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11 UNITED STATES BANKRUPTCY COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13 In re:

14 MUNCHERY INC.,

15 Debtor-in-Possession.

16 Case No.: 19-30232-HLB

17 Chapter 11

18 **MOTION FOR SALE OF ASSETS FREE
19 AND CLEAR OF LIENS**

20 **Date:** April 18, 2019

21 **Time:** 3:00 p.m.

22 **Place:** 450 Golden Gate Ave, 16th Floor
23 San Francisco, CA 94102

24 **LIEN CLAIMANTS:**

25 This Motion to Sell Free and Clear of Liens (the "Motion") affects the following lien
26 claimants:

- 27 - Comerica Bank ("Comerica");
- 28 - TriplePoint Venture Growth BDC Corp. ("TriplePoint");
- Sherpa Ventures Fund, LP;
- SherpaEverest Fund, LP;
- Menlo Ventures XI, L.P.;
- MMEF XI, L.P.;

- 1 - Menlo Ventures XII, L.P.;
- 2 - Menlo Entrepreneurs Fund XII, L.P.;
- 3 - MMEF XII, L.P.;
- 4 - BV eVenture Fund II, LP;
- 5 - COTA Capital Master Fund, L.P.;
- 6 - OA3, LLC; and
- 7 - Vive FC Fund, LP.

8 Comerica and TriplePoint are referred to herein as the “Senior Secured Lenders”. The
9 remaining parties listed above are referred to collectively as the “Junior Secured Lenders”. In
10 addition to the Senior Secured Lenders and the Junior Secured Lenders, a UCC search disclosed
11 the following parties:

- 12 - Ocean Beauty Seafoods, LLC (“Ocean Beauty”);
- 13 - Sysco Los Angeles, Inc.(“Sysco”);
- 14 - Xerox Financial Services (“Xerox”);
- 15 - Apple Financial Services (“Apple”); and
- 16 - Corporation Service Company (“CSC”).

17 Ocean Beauty, Sysco, Xerox, Apple and CSC are collectively referred to as the “Vendor
18 Creditors”. Whatever liens the Vendor Creditors may have, those liens are not the subject of
19 this Motion. Ocean Beauty and Sysco are lien claims that relate to food products delivered to
20 Munchery while it was an operating business. The assets being sold through the Sale Motion do
21 not include any assets that would be covered by whatever lien Ocean Beauty and Sysco may
22 have. The liens relating to Xerox, Apple and CSC are connected to leased or purchased office
23 equipment (a copier) and computer equipment. These assets are not included in the assets being
24 sold through the Sale Motion, such that whatever lien Xerox, Apple and CSC may have, it is not
25 affected by the Sale Motion.

26 In addition to the Senior Secured Creditors, the Junior Secured Creditors and the Vendor
27 Creditors, there are a list of individuals and entities (the “Unsecured Noteholders”) that might
28 assert an interest in the assets that are the subject of this Motion. The list is voluminous

1 (approximately 110 parties) and is attached to the Beriker Declaration as Exhibit C. For reasons
2 set forth below, Debtor asserts that the Unsecured Noteholders do not have any liens against the
3 assets in question.

4 **SUMMARY OF THE RELIEF SOUGHT AND STATUS OF THE CASE:**

5 By this Motion, Debtor in Possession, Munchery Inc. (“Debtor” or “Munchery”) seeks
6 Court approval of a sale of assets to Gate Gourmet, Inc. (“Gate”), or an overbidder if an overbid
7 is made, free and clear of liens. The assets being sold (the “Sale Assets”) are described in greater
8 detail in the Asset Purchase Agreement (“APA”) between Debtor and Gate and the Schedules
9 attached thereto. A copy of the APA is attached to the concurrently filed Declaration of James
10 Beriker (the “Beriker Dec.”). This Motion is based upon the Beriker Declaration, the
11 Declaration of Dominic Troilo, the Declaration of Stephen D. Finestone and such other and
12 further evidence and argument to be prior to or at the hearing on this Motion.

13 Debtor also seeks a determination that Gate (or any overbidder) is a good faith purchaser
14 pursuant to Bankruptcy Code Section 363(m).

15 Debtor also requests a waiver of the 14-day stay of the order granting this motion
16 provided for in Bankruptcy Rule 6004(h) to enable the Debtor to promptly close the sale
17 transaction and avoid incurring additional costs associated with its occupancy of the Premises.

