

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

RUPARI HOLDING CORP., *et al.*,¹

Debtors.

Chapter 11

Case No. 17-10793 (KJC)

(Jointly Administered)

Hearing Date: April 27, 2017 at 11:00 a.m. (ET)

Objection Deadline: April 25, 2017 at 4:00 p.m. (ET)
(extended by agreement)

Related To Docket No. 27

**LIMITED OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS TO THE MOTION OF DEBTORS FOR ENTRY OF ORDERS (I)(A)
APPROVING AND AUTHORIZING BIDDING PROCEDURES IN CONNECTION
WITH THE SALE OF SUBSTANTIALLY ALL ASSETS, (B) APPROVING STALKING
HORSE PROTECTIONS, (C) APPROVING PROCEDURES RELATED TO
ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND
UNEXPIRED LEASES, (D) APPROVING THE FORM AND MANNER OF NOTICE
THEREOF, AND (II)(A) APPROVING AND AUTHORIZING SALE OF
SUBSTANTIALLY ALL DEBTOR ASSETS TO SUCCESSFUL BIDDER FREE AND
CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS, (B)
APPROVING ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY
CONTRACTS AND UNEXPIRED LEASES RELATED THERETO, AND (C)
GRANTING RELATED RELIEF**

The Official Committee of Unsecured Creditors (the “Committee”) appointed in the bankruptcy cases of the above-captioned debtors and debtors-in-possession (the “Debtors”), by and through its proposed undersigned counsel, files this limited objection (the “Objection”) to the Debtors’ proposed bid procedures (the “Bid Procedures”) set forth in the *Motion of Debtors for Entry of Orders (I)(A) Approving and Authorizing Bidding Procedures in Connection with the Sale of Substantially All Assets, (B) Approving Stalking Horse Protections, (C) Approving Procedures Related to Assumption and Assignment of Certain Executory Contracts and*

¹ The debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number are as follows: Rupari Holding Corp. (4943) and Rupari Food Services, Inc. (7933). The mailing address for the Debtors is 15600 Wentworth Avenue, South Holland, Illinois 60473.

Unexpired Leases, (D) Approving the Form and Manner of Notice Thereof, and (II)(A) Approving and Authorizing Sale of Substantially All Debtor Assets to Successful Bidder Free and Clear of All Liens, Claims, Encumbrances and Other Interests, (B) Approving Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto, and (C) Granting Related Relief (the “Sale Motion”) [Docket No. 27]. In support of this Objection, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. By the Bid Procedures, the Debtors are proposing to set the stage for a sale process involving substantially all of their assets. That process however, as it stands, is riddled with serious defects that, if not corrected, may chill bidding and otherwise prevent the Debtors from achieving their alleged goal for these cases, which is to realize the maximum value for their business.

2. While the Committee was just appointed and its review remains ongoing, the Committee is concerned with the Debtors’ proposal to use a highly-contingent Stalking Horse Agreement² as the benchmark for bids for the sale of the Debtors’ assets, without any certainty or assurances that the requisite contingencies can or will be met. The most glaring of the conditions to the proposed Stalking Horse Agreement is the requirement that the Debtors assume and assign that certain License Agreement (the “Roma License Agreement”), by and between Debtor Rupari Food Services, Inc. and Roma Dining, LLC and Romacorp, Inc. (together “Roma”), the validity of which (and ability to assume and assign) is the subject of the pending adversary proceeding before this Court titled *Rupari Food Services, Inc. v. Roma Dining, LLC and Romacorp, Inc.*, Adv. Pro. 17-50345 (KJC) (the “Roma Adversary Proceeding”). Under the Court’s current schedule, the Roma Adversary Proceeding is not set to be resolved until long

² All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Sale Motion.

after the proposed bid, auction and sale hearing deadlines, casting significant doubt on the Debtors' ability to fulfill the conditions and consummate the Stalking Horse Agreement in accordance with the current Bid Procedures.

3. Furthermore, the Stalking Horse Protections are wholly improper under the circumstances. The conditionality of the Stalking Horse Agreement undermines the typical role a stalking horse is intended to serve: to provide a minimum floor bid for the assets. Here, the contingent nature of the Stalking Horse Agreement creates instability and uncertainty, which may chill competitive bidding and deter prospective purchasers. Furthermore, the Bid Procedures and the Stalking Horse Agreement facilitate a sale process that may not even be consummated, and may result in significant expenditure of time and resources. There is no justification to compensate the Stalking Horse for enabling a process that runs a real risk of depleting, rather than maximizing, the value of the estate.

