

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF OKLAHOMA

_____	)	
	)	Chapter 11
In re:	)	
	)	Case No. 17-11444-SAH
EATERIES, INC., <i>et al.</i> <sup>1</sup>	)	
	)	Jointly Administered
Debtors.	)	
_____	)	

**MOTION TO ASSUME UNEXPIRED LEASE OF NON-RESIDENTIAL  
REAL PROPERTY FOR JASPER MALL LOCATION, BRIEF IN SUPPORT, AND  
NOTICE OF OPPORTUNITY FOR HEARING**

**Your rights may be affected. You should read this document carefully and consult your attorney about your rights and the effect of this document.** If you do not want the Court to grant the requested relief, or you wish to have your views considered, you must file a written response or objection to the requested relief with the Clerk of the United States Bankruptcy Court for the Western District of Oklahoma, 215 Dean A. McGee Ave., Oklahoma City, OK 73102 no later fourteen (14) days from the date of filing of this request for relief. You should also serve a file-stamped copy of your response or objection to the undersigned movant's attorney and all others required to be served and file a certificate of service with the Court. If no response or objection is timely filed, the Court may grant the requested relief without a hearing or further notice.

**The 14-day period for response includes the three (3) days allowed for mailing provided for in Bankruptcy Rule 9006(f).**

Eateries, Inc. (“Eateries” or “Debtor”) debtor and debtor-in-possession in the above-captioned case, hereby files this motion (the “Motion”) for entry of an order under to assume the unexpired lease of non-residential real property related to the Garfield’s Restaurant and Pub

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

location in the Jasper Mall located in Jasper, Alabama as modified by negotiation by and between Eateries and Jones Lang LaSalle Americas, Inc., as Received for certain property at 300 Highway 78 East, Jasper Alabama 65501 a/k/a The Jasper Mall pursuant to the Order of the Circuit Court of Walker County, Alabama entered March 15, 2017 in Civil ACTION 64-CV-2017-900070.00 (“Landlord”) pursuant to 11 U.S.C. § 365 and Fed. R. Bankr. P. 2002, 6006 and 9014. The renegotiated lease agreement between Eateries and the Landlord has been memorialized in Exhibit “A” hereto which shall hereinafter be referred to as the “Modification Agreement.” The original lease agreement and previous lease amendments are available upon written request to Counsel for the Debtor and such documents shall also be made publicly available on the website maintained by the Debtor at: <http://www.eateriesinc.com>. In support of this Motion, the Debtor respectfully represents as follows:

#### **JURISDICTION AND VENUE**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
2. The statutory predicate for the relief sought herein is 11 U.S.C. §§ 105(a) and 365.

#### **BACKGROUND AND OVERVIEW**

3. On April 18, 2017 (the “Petition Date”), the Debtor filed its voluntary petition for relief pursuant to chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Western District of Oklahoma (the “Bankruptcy Court”).
4. The Debtor continues to operate its business as a debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. An official committee of unsecured

creditors has not been appointed in this Chapter 11 Case.

5. A description of the Debtor's businesses, the reasons for filing this Chapter 11 Case and the relief sought from the Bankruptcy Court to allow for a smooth transition into operations under chapter 11 of the Bankruptcy Code is set forth in the First Day Affidavit of William C. Liedtke, III [Dkt. No. 10] (the "First Day Affidavit"). The Debtor hereby adopts and incorporates the First Day Affidavit as if fully set forth herein.

6. Immediately prior to the filing of this bankruptcy, Eateries (directly or through its various subsidiaries, including Zanesville) operated a chain of 15 restaurants located in 9 states, and employed more than 450 people. These restaurants are located in various shopping malls whose business is directly related to the volume of shoppers visiting the anchor tenants in such malls. The continued increase in online shopping has left brick-and-mortar shopping centers to fight over a smaller group of consumers. As a result, over the last year, certain segments of the retail shopping industry have experienced a significant downturn resulting in announcements by Macy's, Sears, and, most recently, JCPenney that they have or will close hundreds of these anchor stores. This downturn has had a direct impact on this business of those restaurants located in shopping malls experiencing decreased business.

7. As a result of the decreased business, Eateries has been attempting to renegotiate its lease terms with various of its landlords without success. Indeed, the downturn has resulted in the closure of 4 of Eateries' restaurant locations in advance of the filing of this bankruptcy, leaving 11 locations in operation in 6 states, employing approximately 375 people, at the time of the filing of this case.

8. On June 27, 2017, this Court entered an Order Authorizing the Employment of Hilco Real Estate, LLC including approval payment for such professional services in accordance

with the terms of the commission and fees, inclusive of reimbursement of any expenses incurred, as set forth in the Application and exhibits thereto. *See* Application at Dkt. No. 133; *see also* Order at Dkt. No. 139.