18 On February 28, 2019, Debtor filed a voluntary petition for relief under chapter 11 of the
19 Bankruptcy Code. Debtor is operating as a debtor-in-possession pursuant to sections 1107(a)
20 and 1108 of the Bankruptcy Code. The Court has jurisdiction over this Motion under 28 U.S.C.
21 §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).
22 The bases for the relief requested are sections 363(b) and 503(b) of the Bankruptcy Code and
23 Bankruptcy Rules 6004 and 9014.

24 **STATEMENT OF FACTS**

25 **A. Facts Regarding the Proposed Sale Transaction:**

26 Much of the relevant background is set forth in the Beriker Dec and the Declaration of
27 James Beriker in Support of Debtor’s First Day Motions (ECF 6). In general terms, the Sale
28 Assets consist of Debtor’s improvements to 220 Shaw Road, South San Francisco, CA (the

1 “Premises”) and the extensive machinery and equipment used in the operation of Debtor’s
2 business and located on the Premises. Gate is paying Debtor \$5,000,000 for the Sale Assets. In
3 addition to the Sale Assets, and as part of the overall transaction with Gate, Debtor will assume
4 and assign its lease (the “Lease”) for the Premises between itself as tenant and Eureka Ventures
5 VI LLC (“Landlord”). The initial term of the Lease runs through April 30, 2025. The Lease
6 includes an option to extend (the “Option”) which, if exercised, extends the lease an additional
7 ten year. The assumption and assignment of the Lease are the subject of a concurrently brought
8 motion.

9 In addition to the \$5,000,000 being paid for the Sale Assets, Gate, or any overbidder, will
10 provide the Landlord with a security deposit of \$600,000. This is an amount equivalent to
11 Debtor’s security deposit with the Landlord and a letter of credit posted in Landlord’s favor.
12 When the sale closes, Landlord will return the Debtor’s security deposit and the letter of credit
13 will be terminated.

14 Gate and the Landlord have also prepared and are ready to execute an amendment to the
15 Lease (the “Lease Amendment”) which will provide Gate with an additional five-year option to
16 extend the Lease through April 30, 2040 and will commit Gate to spending at least \$1,000,000 in
17 capital improvements – tenant improvements to the Premises during the first two years of its
18 occupancy. As discussed below, the Lease Amendment is not a required part of Debtor’s
19 transaction with Gate and a party wishing to submit a competing offer should indicate whether it
20 intends to seek a similar agreement with the Landlord.

21 **B. The Background to the Sale Transaction:**

22 The sale is the result of extensive pre-petition efforts by the Debtor to secure a buyer for
23 the Sale Assets and a party to take over the Lease. Munchery had engaged in two separate
24 efforts to sell its business and assets in 2017 and 2018. Based on those efforts, its management
25 had thorough knowledge and information about, and contacts with, potential buyers of the
26 Premises and it was heavily engaged with those prospects beginning in the fall of 2018. The
27 purpose of those discussions was in an attempt to sell assets and sublease the Premises as a
28 means of reducing fixed costs and financing the ongoing business at a new kitchen facility.

1 Debtor was not able to consummate a transaction with a party during the timeframe
2 required by its investors and lenders and the investors and lenders did not provide adequate
3 financing for the company to continue operating the business until a transaction was
4 consummated. Munchery ceased operations January 22, 2019, while it was negotiating with
5 Gate and other parties and entered into a Letter of Intent (“LOI”) with Gate on February 18,
6 2019. Debtor determined that Gate was the right counter-party as the San Francisco-based
7 General Manager and corporate executives were the most committed to acquiring the facility
8 given the facilities improvements, equipment, size and location, and Gate’s current need to
9 service its business at the San Francisco International Airport. Additionally, Gate had a very
10 strong business and balance sheet, and long record of financial performance, that Debtor
11 believed would be acceptable to the Landlord. Finally, Gate provided the highest guidance on
12 price and a high level of certainty of closing and were prepared to proceed on an expedited time
13 frame. The LOI required Munchery to terminate all discussions with other interested parties
14 from its execution up to the date Munchery filed this case. Munchery complied with the
15 exclusivity provisions.