4. Finally, prior to the filing of this Objection, the Committee raised several additional concerns with respect to the Bid Procedures with the Debtors, many of which are set forth in a proposed mark-up to the order approving Bid Procedures which was provided to Debtors' counsel prior to the filing of this Objection. The Committee's proposed mark-up is attached hereto as "**Exhibit A**".³ Among others, the Committee objects to the confirmation of credit bidding rights, as well as the release of any sale proceeds, to the Debtors' prepetition secured lenders pending the establishment by the lenders that they hold validly perfected liens on and security interests in the Debtors' assets.

³ The Committee provided comments to an incremental draft of the proposed order, which counsel for the Debtors indicated was subject to further review and revision. Accordingly, the Committee attaches Exhibit A hereto merely to demonstrate the nature of the Committee's comments, with the understanding that the proposed order is subject to further modification.

BACKGROUND

5. On April 10, 2017 (the “Petition Date”), each of the Debtors filed voluntary petitions for relief (the “Chapter 11 Cases”) under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

6. Also on the Petition Date, the Debtors commenced the Roma Adversary Proceeding, in which the Debtors seek a declaration that the Roma License Agreement remains in full force. The Debtors requested that the Roma Adversary Proceeding be heard on an expedited basis to enable a resolution of the validity and assignability of the Roma License Agreement such that it may be included in the Debtors’ assets to be sold. The Court is tentatively scheduled to hold a hearing to consider the Roma Adversary Proceeding in mid-July of 2017.

7. On April 11, 2017, the Debtors filed the Sale Motion seeking, as an initial matter, the approval of the Bid Procedures, including approval of the Stalking Horse Agreement pursuant to which the Debtors will seek to sell all or substantially all of their assets to CBQ, LLC, as Stalking Horse Bidder, for a purchase price of \$26 million (the “Purchase Price”), subject to higher and better bids.

8. The proposed Stalking Horse Agreement requires the occurrence of several conditions precedent to the consummation of the sale, including, but not limited to: (i) the assumption and assignment of the Roma License Agreement to the Stalking Horse, including the payment by the Debtors of any costs to cure any default thereunder, (ii) the purchase by the Stalking Horse of certain real property located in South Holland, Illinois, and (iii) the rejection of the Debtors’ collective bargaining agreement with the United Food and Commercial Workers Union Local 1546. *See* Stalking Horse Agreement, §§ 9.2(i), (j), and (m). Failure to meet any of

the foregoing conditions relieves the Stalking Horse of its obligations to perform under the Stalking Horse Agreement.

9. Pursuant to the Bid Procedures, the Debtors further seek approval of certain Stalking Horse Protections, which are comprised of a break-up fee equal to 4% of the Purchase Price and an expense reimbursement of all actual and necessary expenses incurred by the Stalking Horse in an amount up to \$325,000.

10. On April 20, 2017, Roma filed an objection (the “Roma Objection”) to the Bid Procedures, to challenge the approval of the Bid Procedures to the extent they seek to sell (and assume and assign) the Roma License Agreement because, according to Roma, Roma terminated the Roma License Agreement prepetition and, even if the Roma License Agreement was not properly terminated prepetition, Roma will not consent to the assignment of the agreement to the Stalking Horse in connection with the Sale.

OBJECTION

A. The Bid Procedures Cannot Proceed on a Contingent Stalking Horse Agreement and the Various Deadlines Must Follow the Roma Litigation.

11. Approval of the Stalking Horse Agreement at this juncture provides no benefit to the estates. The fact that the Stalking Horse Agreement is conditioned upon matters that will most likely not be resolved prior to the proposed bid and sale deadlines, coupled with the provision of unwarranted bidding protections, makes the Stalking Horse bid illusory and any benefit to the estate is outweighed by the restrictions imposed under the Stalking Horse Agreement and the proposed Bidding Procedures Order.