9. Debtor and Landlord entered into a pre-petition lease of non-residential real property (the “Lease”) that is described in detail in the Modification Agreement. In light of the changes in market conditions, with the assistance of Hilco, the Debtor and Landlord were able to negotiate modified terms for the Lease sufficient to cause the Lease to be economically advantageous for the Debtor to assume the Lease as modified by the Modification Agreement (the modified Lease shall hereafter be referred to as the “Modified Lease”).

10. Debtor believes that it would be prohibitively expensive, disruptive and cumbersome to locate and secure new location for their restaurant that is now operating in the premises that is the subject of the Modified Lease and as such, given the favorable terms that have been negotiated in the Modified Lease the Debtor hereby seeks approval of its assumption of the Modified Lease.

11. On July 13, 2017 the Debtor filed a Motion pursuant to §363 to Sell its primary assets and therein included a request that certain unexpired leases be assumed and assigned to the buyer [Doc. 141] (the “Sale Motion”). The Sale Motion is set for hearing on September 27, 2017. Debtor requests the effective date of the relief requested herein be upon the entry of an order granting the Sale Motion (the “Sale Order”).

#### **REQUEST FOR AN ORDER ALLOWING ASSUMPTION OF THE MODIFIED LEASE**

12. In the exercise of its business judgment, Debtor respectfully seeks to assume the Modified Lease including a waiver of the cure costs provided for under 11 U.S.C. § 365(a) and Fed. R. Bankr. P. 6006. *See* Modification Agreement at p. 3 ¶ 11.

13. The terms of the Modified Lease are sufficient to provide adequate assurances to the Landlord.

14. Debtor is aware that the Secured Creditors with whom the Debtor is negotiating a Stalking Horse sale agreement desire to assume the Modified Lease and assumes that any other interested bidder would likewise wish to assume that agreement where it would be not be cost effective, disruptive, and cumbersome to locate and secure a new location for the restaurant currently operating in the premises that is the subject to the Modified Lease.

15. This Motion is not intended to encompass each and every executory contract or unexpired lease of the Debtor. There are other unexpired leases and executory contracts not addressed herein and it is not the intention of the Debtor by omission of any such lease or contract from this Motion to imply the assumption or rejection of such lease or contract by the filing of this Motion.

WHEREFORE Debtor requests the following relief:

A. That the Court make and enter its Order authorizing and permitting the assumption of the Modified Lease between Debtor and the Landlord in accordance with the terms set forth in the Modified Lease;

B. That the effective date of the relief requested herein be the same date as the entry of the Sale Order; and

C. That the Debtor and its estate have such other and further relief as may be justified in the premises.

**CONCLUSION**

WHEREFORE, Debtor respectfully requests entry of an order granting the relief requested herein and such other and further relief as this Court deems just and proper.

Attached hereto as Exhibit "B" is a proposed order granting the relief requested herein.

Respectfully submitted,

*s/ Lysbeth L. George*

---

Mark A. Craige, OBA No. 1992  
-Of the Firm-  
CROWE & DUNLEVY  
A Professional Corporation  
500 Kennedy Building  
321 South Boston Avenue  
Tulsa, Oklahoma 74103-3313  
Telephone: 918.592.9800  
Facsimile: 918.592.9801  
mark.craige@crowedunlevy.com

and

William H. Hoch, OBA No. 15788  
Lysbeth L. George, OBA No. 30562  
-Of the Firm-  
CROWE & DUNLEVY  
A Professional Corporation  
Braniff Building  
324 North Robinson Avenue, Suite 100  
Oklahoma City, OK 73102-8273  
Telephone: (405) 234-3245  
Facsimile: (405) 272-5203  
Will.hoch@crowedunlevy.com  
lysbeth.george@crowedunlevy.com

COUNSEL FOR DEBTOR

**FOURTH AMENDMENT OF LEASE**

THIS FOURTH AMENDMENT OF LEASE ("Amendment") is made this 14 day of September, 2017, to be effective July 1, 2017 (the "Effective Date"), by and BETWEEN JONES LANG LASALLE AMERICAS, INC., as Receiver for certain property at 300 Highway 78 East, Jasper, Alabama 35501, a/k/a The Jasper Mall pursuant to Order of the Circuit Court of Walker County, Alabama entered March 15, 2017 in Civil Action No. 64-CV-2017-900070.00 ("Landlord") and EATERIES, INC., a Delaware corporation, d/b/a Garfield's Restaurant and Pub® ("Tenant").

**WITNESSETH:**

WHEREAS, under that certain lease dated September 23, 1997 between Landlord and Tenant (which with any and all amendments and letter agreements is the "Lease"), Landlord leased to Tenant those premises numbered C-IO and containing a total area of approximately 4,750 square feet ("Leased Premises") in the JASPER MALL ("Shopping Center").