16 **C. The Overbid Process and Break-Up Fee:**

17 The process described was approved by an order of the Court granting Debtor’s Motion
18 to Approve Bid Procedures (ECF 8 and 49). A copy of the Bid Procedures are attached hereto.
19 Under the terms of the LOI, which were incorporated into APA, an interested party
20 (“Overbidder”) may submit an overbid (“Overbid”) to acquire the Sale Assets and assume the
21 Lease. The Overbid must be in the minimum amount of \$5,250,000 and provide for the
22 additional \$600,000 in security deposit for the Landlord. An Overbid must be submitted no later
23 than seven days prior to the date set for the hearing on the Motion. An Overbid must also
24 include adequate financial information about the Overbidder to: i) satisfy Debtor that Overbidder
25 will be able to close the sale transaction and ii) provide adequate assurance to the Landlord of the
26 Overbidder’s ability to perform its obligations under the Lease. To the extent an Overbidder
27 seeks terms with the Landlord similar to those described above under the Lease Amendment (a
28 further option and a commitment to making tenant improvements), the Overbidder should so

1 indicate. Finally, an Overbid should be accompanied by an asset purchase agreement similar, if
2 not identical to the APA with Gate, and on terms no less favorable to the Debtor.

3 If one or more Overbids are received, Debtor will conduct an auction between the
4 Overbidders and Gate at the time and date set for the hearing on this Motion and then ask the
5 Court to approve the results of the auction. If an Overbid is received and any parties wishes to
6 submit a further bid, the bidding increments will be in a minimum amount of \$25,000. Once a
7 winning bidder is determined, Debtor will request that the next highest bidder confirm its
8 willingness to act as a back-up bidder at the amount of its most recent bid and close a sale at that
9 price if the winning bidder fails to do so.

10 If Gate is not the winning bidder, it will be entitled to receive \$150,000 from escrow as a
11 break-up fee. This fee is subject to Court approval as being a reasonable estimate of the cost
12 incurred by Gate as the stalking horse bidder. Because Gate will receive \$150,000 as the break-
13 up fee, the fee will be considered in the event Gate submits any subsequent bids. As an example,
14 if an Overbid is received at \$5,250,000, if Gate wants to submit another bid, its bid would need
15 to be a minimum of \$5,125,000, as a bid by Gate in that amount will be considered equivalent to
16 a bid of \$5,275,000 ($\$5,125,000 + \$150,000$ break-up fee = \$5,275,000).

17 **D. A Sale of Debtor's Assets is Appropriate at This Early State of the Case:**

18 With respect to the need to sell the assets covered in the APA early in the case, the
19 following are the main factors supporting the appropriateness of selling these assets now: i) the
20 Debtor is no longer in operation and does not need the Premises or the Sale Assets; ii) Debtor
21 engaged various parties pre-petition with respect to the potential purchase of the Sale Assets and
22 assumption of the Lease and waiting to sell may result in less interest in the transaction; iii) The
23 rent for the Premises is approximately \$85,000 per month, including taxes and other charges; in
24 addition, the cost of utilities, insurance and security services exceed an additional \$20,000 per
25 month. Debtor does not have the funds to continue paying these expenses and its lenders have
26 been unwilling to fund these expenses beyond the end of April 2019; and iv) Once the sale
27 transaction closes, Debtor will still have other assets, including its intellectual property and
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1 customer relationships, and a potential reorganization to acquire some or all of those assets, but
2 the amounts owing to Senior Secured Lenders will have been nearly satisfied in full.

3 Moreover, the terms of the APA are fair and reasonable under the circumstances and
4 provide the estate with a satisfactory return on the sale of the assets. Based on pre-petition
5 activities, including communications with many potentially interested parties, Munchery decided
6 that Gate was the most serious potential purchaser and the one that was ready to move quickly to
7 close a sale transaction. The LOI and subsequent APA with Gate were each consummated
8 following extensive discussions and negotiations between Debtor and Gate, as numerous drafts
9 were exchanged, and the parties participated in conference calls with their counsel to reach
10 agreement on business deal points and other items over which there were disagreements.

11 **E. Gate is Entitled to the Protections of Bankruptcy Code Section 363(m).**

12 As set forth in the declaration of Gate's representative, Dominic Troilo and the Beriker
13 Declaration, Gate is a good faith purchaser and entitled to the protections of Bankruptcy Code
14 Section 363(m) if it is the winning bidder.

