Except as otherwise provided in the Asset Purchase Agreement or the Marked Agreement, as the case may be, all of VIVID's right, title and interest in and to the respective assets shall be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options and interests thereon (collectively, the "Transferred

Liens”), such Transferred Liens to attach to the net proceeds of the sale of such assets.

- H. **Auction**. After all Qualified Bids have been received, Seller may conduct an auction (the “Auction”) with respect to the Assets. The Auction shall take place at 9:00 a.m. (CDT) on the date of the Sale Confirmation Hearing, at the Federal Courthouse, outside Courtroom Room 873, at 801 Broadway, Nashville, Tennessee, or such other time or place as Seller shall notify all Qualified Bidders who have submitted Qualified Bids. Only a Qualified Bidder who has submitted a Qualified Bid is eligible to participate at the Auction. At the Auction, Qualified Bidders will be permitted to increase their bids. The bidding shall start at the purchase price stated in the highest Qualified Bid and continue in increments of at least \$50,000.

Upon conclusion of the Auction or, if Seller determines not to hold an Auction, then promptly following the Bid Deadline, Seller shall: (i) review each Qualified Bid on the basis of financial and contractual terms and the factors relevant to the sale process, including those factors affecting the speed and certainty of consummating the sale with respect to such assets and (ii) identify the highest and best offer for the Assets (the “Successful Bid”). At the Sale Confirmation Hearing, Seller shall present to the Receivership Court for approval the Successful Bid.

- I. **Acceptance of Qualified Bids**. Seller presently intends to sell the Assets to the presenter of the highest or otherwise best Qualified Bid received, whether received from the Buyer or another Qualified Bidder. Seller’s presentation to the Receivership Court for approval of a particular Qualified Bid does not constitute Seller’s acceptance of the bid, except with respect to the bid of Buyer as reflected in the Asset Purchase Agreement (subject to higher or otherwise better Qualified Bids and subject to Receivership Court approval). Seller has accepted any other bid only when the bid has been approved by the Receivership Court at the Sale Confirmation Hearing.
- J. **Return of Good Faith Deposit**. The Good Faith Deposits of all Qualified Bidders shall be retained by Seller and all Qualified Bids will remain open, notwithstanding Receivership Court approval of a sale pursuant to the terms of a Successful Bid by a Qualified Bidder, until forty-eight hours after the closing of the transaction. The Seller will then return any Good Faith Deposit to the appropriate Qualified Bidder.
- K. **Modifications**. Seller may: (i) determine, in his business judgment, which Qualified Bid, if any, is the highest or otherwise best offer; and (ii) reject at any time before entry of an order of the Receivership Court approving a Qualified Bid, any bid that, in Seller’s sole discretion, is (a) inadequate or insufficient, (b) not in conformity with the terms and conditions of sale, or (c) contrary to the best interests of the receivership estate and its creditors.

16. In the event the Receiver receives and accepts a higher, competing bid, the Receiver requests approval to pay J.H.S. Holdings, L.L.C. a break-up fee of \$50,000 from the proceeds of the sale to the successful bidder (the "Break-Up Fee"). The Break-Up Fee will be paid to J.H.S. Holdings, L.L.C. only upon the closing of a sale of the Assets to a Successful Bidder other than J.H.S. Holdings, L.L.C..

17. The Receiver proposes to serve a copy of the Sale Motion and the Order Approving Bidding Procedures, Break-Up Fee, and Form and Notice of Sale and Setting Sale Confirmation Hearing (or such other as may be entered by the Court upon the Sale Motion) in the following manner. Unless the party is scheduled to receive automatic electronic notice through CM/ECF, within two business days of entry of the Order Approving Bidding Procedures, Break-Up Fee, and Form and Notice of Sale and Setting Sale Confirmation Hearing, or other order, the Receiver or his counsel shall serve by electronic mail or facsimile, if such information is known, or by U.S. Mail, copies of the Sale Motion and Order Approving Bidding Procedures, Break-Up Fee, and Form and Notice of Sale and Setting Sale Confirmation Hearing or other order to the following parties: (i) all parties who filed requests for notices in the Receivership Proceeding; (ii) counsel for J.H.S. Holdings, L.L.C.; (iii) GECC; (iv) VIVID trade creditors, including its suppliers and landlords; (v) all governmental taxing authorities who have, or as a result of the sale may have, claims, contingent or otherwise, against the receivership estate or the Receivership Property; and (vi) any potential bidders that are made known to the Receiver.

