

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

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

MOTION TO ASSUME UNEXPIRED LEASE OF NON-RESIDENTIAL REAL PROPERTY FOR UNIVERSITY MALL LOCATION AND PAY COMMISSIONS, 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 S&B’s Burger Joint location in

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

University Mall in Carbondale, Illinois, as modified by negotiation by and between Eateries and University Mall Realty LLC, University CH LLC, and University Nassim LLC, successor-in-interest to BA Properties, Inc. (University Mall Realty LLC, University CH LLC, and University Nassim LLC are collectively referred to herein as “Landlord”) pursuant to 11 U.S.C. § 365 and Fed. R. Bankr. P. 2002, 6006 and 9014, and to pay a commission to Hilco, Inc. (“Hilco”) for its assistance in the negotiations of the modified lease agreement. The renegotiated lease agreement between Eateries and the Landlord has been memorialized in Exhibit “A” hereto which shall hereinafter be referred to as the “Modified 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 several 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 a 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 13, 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 seek 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 ¶ 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. Debtor further believes that any other interested bidder would likewise wish to assume the Modified Lease as it would be costly, disruptive, and cumbersome to locate and secure a new location for the restaurant currently operating in the premises of 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.

REQUEST FOR AN ORDER ALLOWING PAYMENT OF COMMISSION TO HILCO

16. The Debtor has an agreement with Hilco to pay commission for their assistance with the renegotiations of several of the unexpired leases related to their various restaurant operations as approved by this Court. *See* Order at Dkt. No. 139. The Lease is one of the agreements with which Hilco has been involved.

17. The terms of compensation to be paid to Hilco are as follows:

(4) Compensation. As compensation for Hilco's Services, subject to approval by the Bankruptcy Court, the Company will pay to Hilco compensation in accordance with the following.

(a) Certain Definitions.

(i) “Restructured Lease” means any Lease for which the Company enters into a written agreement with the applicable landlord that has the effect of modifying the terms of such Lease.

(ii) “Restructured Lease Savings Fee” means, for any Restructured Lease, an amount equal to a base fee of \$2,500, plus the aggregate Restructured Lease Savings multiplied by seven and one-half percent (7.50%); provided, further, that the Restructured Lease Savings Fee shall be capped at \$10,000 for each of the following locations: (x) State College, Pennsylvania, (y) Selinsgrove, Pennsylvania, and (z) Carbondale, Illinois.

(iii) “Restructured Lease Savings” means an amount equal to the net savings created by a Restructured Lease, including (without limitation) the sum of (x) the aggregate reduction of base rent, percentage rent, CAM, real estate taxes, property insurance, and deferred maintenance or maintenance obligations (including clean up) payable under a lease (inclusive of term shortening), and (y) the aggregate amount of any tenant improvement allowance dollars or landlord capital contribution secured plus any past due costs, cure costs or expenses waived, minus any restructuring, termination or similar fees paid by the Company to the counterparty to the leased property, or any other party, in connection with the Restructured Lease. Where term is extended and the rent during such extended period is not specifically fixed or calculable within a leased property, Restructured Lease Savings shall be based on the last year's rent immediately prior to the extended period under a leased property.

(b) Restructuring. For each Lease that becomes a Restructured Lease, Hilco shall earn a fee equal to the Restructured Lease Savings Fee. The amounts payable on account of a Restructured Lease shall be paid in monthly installments, commencing upon the closing of the transaction having the effect of restructuring the Lease and continuing on the first calendar day of each month thereafter, in an amount equal to the lesser of (x) the Restructured Lease Savings Fee which remains due and owing or (y) 100% of the Company's monthly realized Restructured Lease Savings for such Lease until the full amount of the Restructured Lease Savings Fee for such Lease is paid in full; provided, however, that any amounts still payable to Hilco on account of any

Restructured Leases shall be immediately due and owing in full upon the expiration of the Term.

(c) Retainer. Omitted.

(d) Free and Clear. All fees payable to Hilco hereunder shall be free and clear of any liens, claims and encumbrances, including the liens of any secured parties.

(5) Commission for Liquor License Sales. Upon the successful close of a sale of a liquor license owned by the Company, Hilco shall earn a commission on such sale payable at closing in a percentage amount equal to ten percent (10%) of the purchase price and/or other consideration paid for such liquor license.

(6) Expenses. All Expenses (defined below) shall be borne by the Company, and Hilco shall be entitled to reimbursement from the Company for all Expenses. "Expenses" means all reasonable, documented (through receipts or invoices) out-of-pocket expenses incurred by Hilco in connection with its performance of its Services hereunder, including, without limitation: reasonable expenses of advertising, marketing, coach travel and transportation, including, the cost of out-of-town travel and postage and courier/overnight express fees and other mutually agreed upon expenses incurred in connection with performing the services required by this Agreement.

18. The Modified Lease provides, amongst other renegotiated benefits, \$822,109.00 in savings to the Debtor, therefore, in accordance with the terms of the Real Estate Consulting Agreement between Hilco and Eateries, Hilco is entitled to a commission of \$10,000.00 to be paid in monthly installments as provided in the Real Estate Consulting Agreement (the "Commission"). *See* Real Estate Consulting Agreement at ¶¶ 4, 6 attached as Exhibit 1 to Application to Employ Hilco [Dkt. No. 133].