15 There is no connection between Debtor and Gate. The APA is the result of extensive
16 negotiations between the parties and traces back to pre-petition interactions that led to the
17 execution of the LOI in early February 2019. The proposed sale to Gate is an arms' length
18 transaction. Gate has not promised any compensation or any employment to anyone with
19 Munchery. The companies do not have any common or related board members or officers.

20 **LEGAL ARGUMENT**

21 **A. The Proposed Transaction is Authorized by the Bankruptcy Code:**

22 Bankruptcy Code section 363 provides that a debtor, "after notice and a hearing, may use,
23 sell or lease, other than in the ordinary course of business, property of the estate." Bankruptcy
24 Code § 363(b). To approve the use, sale or lease of property outside of the ordinary course of
25 business, the Debtor must show four requirements: "(1) that a sound business reason exists for
26 the sale; (2) there has been adequate and reasonable notice to interested parties, including full
27 disclosure of the sale terms and the Debtor's relationship with the buyer; (3) that the sale price is
28 fair and reasonable; and (4) that the proposed buyer is proceeding in good faith." *In re Medical*

1 *Software Solutions*, 286 B.R. 431 (Bankr. D. Utah 2002). *See Walter v. Sunwest Bank (In re*
2 *Walter)*, 83 B.R. 14, 19 (9th Cir. BAP 1988) (quoting *Institutional Creditors of Continental Air*
3 *Lines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.)*, 780 F.2d 1223, 1226
4 (5th Cir. 1986).

5 In general, bankruptcy courts often defer to a debtor’s business judgment regarding the
6 sale of estate assets, unless such decision is arbitrary and capricious. Courts generally will not
7 second-guess a debtor’s business decisions when those decisions involve “a business judgment
8 made in good faith, upon a reasonable basis, and within the scope of his authority under the
9 Code.” *See In re Curlew Valley Assocs.*, 14 B.R. 506, 511-514 (Bankr. D. Utah 1981). *See also,*
10 *Committee of Equity Sec. Holders v. Lionel Corp (In re Lionel Corp)*, 722 F.2d 1063, 1070 (2nd
11 Cir. 1983).

12 The Court should also consider whether the proposed transaction will further the diverse
13 interests of the debtor, creditors, and equity holders, whether the assets are increasing or
14 decreasing in value, and whether allowing the transaction would render meaningless the
15 protections afforded to creditors under chapter 11. *See In re Work Recovery, Inc.*, 202 B.R. 301,
16 304 (Bankr. D. Ariz. 1996) (citing *In re Continental Air Lines, Inc.*, 780 F.2d 1223 (5th Cir.
17 1986)); *see also In re Chrysler LLC*, 576 F.3d 108, 117–18 (2d Cir. 2009)

18 Debtor submits that the proposed transaction with Gate and the procedures set forth in the
19 Bidding Procedures are well within the exercise of Debtor’s reasonable business judgment.
20 Debtor marketed its business extensively in 2017 and 2018 but was unable to complete a
21 transaction. Debtor also sought ongoing financing or additional investment to sell the Sale
22 Assets and transfer the Lease as part of a going concern but was not able to accomplish that
23 either. The proposed sale to Gate is appropriate under the circumstances. The sale will return
24 fair value to the Debtor. Along with the motion to assume the lease, the sale will relieve the
25 Debtor from further liability under the Lease. Moreover, the sale transaction has the potential to
26 generate Overbids, which will increase the return to the estate. Depending on what bids are
27 received, all or almost all of the debt to the Senior Secured Lenders will be paid. Finally, the
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1 Bidding Procedures establish a fair method for auctioning the Sale Assets and obtaining the
2 highest and best bid for them.

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4 **B. A Sale Free and Clear of Liens is Appropriate in the Circumstances:**

5 Debtor is authorized to complete the sale pursuant to Bankruptcy Code section 363(f),
6 which provides, the Debtor may sell property free and clear of any lien, claim, or interest in such
7 property, if, among other things:

8 (1) applicable nonbankruptcy law permits sale of such property free and clear of such
9 interest;

10 (2) such entity consents;

11 (3) such interest is a lien and the price at which such property is sold is greater than the
12 aggregate value of all liens on such property;

13 (4) such interest is in bona fide dispute; or

14 (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money
15 satisfaction of such interest.