18. The Receiver also proposes to publish notice of the proposed sale (including the general terms of the sale) and the applicable Bidding Procedures in the following newspapers, which are newspapers regularly issued and of general circulation in the cities where the Assets

are located: Memphis-*The Commercial Appeal*; Nashville-*The Tennessean*; Jackson (Mississippi)-*The Clarion-Ledger*. The Receiver proposes to publish this notice once a week during the month of June.

19. The Receiver requests that the Court set the Sale Confirmation Hearing, at the Court's convenience, for some time during the last week of June, preferably in the afternoon and by no later than June 30, 2009.

20. The Receiver requests that the form and scope of notice provided for herein be deemed good, sufficient, and adequate notice under the Receiver Order and the requirements of the judicial sale provisions of Title 28 discussed below. The Receiver further requests that he be excused from any further notice to any party of any adjournment or continuation of the Sale Confirmation Hearing, except as announced by the Court at the Sale Confirmation Hearing.

APPLICABLE AUTHORITY

I. Sale of Assets

21. This Court has "broad powers and wide discretion" in crafting relief in this equity receivership proceeding. *See SEC v. Basic Energy & Affiliated Res. Inc.*, 273 F.3d 657, 668 (6th Cir. 2001). Such relief has traditionally included the power to authorize the sale of property in receivership free from claims and encumbrances, *Van Huffel v. Harkelrode*, 284 U.S. 225, 22852 S.Ct. 115, 116, 76 L.Ed. 256 (1931), provided parties with valid interests in such property are afforded due process, *Liberte Capital Group, LLC v. Capwill*, 421 F.3d 377, 382-83 (6th Cir. 2005).

22. Section 2004 of Title 28 on judicial sales directs that "personalty sold under any order or decree of any court of this United States shall be sold in accordance with section 2001 of

[title 28], unless the court orders otherwise.” 28 U.S.C. § 2004. Section 2001 provides for the sale of realty and directs, in part, that

[a]fter a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby.

28 U.S.C. § 2001(b).⁴

23. Because the Receiver is not selling real estate, the Court may fashion sale procedures different than those required for a sale of realty under 28 U.S.C. § 2001. The Receiver respectfully submits that the requirement under that section for two hearings, one to authorize the sale and one to confirm the sale, are not necessary in this case and will unduly delay the sale. Accordingly, the Receiver requests that the Court authorize the sale procedures proposed herein on an *ex parte* basis, subject to confirmation and final approval following a final report of sale by the Receiver, at which any party in interest may raise an appropriate objection to the terms or conditions of the sale.

24. Section 2001 of Title 28 further directs that “[b]efore confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation” 28 U.S.C. § 2001(b). The Trustee proposes to publish the notice of sale in local newspapers for four consecutive weeks (or such shorter period as the Court may deem appropriate.) *See* 28 U.S.C. § 2002.

25. Generally, a court may not confirm a private sale under this section “if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per

⁴ Section 2001 of Title 28 further provides for the appointment of a three disinterested appraisers to appraise the real property and sets a minimum sale price based on the resulting appraisals. That procedure is not necessary in this case because the Receiver is not selling real estate. Section 2004 of Title specifically authorizes the court to modify the sale procedures when personal property is being sold.

centum increase over the price offered in the private sale. *Id.* However, the Receiver respectfully submits that a \$600,000 topping bid (or ten percent of the \$6 million purchase price) will discourage other bids. Consistent with the Court's authority under 28 U.S.C. § 2004 to modify the procedures for sales of personalty, the Receiver respectfully requests that the proposed topping bid amount of \$110,000 (or \$60,000 plus the proposed break-up fee of \$50,000) is reasonable and appropriate.

26. Approval of the sale free and clear of interests, liens, claims, and encumbrances is within the authority of this Court. The notice provided for in the proposed Bidding Procedures affords claimants the opportunity to assert any claimed property interests for consideration by the Court at the Sale Confirmation Hearing. This procedure satisfies due process and the requirements for judicial sales under Title 28.