19. Upon entry of an order granting this Motion, Hilco will have fully earned the Commission.

20. Debtor requests this Court authorize payment of the Commission as a part of the Order granting 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 Court authorize payment of the Commission to Hilco as a part of the Order granting this Motion;

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

D. 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/ Mark A. Craige

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COUNSEL FOR DEBTOR

THIRD LEASE AMENDMENT

THIS THIRD LEASE AMENDMENT ("Agreement") made and entered into as of this 26 day of June, 2017, by and between UNIVERSITY MALL REALTY LLC, UNIVERSITY CH LLC, UNIVERSITY NASSIM LLC, each an Illinois limited liability company, successor-in-interest to BA Properties, Inc. ("Landlord"), and EATERIES, INC., a Delaware Corporation d/b/a "S&B's Burger Joint" ("Tenant").

A. Landlord and Tenant have heretofore entered into that certain lease dated July 27, 2012 for premises described as Space Number 1030, containing approximately 5,054 square feet (the "Premises"), in the property known as University Mall, located in Carbondale, Illinois (the Shopping Center") (which lease, together with that certain First Lease Amendment dated as of December 18, 2013 and that certain Second Lease Amendment dated as of August 26, 2016, and any and all other prior amendments, extensions, assignments, or other instruments, is hereinafter referred to as the "Lease").

B. Tenant has sought protection in bankruptcy in a matter filed in the United States Bankruptcy Court for the Western District of Oklahoma (the "Court"), bearing Case Number 17-11444 (the "Bankruptcy").

C. The parties mutually desire to amend the Lease, all on and subject to the terms and conditions hereof.

NOW THEREFORE, in consideration of the mutual agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. **Effective Date.** The effective Date of this Agreement shall be May 1, 2017.
2. **Term.** The Lease Term shall hereby expire April 30, 2018 (which extended period shall be referred to herein as the "Extended Term"), unless sooner terminated in accordance with its terms.
3. **Gross Rent.**
 - (a) Commencing on the Effective Date and continuing through the Extended Term, in lieu of Minimum Rent, Percentage Rent, Center Expenses, Taxes, Promotion Fund Charge, and other Additional Rent charges as per the terms of the Lease, Tenant shall pay an annual gross rent in the amount of Seven and One Half percent (7.5%) of all Gross Sales at the Premises (the "Gross Rent") in accordance to the reporting and payment procedure more particularly described in Article 3 of the Lease.
 - (b) Notwithstanding the aforementioned and anything contrary herein or in the Lease, Tenant shall continue to pay for all the utilities consumed by and at the Premises.
4. **Option to Renew.** Tenant shall have two (2) consecutive options to renew this Lease for a period of one (1) year, each. Tenant may exercise each option upon a minimum of Sixty (60) days' written notice prior to expiration of the then current Term. Rent during each option term shall continue to be the Gross Rent as described in paragraph 3 herein.
5. **Waiver.** As of the Effective Date of this Agreement, Landlord hereby waives all claims against Tenant relating to any pre-petition rent and Tenant Improvement sums.
6. **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. The capitalized terms used in this Agreement that are not defined herein shall have the meanings given them in the Lease. Under no circumstances shall this Agreement be deemed to grant any right to Tenant to further extend the Lease, and any rights to extend or renew contained in the Lease are hereby deleted.

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.

IN WITNESS WHEREOF, the Landlord and Tenant have duly executed this Agreement as of the day and year first above written.

LANDLORD:

UNIVERSITY MALL REALTY LLC, UNIVERSITY CH LLC, UNIVERSITY NASSIM LLC, each an Illinois limited liability company

By: University Mall Realty LLC

Title: Authorized Agent

By: 

Name: Igal Namdar

Title: Managing Member

TENANT:

EATERIES, INC., a Delaware Corporation d/b/a "S&B's Burger Joint"

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> ¹)	Case No. 17-11444-SAH
)	
Debtors.)	(Jointly Administered)
_____)	

**ORDER GRANTING MOTION TO ASSUME UNEXPIRED LEASE OF NON-RESIDENTIAL REAL PROPERTY FOR UNIVERSITY MALL LOCATION
AND PAY COMMISSIONS
[RELATES TO THE MOTION AT DKT. _____]**

Upon the *Motion to Assume Unexpired Lease of Non-Residential Real Property for University Mall Location and Pay Commissions* (the “Motion to Assume”) [Dkt. No. _____] filed on August 11, 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

¹ The affiliated Debtors are Eateries, Inc. and GRP of Zanesville, LLC, Case Nos. 17-11444 and 17-11445.

venue being proper pursuant to 28 U.S.C. §§ 1408 and 1409, 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. Debtor is further authorized to pay the Commission of \$10,000.00 to be paid to Hilco in monthly installments as provided in the Real Estate Consulting Agreement;
4. 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.

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Submitted for Entry:

s/ Mark A. Craige

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