16 Satisfaction of any one of the five requirements will be sufficient to permit the sale of the
17 Sale Assets free and clear of liens, claims, encumbrances, pledges, mortgages, security interests,
18 charges, options, and other interests (collectively, the "Interests").

19 Debtor now discusses these factors with respect to the various lien creditors mentioned
20 above:

21 The Senior Secured Creditors – Both Comerica and TriplePoint consent to the sale.

22 Moreover, Comerica will be paid off in full by the sale and depending on the overbid activity,
23 TriplePoint may be paid off as well.

24 The Junior Secured Creditors – Debtor anticipates that all the Junior Secured Creditors
25 will consent to the sale as well. In addition, pursuant to the subordination agreements entered
26 into by the Junior Secured Creditors and the Senior Secured Creditors, Debtor believes that the
27 Senior Secured Creditors can effectively consent to the sale on behalf of the Junior Secured
28 Creditors.

1 The Vendor Creditors – As discussed above, the proposed sale does not impact whatever
2 lien claims these creditors hold as the Sale Assets do not include any assets against which these
3 creditors can assert a lien.

4 The Unsecured Noteholders – The situation with this group is described in the Beriker
5 Declaration. In 2017 and 2018, the Debtor sold notes described as Convertible Bridge Notes (the
6 “Notes”) to a group of individuals and entities. The noteholders purchased a fractionalized share
7 of the notes, with parties often putting up as little as \$3,000-\$4,000. There are dozens of parties
8 with small interests in the Notes. The language of the Notes references the loans being made on a
9 secured basis, and the schedules attached to the Notes includes a blank schedule for a security
10 agreement. Debtor has not located any signed security agreements. More importantly, Debtor
11 does not believe any UCC-1 forms were completed and a search of lien filings in California and
12 Delaware, the latter being Debtor’s state of incorporation, do not disclose the filing/perfection of
13 any of the Notes. None of the Unsecured Noteholders have appeared in the case to date, so
14 Debtor does not know whether they consider themselves secured. To the extent they would
15 assert a security interest in the Sale Assets, such assertion would certainly be subject to a bona
16 fide dispute.

17 **C. A Finding Under Bankruptcy Code Section 363(m) is Appropriate:**

18 The Motion seeks a determination that the Gate is a good faith purchaser and entitled to
19 the protections provided by Bankruptcy Code section 363(m).¹ Section 363(m) of the
20 Bankruptcy Code provides that “[t]he reversal or modification on appeal of an authorization
21 under subsection (b) or (c) of this section of a sale or lease of property does not affect the
22 validity of a sale or lease under such authorization to an entity that purchased or leased such
23 property in good faith” 11 U.S.C. § 363(m).

24 Under Bankruptcy Code section 363(m), “an appeal of a bankruptcy court’s ruling on a
25 foreclosure action [or sale] generally cannot affect the rights of a good faith purchaser of the
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27 _____

28 ¹ If there are any Overbidders, Debtor expects such party to submit an appropriate
 declaration to satisfy the requirements of Section 363(m) and Debtor will likewise request the
 Overbidder receive the same protections as Gate.

1 foreclosed property, unless the debtor [or other complaining party] stays the foreclosure [or
2 other] sale pending an appeal." *Mann v. Alexander Dawson, Inc. (In re Mann)*, 907 F.2d 923,
3 926 (9th Cir. 1990) "[T]he primary goal of the mootness rule [embodied in section 363(m)] 'is to
4 protect the interest of a good faith purchaser . . . of the property,' thereby assuring finality of
5 sales." *Onouli-Kona Land Co. v. Estate of Richards (In re Onouli- Kona Land Co.)*, 846 F.2d
6 1170, 1173 (9th Cir. 1988) (quoting *Community Thrift & Loan v. Suchy (In re Suchy)*, 786 F.2d
7 900, 901-02 (9th Cir. 1985). Lack of good faith for purposes of Bankruptcy Code section 363(m)
8 is generally determined by the existence of fraudulent conduct or insider dealing during the sale
9 process. *See, e.g., In re Exennium, Inc.*, 715 F.2d 1401 (9th Cir. 1983).