WHEREAS, Tenant filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code on the April 18, 2017, in the United States Bankruptcy Court for the Western District of Oklahoma (the "Court"), bearing Case Number 17-11444 (the "Bankruptcy"); and

WHEREAS, Landlord and Tenant desire to modify the provisions of the Lease upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual promises herein contained, the parties hereto, intending to be legally bound hereby, covenant and agree as follows:

1. The effective date of this Amendment shall be July 1, 2017.
2. The provisions of Paragraph 3(b) and (c) (*Basic Annual Rental – Modified Term*) in the Third Amendment and Extension of Lease effective July 1, 2013 ("3<sup>rd</sup> Amendment") are deleted and the following provisions are substituted in their stead:

" (b) During the period September 1, 2014 and ending on June 30, 2017, the amount of \$92,625.00, payable in equal monthly installments of \$7,718.75.

(c) During the period July 1, 2017 and ending on August 31, 2019, the amount of \$77,625.00, payable in equal monthly installments of \$6,468.75.

(d) During the period September 1, 2019 and ending on August 31, 2023, the

amount of \$86,887.50, payable in equal monthly installments of \$7,240.63.”

3. The provisions of Paragraph 4 (*Basic Annual Rental – Option Term*) in the 3<sup>rd</sup>

Amendment are deleted and the following provisions are substituted in their stead:

“If the option is exercised, during the Option Term beginning September 1, 2023 and ending on August 31, 2028, Tenant's Basic Annual Rental shall be \$97,076.25, payable in equal monthly installments of \$8,089.69.”

4. The provisions of Paragraph 5(b) and (c) (*Percentage Rental – Modified Term*) in

the 3<sup>rd</sup> Amendment are deleted and the following provisions are substituted in their stead:

“ (b) During the period September 1, 2014 and ending on June 30, 2017 the Tenant's Percentage Rental shall be Five Percent (5%) of Gross Sales in excess of One Million Eight Hundred Fifty Two Thousand Five Hundred and no/100 Dollars.(\$1,852,500.00) as set out in the Lease.

(c) During the period July 1, 2017 and ending on August 31, 2019 the Tenant's Percentage Rental shall be Five Percent (5%) of Gross Sales in excess of One Million Five Hundred Fifty Two Thousand Five Hundred and no/100 Dollars (\$1,552,500.00) as set out in the Lease.

(d) During the period September 1, 2019 and ending on August 31, 2023, the Tenant's Percentage Rental shall be Five Percent (5%) of Gross Sales in excess of One Million Seven Hundred Thirty Seven Thousand Seven Hundred and Fifty and no/100 Dollars (\$1,737,750.00) as set out in the Lease.”

5. The provisions of Paragraph 6 (*Percentage Rental – Option Term*) in the 3<sup>rd</sup>

Amendment are deleted and the following provisions are substituted in their stead:

“If the option is exercised, during the Option Term beginning September 1, 2023 and ending on August 31, 2028, Tenant's Percentage Rental shall be Five Percent (5%) of Gross Sales in excess of One Million Nine Hundred Forty One Thousand Five Hundred and Twenty Five and no/100 Dollars (\$1,941,525.00) as set out in the Lease.”

6. **Waiver.** As of the Effective Date of this Agreement, Landlord hereby

waives all claims against Tenant relating to any pre-petition rent, excluding reconciliation of extra charges. As of the Effective date of this Agreement, Tenant acknowledges that, to Tenant's knowledge, Tenant has no claims for unpaid sums or claims that Landlord has not complied with the terms of the Lease.

7. **Not An Offer.** This Agreement shall not be binding until executed and delivered

by both parties. Landlord and Tenant acknowledge that this Agreement remains subject to the approval of the Court.

8. **Consent.**

(a) Landlord represents and warrants that Landlord has obtained all consents of third parties, if any, necessary for the execution and performance of this Agreement.



Landlord shall defend, indemnify and save harmless Tenant from and against all losses, claims, demands, damages, liabilities, costs and reasonable attorneys' fees resulting from a breach of, or inaccuracy in, the aforesaid representation and warranty.

(b) Tenant represents and warrants that Tenant has obtained all consents of third parties, if any, necessary for the execution and performance of this Agreement. Tenant shall defend, indemnify and save harmless Landlord from and against all losses, claims, demands, damages, liabilities, costs and reasonable attorneys' fees resulting from a breach of, or inaccuracy in, the aforesaid representation and warranty.

9. **Section 363 Sale.** Tenant may assign this Lease through the Bankruptcy pursuant to a sale under 11 U.S.C. Section 363.