II. Assignment of Unexpired Leases

27. The Receiver also seeks to assign the unexpired real estate leases related to the Amerigo restaurants located at the following addresses in Memphis, Nashville, and Brentwood, Tennessee and Ridgeland, Mississippi, and the Char restaurant located in Jackson, Mississippi (as more particularly defined in Section 2.1 of the Asset Purchase Agreement):

| <u>Restaurants</u> | <u>Property Address</u> |
|---------------------------|---|
| Amerigo | 1239 Ridgeway Road, Memphis, TN |
| Amerigo | 1920 West End Ave., Nashville, TN |
| Amerigo | 1656 Westgate Circle, Brentwood, TN |
| Amerigo | 6592 Old Canton Road, Ridgeland, MS |
| Char | 4500 I-55 North, Suite 142, Jackson, MS |

28. The Receiver also proposes to assign to the Buyer the leases for parking lots adjacent to certain of the Restaurants. A supplemental Exhibit C to this Sale Motion will be filed identifying the landlords to the restaurant and parking lot leases.

29. The Receiver proposes to assign the referenced leases on a going-forward basis with: (i) the Buyer to assume all lease obligations following the closing of the sale; and, (ii) any amounts due for pre-receivership rent or other obligations to be treated as a claim against the receivership estate. The Receiver reserves the right to reject some or all of the unexpired real estate leases should the bid of the Successful Bidder (as defined in the bidding procedures described herein) not include a provision for assignment of the leases.

30. The Court has the discretionary power to adjust legal relationships and deny contractual and other remedies that would otherwise be detrimental to the receivership. *See Liberte Capital Group, LLC*, 2005 WL 2062677 at **1-7 (6th Cir. 2005)(district court properly denied contractual right to death benefits under matured life insurance policies in receivership of viatical settlement company) and *Quilling v. Trade Partners, Inc.*, 2006 WL 1144196 at *2 (W.D. Mich. 2006)(even though a federal receiver takes property subject to all existing liens, priorities, or privileges, district court may equitably deny payment of contractual interest to an over-secured creditor in a receivership proceeding)(copy attached hereto).

31. Authorizing the assignment of the leases is consistent with the purposes of the receivership to administer the Receivership Property and achieve a final, equitable distribution. *See Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006)(“The receiver’s role, and the district court’s purpose in the appointment, is to safeguard the disputed assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary.”)

32. Assignment of the leases in connection with the proposed sale is also consistent with the Court's authority under 28 U.S.C. § 2001, as incorporated into 28 U.S.C. § 2004, to order the sale "upon such terms and conditions" as will conserve the "best interests of the estate". 28 U.S.C. § 2001(b). Assignment of the leases will ensure that the Buyer can continue to operate the restaurants and, therefore, generate the highest and best price for the Assets.

III. Bidding Procedures

33. The Bidding Procedures are fair, reasonable and productive because they will permit the Receiver to conduct an orderly sale and obtain the best offer on the best possible terms for the purchased Assets, which serves the interests of the receivership estate.

34. The Bidding Procedures are intended to ensure that the maximum return is achieved from the sale of the purchased Assets. In particular, the requirement that the initial minimum subsequent bid amount must exceed the purchase price under the Asset Purchase Agreement by the described amount is necessary to compensate the estate for the additional time and cost that would be involved in assisting a new purchaser in finalizing the terms of a new asset purchase agreement, as well as for the cost of the Break-Up Fee.

35. The Bidding Procedures also will ensure that all bids will be comparable by requiring all bids be on the same terms and conditions as the Asset Purchase Agreement (except to the extent expressly modified in writing). If competing bidders appear who meet the required minimum bid, the Receiver will determine, in his business judgment, which bid is the highest and best for the estate. The comparability requirements of the Bidding Procedures will make it possible to accomplish this task with a focus on purchase price, ability to perform the unexpired leases, and ability to close on the terms set forth in the Asset Purchase Agreement.

36. For all of these reasons, the Receiver respectfully requests that the Court approve the Bidding Procedures as described herein.

IV. Good Faith

37. The Receiver also requests that the order confirming the sale provide that the Buyer has acted in good faith. This transaction has been negotiated at an arms-length and is fair to the receivership estate.