10 As discussed above and in the declarations submitted in support of the Motion, Gate
11 qualifies as a good faith purchaser. The APA is an arms' length transaction, resulting from
12 extensive negotiations over the LOI and the APA. There is no connection between Gate and the
13 Debtor and Gate has not promised any employment or compensation to any officer or director of
14 the Debtor.

15 **D. Debtor is Entitled to a Waiver of the 14-day Stay of the Order:**

16 Debtor also seeks waiver of the 14-day stay provided for in Bankruptcy Rule 6004(h),
17 which provides that an "order authorizing the use, sale, or lease of property ... is stayed until the
18 expiration of 14 days after entry of the order, unless the court orders otherwise." Debtor requests
19 that the order approving the sale be effective immediately by providing that the 14-day stay
20 under Bankruptcy Rule 6004(h) is waived. The stay should be eliminated to allow the sale to
21 close immediately where there has been no objection to the procedures. Here, absent an
22 unexpected objection, there is no reason why the stay should not be lifted in this instance.
23 Moreover, closing the transaction as quickly as possible after entry of an order is critical to the
24 Debtor to avoid the further and significant costs of occupying the Premises.

25 **CONCLUSION**

26 Based on the foregoing, Debtor requests that this Court enter an order (i) granting the
27 Motion, (ii) authorizing Debtor to perform its obligations under the APA, (iii) approving the
28 proposed sale to Gate or any winning Overbidder with approval of any backup bidder as may

1 occur at an auction, (iv) determining that Gate or any overbidder is entitled to the protections of
2 Bankruptcy Code Section 363(m), (v) waiving the 14-day stay, and allowing such other relief as
3 this Court deems just and proper.

4 Dated: March 21, 2019

FINESTONE HAYES LLP

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By

/s/Stephen D. Finestone
Stephen D. Finestone.
Attorneys for Munchery Inc.

EXHIBIT A

MUNCHERY, INC.

BIDDING PROCEDURES FOR SALE OF CERTAIN ASSETS

1. Introduction and Background:

Munchery, Inc. (“Debtor”) is the debtor and debtor in possession in Chapter 11 case no.19-03232, currently pending in the United States Bankruptcy Court for the Northern District of California (the “Bankruptcy Court”). The Debtor entered into an Asset Purchase Agreement (“APA”) with Gate Gourmet, Inc. (“Gate”) involving the assignment of Debtor’s lease (the “Lease”) for premises (the “Premises”) located at 220 Shaw Road, South San Francisco, CA and the sale of the improvements to and machinery and equipment located at the Premises. The assets being sold pursuant to the APA are referred to herein as the “Hard Assets”. Under the APA, Debtor will receive \$5,000,000 for the Hard Assets. The sale transaction also involves two modifications to the Lease in the event Gate is the winning bidder for the purchase of the Hard Assets. The two modifications are i) a commitment from the landlord of the Premises (the “Landlord”) to provide Gate with an additional five-year option on the Lease, and ii) Gate’s commitment to spend \$1,000,000 on additional improvements to the Premises within two years of taking possession.

The Bankruptcy Court has granted Debtor’s motion to establish certain bid procedures (the “Bidding Procedures”) for any party interested in submitting a higher or otherwise better bid for the Sale Assets (an “Overbid”).

2. Important Dates:

- April 11, 2019 at 5:00 p.m. as the deadline for submitting an Overbid;
- April 18, 2019 at 3:00 p.m. as the date and time for the hearing in the Bankruptcy Court for approval of the sale of the Hard Assets free and clear of liens and the assignment of the Lease to Gate or a successful overbidder (the “Sale Hearing”).
- In the event that an Overbid is received, an auction will be held at the Bankruptcy Court at the time set for the Sale Hearing.

3. Stalking Horse Bidder:

As noted above, Gate and Munchery have entered into the APA for the sale of the Hard Assets and the assignment of the Lease. A copy of the APA may be obtained by making a request via email to Munchery’s counsel: Stephen D. Finestone, Finestone Hayes LLP, 456 Montgomery St., 20th Floor, San Francisco, CA 94104 (sfinestone@fhlawllp.com). The consideration being paid to Munchery pursuant to the APA is \$5,000,000, subject to a possible Overbid, assignment of the Lease and approval by the Bankruptcy Court. If there is a timely Overbid, Debtor will notify Gate, the Office of the U.S. Trustee, Debtor’s lenders and any parties requesting notice of the Overbid.