10. **Court Approval.** The Parties understand the Tenant intends to assume the Lease as modified by this Agreement and that the assumption is subject to approval by the Court pursuant to 11 U.S.C. Section 363 (the "Assumption Order"). Tenant agrees to file a Motion with the Court seeking entry of the Assumption Order within 7 days after the execution of this Agreement by all of the Parties and diligently prosecute the same. Landlord agrees to cooperate with Tenant in seeking the Court's approval.

11. **Cure Costs.** Upon execution of this Agreement by all Parties and payment of all obligations due hereunder at the time of the entry of the Assumption Order, then all of the Tenant's obligations pursuant to 11 U.S.C. §365(b)(1)(A), (B) and (C) shall be deemed fully satisfied.

12. **Whole Agreement.** This Agreement sets forth the entire agreement between the parties with respect to the matters set forth herein. There have been no additional oral or written representations or agreements. Except as extended and amended herein, the Lease between the parties shall remain unamended and in full force and effect, and other than the amendments contained herein, this Agreement in no way constitutes a waiver of any other rights or remedies of Landlord and Tenant, respectively, that may exist under the Lease. In case of any inconsistency between the provisions of the Lease and this Agreement, the latter provisions shall govern and control. Capitalized terms used in this Agreement that are not defined herein shall have the meanings given them in the Lease.

13. This Amendment shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors, administrators, successors and assigns.

*[Remainder of page intentionally blank; signatures on following page]*

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed on the day and year first above written.

**LANDLORD:**

**JONES LANG LASALLE AMERICAS, INC.**, as Receiver for certain property at 300 Highway 78 East, Jasper, Alabama 35501, a/k/a The Jasper Mall pursuant to Order of the Circuit Court of Walker County, Alabama entered March 15, 2017 in Civil Action No. 64-CV-2017-900070.00

By: 

Name: **GREGORY T. MALONEY**  
Title: **President and CEO, Retail**

**TENANT:**

**EATERIES, INC.**, a Delaware corporation

By: 

Name: William C. Liedtke III

Title: Vice President

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

_____	)	Chapter 11
In re:	)	
	)	
EATERIES, INC., <i>et al.</i> <sup>1</sup>	)	Case No. 17-11444-SAH
	)	
Debtors.	)	(Jointly Administered)
_____	)	

**ORDER GRANTING MOTION TO ASSUME UNEXPIRED LEASE OF NON-RESIDENTIAL REAL PROPERTY FOR JASPER MALL LOCATION**  
[RELATES TO THE MOTION AT DKT. \_\_\_\_\_]

Upon the *Motion to Assume Unexpired Lease of Non-Residential Real Property for Jasper Mall Location* (the “Motion to Assume”) [Dkt. No. \_\_\_\_\_] filed on September 14, 2017, and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and this being a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and venue being proper pursuant

\_\_\_\_\_  
<sup>1</sup> The affiliated Debtors are Eateries, Inc. and GRP of Zanesville, LLC, Case Nos. 17-11444 and 17-11445.

to 28 U.S.C. §§ 1408 and 1409, and notice of the Motion having been electronically served using the Court's CM/ECF system upon those parties registered for electronic service on September 14, 2017, and via the United States Postal Service, first-class mail, postage pre-paid, to the parties on the Master Service List on September 14, 2017, and no objection having been filed or served within the time prescribed, such period having expired on September 28, 2017; and it appearing that the relief requested in the Motion to Assume is in the best interests of these estates, and all creditors and parties-in-interest of these estates; and the Debtors having provided adequate and appropriate notice of this Motion under the circumstances; and based upon the representations of Debtors as set forth in the Motion, and after due deliberation and sufficient cause appearing therefore, it is hereby

ORDERED, DETERMINED, ADJUDGED AND DECREED THAT:

1. The Motion to Assume is GRANTED.
2. Debtor is hereby authorized and permitted to assume the Modified Lease between Debtor and the Landlord in accordance with the terms set forth in the Modified Lease;
3. The effective date of the relief requested herein shall be the same date as the entry of the Order Granting 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; and
5. All findings of fact in this Order are based upon representations of counsel.

IT IS SO ORDERED.

###

Submitted for Entry:

*s/ Lysbeth L. George*

---

Mark A. Craige, OBA No. 1992  
-Of the Firm-  
CROWE & DUNLEVY  
A Professional Corporation  
500 Kennedy Building  
321 South Boston Avenue  
Tulsa, Oklahoma 74103-3313  
Telephone: 918.592.9800  
Facsimile: 918.592.9801  
mark.craige@crowedunlevy.com

and

Lysbeth L. George, OBA No. 30562  
-Of the Firm-  
CROWE & DUNLEVY  
A Professional Corporation  
Braniff Building  
324 North Robinson Avenue, Suite 100  
Oklahoma City, OK 73102-8273  
Telephone: (405) 234-3245  
Facsimile: (405) 272-5203  
lysbeth.george@crowedunlevy.com

PROPOSED COUNSEL FOR DEBTOR