12. Of particular concern to the Committee is the requirement that the Roma License Agreement be assumed and assigned in connection with the sale. As explained in greater detail above, the Debtors’ ability to assume and assign the Roma License Agreement has been

challenged by Roma on multiple grounds, as set forth in the Roma Objection. Furthermore, the Roma Adversary Proceeding is in its initial stages and is scheduled for trial in mid-July, long after the auction and sale hearing will have concluded under the current Bid Procedures. Accordingly, if all goes according to the proposed schedule, the Debtors will simply be unable to complete the sale to the Stalking Horse for failure to assume the Roma License Agreement.

13. Furthermore, the Debtors have not provided any assurances that the remaining conditions precedent to the sale to the Stalking Horse are likely to be met. The Committee and other parties in interest require greater confidence that the sale to the Stalking Horse is a truly viable option, particularly when considering whether or not to approve the Stalking Horse Protections, as discussed in greater detail below. Furthermore, as the Stalking Horse Agreement will serve as a template for future bids, the sale process is likely to generate bids with similar contingencies that may be similarly unattainable and may result in the selection of a Successful Bidder who is ultimately unable to complete the sale.

14. Accordingly, the deadlines set forth in the Bid Procedures must be extended pending the provision of greater assurances by the Debtors that the conditions precedent to the Stalking Horse Agreement are attainable, or the Stalking Horse Agreement must be revised to remove the conditions.

B. The Stalking Horse Protections for the Stalking Horse's Contingent Bid Cannot Be Approved.

15. The viability of the Stalking Horse Bidder is of particular concern when considering the approval of the Stalking Horse Protections, which could entitle the Stalking Horse Bidder to payment of more than 5% of its proposed Purchase Price (an amount equal to \$1,365,000). As acknowledged by the Debtors in the Sale Motion, approval of bid protections depends on whether such bid protections are necessary to preserve the value of the estate. *See*

Sale Motion, ¶ 83, citing *Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy)*, 181 F.3d 527, 536 (3d Cir. 1999). Here, however, the Committee is concerned that the Bid Protections, in conjunction with the Stalking Horse Agreement, may foster a waste of estate resources, rather than a sale process that will maximize the value of the Debtors' assets.

16. There is simply no justification for compensating the Stalking Horse for putting forth a bid that may not be consummated and is subject to the outcome of pending litigation. Here, there is no guarantee that the Stalking Horse will serve to preserve the value of the estate. Rather, the Stalking Horse Agreement has the potential to foster an uncertain sale process reliant on contingencies that may not be met, penalizes (and potentially deters) serious buyers, and diverts value that could otherwise flow to the Debtors' estates. Payment of the Stalking Horse Protections to the Stalking Horse under such circumstances is plainly improper and a waste of estate resources, without a commensurate benefit.

17. The Stalking Horse Protections must be removed to reflect the tenuous value the Stalking Horse bid will provide to the estate.⁴

C. Credit Bidding Should Not be Preapproved at this Time.

18. The proposed order approving the Bidding Procedures bless the credit bid rights of the prepetition lenders. Given that the liens and claims of the prepetition lenders have not been proven valid and remain subject to the Committee's challenge rights, approval of credit bid rights at this time is premature. The Bid Procedures and the Bid Procedures Order should leave

⁴ The Committee notes that the proposed revised draft order to approve the Bid Procedures that was provided to the Committee by the Debtors (on which the Committee's markup is based) includes a waiver of the conditions precedent to the Stalking Horse Agreement prior to the Bid Deadline in order for the Stalking Horse Protections to be paid. To the extent this change is made in the final proposed order, the Committee would propose that the Stalking Horse Protections be reduced, as opposed to omitted, as reflected in the proposed mark-up. Under such circumstances, the Committee would propose that the Break-Up Fee be reduced to 2.5% and the Expense Reimbursement be reduced to \$260,000.

unimpaired the lenders' rights under section 363(k) of the Bankruptcy Code, as well as the Committee's right to challenge any such bids prior to the sale hearing.⁵

19. To the extent the Debtors' prepetition secured lenders are permitted to credit bid their secured claims, the Bid Procedures Order and any sale order must make clear that none of the prepetition lenders' alleged liens and security interests are *ipso facto* validated by the entry of such order, and instead remain subject to challenge by the Committee.