An Overbid must be at least \$5,250,000. If an Overbid is received, further incremental bids may be made in amounts of at least \$25,000. In the event an Overbid is received, and Gate

is not the ultimate winning bidder, it will receive \$150,000 (the “Break-up Fee”) upon closing of the transaction to compensate for its costs and fees incurred in becoming the stalking horse bidder. Because Gate will receive the Break-Up Fee, in the event of bidding at the hearing, Gate will receive a credit of \$150,000 at the bidding. For purposes of example, if a bid of \$5,250,000 is received, if Gate wishes to submit a higher bid at the \$25,000 minimum, it would need to bid \$5,125,000 ($\$5,125,000 + \$150,000 = \$5,275,000$).

4. Conditions for Potential Bidders:

Any party wishing to submit an Overbid (a “Prospective Bidder”) should submit any such Overbid to counsel for the Debtor: Stephen D. Finestone, Finestone Hayes LLP, 456 Montgomery St., 20th Floor, San Francisco, CA 94104 (sfinestone@fhlawllp.com) by the deadline noted above. Any Prospective Bidder should include the following information in its Overbid:

- i) A price of at least \$5,250,000;
- ii) The identity of the party submitting the Overbid and adequate financial information regarding the party’s financial wherewithal, satisfactory to the Debtor, to assure Debtor and its creditors that the party can close the sale, and satisfactory so that Debtor can meet its obligations under Bankruptcy Code Section 365 to provide the Landlord with adequate assurance of the party’s ability to perform its obligations under the Lease;
- iii) An indication whether the Prospective Bidder will assume the Lease without modification or whether it will do so on substantially the same terms as Gate, including without limitation: a) whether it is willing to make additional improvements to the Premises of at least \$1,000,000 within two years; b) whether it will request that the Landlord amend the Lease to provide an additional five-year option; and, c) provide a replacement security deposit (\$300,000), a Letter of Credit (\$300,000), and other financial assurances so that Debtor can obtain a return of its security deposit and release of its letter of credit issued in connection with the Lease;
- iv) A draft asset purchase agreement in a form substantially similar to the APA with Gate, or such other document(s) as may be appropriate in the event the Prospective Bidder proposes an alternative form of transaction;
- v) A commitment as to the date on which the party will be able to close the transaction (the ability to close promptly after Court approval is a critical factor);
- vi) A good faith deposit of \$100,000 to be deposited with the Debtor’s counsel in counsel’s trust account and which will be refundable after closing if the party submitting the Overbid is not the ultimate winning bidder. If the party submitting the deposit is the winning bidder, the deposit shall be credited as part of the purchase price;
- vii) Acknowledgement satisfactory to the Debtor that the bidder is prepared to submit a declaration of its principal to support a finding by the Bankruptcy Court that the bidder is a good faith buyer under Bankruptcy Code Section 363(m); or, alternatively a draft of such a declaration; and,
- viii) An indication whether the bidder is willing to act as a back-up bidder if it ultimately does not submit the highest or otherwise bid, in which case the bidder would be willing to close a sale transaction at its highest or otherwise best bid in the event that the winning bidder does not close.

The Debtor, in its sole discretion, will determine whether Prospective Bidder has submitted an appropriate Overbid. If Debtor so determines, it will notify the Prospective Bidder of such determination and advise Gate, the lenders and the U.S. Trustee of the same. In the event a creditor’s committee has been formed by the time that an Overbid is received, Debtor will also

advise the committee of the Overbid (or if the committee has counsel, advise its counsel instead). The Debtor reserves the right, as it may reasonably determine to be in the best interests of its estate and in consultation with any official committee appointed in this case, to modify the Bidding Procedures in any manner that will best promote the goals of the bidding process or impose, at or before the Auction, additional customary terms and conditions on such auction or sale to the extent not inconsistent with the Bidding Procedures Order.

5. The Sale Hearing:

At the Sale Hearing, Debtor will seek Bankruptcy Court approval of the highest or otherwise best bid whether it is the Gate bid, an Overbid, or a bid as a result of subsequent bidding at the hearing. In addition, Debtor will request that the Court approve the second highest or otherwise best bidder as a back-up bidder and provide in its order that if the winning bidder does not consummate the sale transaction, that Debtor be allowed to close the transaction with the back-up bidder in the amount of its bid without further order of the Court.