V. Break-Up Fee

38. The Receiver hereby seeks authority to approve compensation to J.H.S. Holdings, L.L.C. for serving as the initial bidder in the form of the Break-Up Fee described herein and in the Asset Purchase Agreement. The Break-Up Fee contemplated by the Asset Purchase Agreement is a total payment of \$50,000. The Break-Up Fee is payable from the proceeds of sale only if the Receiver terminates the Asset Purchase Agreement and then actually closes on the sale of the Assets to a Successful Bidder. If a higher bidder fails to close, J.H.S. Holdings, L.L.C. shall have the right to purchase the Assets.

39. The payment of break-up fees as part of a commercial sale process is a prudent and generally accepted practice. Break-up fees encourage an initial purchaser to invest the time, effort and money necessary to consummate the purchase of assets, despite the possibility that such purchaser may not ultimately acquire the property. As such, they are important tools to be used to encourage bidding. Courts have generally evaluated break-up fee arrangements under the business judgment rule standard. *See e.g. Cottle v. Storer Communications, Inc.*, 849 F.2d 570 (11th Cir. 1988); *CRTF Corp. v. Federated Dep't Stores*, 683 F.Supp. 422 (S.D.N.Y. 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).

40. Application of the business judgment test and evaluation of the circumstances of the proposed sale of the Assets, demonstrates the appropriateness of the Break-Up Fee to J.H.S. Holdings, L.L.C.. Here, the proposed Break-Up Fee is reasonable in amount. Further, J.H.S. Holdings, L.L.C. will receive the Break-Up Fee only if it is not the Successful Bidder and the Successful Bidder actually closes on the sale.

41. The Break-Up Fee has been necessary to encourage J.H.S. Holdings, L.L.C. to serve as the initial bidder and use its offer to start the sale process. The initiation of the sales process is important as it establishes a date for the sale of the Assets, forcing all other interested bidders to either step forward or lose their opportunity to acquire the Assets. Moreover, J.H.S. Holdings, L.L.C.'s offering price will set the standard that all subsequent offers must exceed.

42. In light of the risks involved in making an opening offer and the expense involved in completing such an Asset Sale, the Break-Up Fee is fair and reasonable. If another bidder appears and pays substantially more than the original offer by J.H.S. Holdings, L.L.C., the receivership estate will benefit from J.H.S. Holdings, L.L.C.'s due diligence, effort and financial capacity to purchase the Assets that made such a better offer possible.

VI. Notice of Sale

43. As discussed above, the Court has discretion to establish procedures for notice of a judicial sale of personalty. The Receiver respectfully submits that the notice proposed herein is reasonable and sufficient under the facts and circumstances, and consistent with the statutory directives of Title 28.

44. The Receiver respectfully requests, therefore, that the form and scope of notice provided for herein be deemed good, sufficient, and adequate notice under the Receiver Order and the requirements of the judicial sale provisions of Title 28 discussed below. The Receiver further requests that he be excused from any further notice to any party of any adjournment or

continuation of the Sale Confirmation Hearing, except as announced by the Court at the Sale Confirmation Hearing.

45. For all of these reasons, the Receiver respectfully submits that the procedures for and notice of the proposed sale are fair and reasonable and consistent with the Court's statutory authority under Title 28 for oversight of judicial sales of personalty.

WHEREFORE, Kevin T. O'Halloran, in his official capacity as the duly appointed receiver for Vivid Restaurant Concepts, LLC, respectfully requests the Court enter on an expedited basis an order substantially similar to the proposed Order Approving Bidding Procedures, Break-Up Fee, and Form and Notice of Sale and Setting Sale Confirmation Hearing attached hereto and submitted simultaneously herewith: (i) authorizing the sale of the Assets on the terms set forth in the Asset Purchase Agreement, free and clear of liens, claims, encumbrances and interests of any kind and finding that the Buyer is a good faith buyer; (ii) approving bid procedures and break-up fee; (iii) approving the form and manner of notice of sale; and, (iv) setting a Sale Confirmation Hearing; and (v) granting such other relief as the Court deems appropriate and just.

This 27th day of May, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent via electronic notice through the Court's ECF system on this 27th day of May, 2009, to the following:

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