20. In the event the relief requested by the *Emergency Motion to Approve Use of Cash Collateral* [Dkt. No. 18] is approved on a final basis in its current form of proposed final order, the Committee will have sixty (60) days from its appointment, or until June 19, 2017, to bring a challenge to the nature, extent and validity of the Debtors' prepetition lenders' liens. Under the current schedule established by the Bid Procedures, the auction is scheduled to be held on June 5, 2017 and the hearing to consider final approval of the sale is scheduled to be held on June 9, 2017, which will each occur prior to the expiration of the Committee's Challenge period. While the Committee will work diligently to complete its investigation into the liens of the Debtors' prepetition lenders in advance of the auction, to ensure that the Committee's Challenge rights are preserved through to the Investigation Termination Date (as that term is defined in the Interim Cash Collateral Order), the Committee requests that the Bid Procedures Order and any sale order include the following language:

⁵ The Committee understands that certain of the lenders do not have validly perfected liens on the assets of Debtor Rupari Food Service, Inc., the main operating company in this case. Thus, such lenders should not be permitted to credit bid on any assets of Rupari Food Service, Inc.

The failure of the Official Committee of Unsecured Creditors (the “Committee”) to object to a credit bid of any prepetition debt held by a prepetition lender or other secured party, or the Court’s approval of any such credit bid, shall not (a) prejudice or impair the rights of the Committee to challenge the nature, extent, validity, priority, perfection or amount of the underlying liens, security interests and claims, or (b) release such lender from any causes of action which can be brought by or on behalf of the Debtors’ estates.

21. For the same reason, the prepetition lenders should not receive payment from the proceeds of any Sale until such time as their liens are determined to be valid and in the order of priority alleged. Any language in the proposed Bid Procedures Order providing for or dictating the distribution or allocation of sale proceeds must be stricken.

D. Miscellaneous Objections.

22. In addition to the foregoing, while the Committee raised several of the below issues with the Debtors prior to the filing of this Objection, the Committee has not yet received assurances that the issues will be addressed in the order approving the Bid Procedures. Accordingly, out of an abundance of caution, the Committee raises the following additional objections to the Bid Procedures, many of which are reflected in the Committee’s proposed comments set forth on Exhibit A:

- The Stalking Horse should not be entitled to make a smaller deposit than other Qualified Bidders. The Bid Procedures, Bid Procedures Order and Stalking Horse Agreement must be revised to reflect that all Qualified Bidders are required to make a deposit equal to 4% of their respective proposed purchase price.
- The Stalking Horse should not be entitled the option to increase its bid at the Auction by \$250,000 so that its bid will serve as the Starting Bid. This provision will effectively increase the bidding increments for subsequent bids to \$750,000, which may chill bidding.

- The Stalking Horse Agreement should be revised to clarify the amount of 503(b)(9) liabilities the Stalking Horse intends to assume in connection with the sale.
- The Stalking Horse is not entitled to protection under section 507(b) of the Bankruptcy Code, which is reserved for secured creditors.
- The Debtors must clarify that the Stalking Horse is not permitted to “credit bid” its Break Up Fee, which is not a secured claim and is not entitled to be credit bid.
- The Debtors should not be required to value a credit bid as equivalent to a cash bid. Rather, the Debtors should be permitted to consider whether a bid contains a sufficient cash component to ensure that the Debtors’ estates are not rendered administratively insolvent.
- The Stalking Horse Agreement should be revised to require that the Committee Professionals will be consulted in connection with the calculation of the Net Working Capital adjustment.
- The Committee must be afforded consultation rights with respect to all aspects of the Bid Procedures.
- The contract assumption procedures should be revised to clarify that contract counterparties will be provided with information demonstrating adequate assurance of the Successful Bidder to perform under their respective contracts or leases, and will thereafter be afforded a sufficient opportunity to object to the adequacy of such information.

RESERVATION OF RIGHTS

23. The Committee reserves the right to supplement or amend this Objection at or prior to the hearing on approval of the proposed Bid Procedures.

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WHEREFORE, unless the Bid Procedures are modified as set forth in this Objection, the Committee respectfully requests that the Court enter an order granting its Objection and denying the approval of the Sale Motion as it relates to the Bid Procedures and granting such further relief as may be just and proper.

Dated: April 25, 2017

Respectfully submitted,

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