

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 OHIO VALLEY MALL SHOPPING CENTER LOCATION,
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

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

unexpired lease of non-residential real property related to the Garfield's Restaurant and Pub location in the Ohio Valley Mall Shopping Center located in Richland, Ohio as modified by negotiation by and between Eateries and the Ohio Valley Mall Company, a limited partnership ("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 "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 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 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. 4, ¶ 9.

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.

REQUEST FOR AN ORDER ALLOWING PAYMENT OF COMMISSION TO HILCO

16. The Debtor has an agreement with Hilco to pay a 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 an added benefit of a termination right 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 \$2,500.00 to be paid in monthly installments as provided in the Real Estate Consulting Agreement (the "Commission"). *See* Real Estate Consulting Agreement at ¶¶ 4 and 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

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

ACJ/RLM/aes, 05/03/17; 06/20/17

LEASE AMENDMENT NO. 4

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THIS LEASE AMENDMENT NO.4, made as of this 28th day of July, 2017, by and between OHIO VALLEY MALL COMPANY, an Ohio limited partnership, having offices at 5577 Youngstown-Warren Road, Niles, Ohio 44446 (hereinafter referred to as "Landlord"), and EATERIES, INC., a Delaware corporation, having a permanent business address at 14504 Hertz Quail Springs Parkway, Oklahoma City, OK 73134 (hereinafter referred to as "Tenant").

WITNESSETH:

WHEREAS, there is a Lease in effect between the parties hereto dated January 12, 1999, as amended and/or supplemented by a Satellite Dish Installment Policy Agreement dated January 25, 2006, a First Lease Amendment dated February 27, 2009, a Lease Amendment No. 2 dated November 19, 2009 and a Lease Amendment No. 3 dated December 16, 2011, for Unit No. 695, Ohio Valley Mall Shopping Center, located in the Township of Richland, County of Belmont, and State of Ohio (hereinafter referred to as the "Lease"); and

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").

WHEREAS, the parties hereto are desirous of amending certain sections of said Lease in the manner hereinafter provided.

NOW, THEREFORE, for and in consideration of the sum of One Dollar (\$1.00) paid by each of the parties hereto to the other, and in further consideration of the mutual covenants and promises herein contained, the sufficiency and receipt of which are hereby acknowledged by

1 each of the parties hereto, it is agreed that said Lease be, and is hereby amended in the following
2 respects:

3 1. This Lease Amendment No. 4 is legally binding as of the date of its mutual
4 execution. Unless specifically stated to the contrary, the amendments, modifications and/or
5 additions set forth herein will become effective as of May 1, 2017 (the "Effective Date").

6 2. From and after the Effective Date, Clause 53 of the Lease entitled "Tenant's
7 Cancellation Privilege" is hereby deleted in its entirety and replaced with the following:

8 53. Tenant's Cancellation Privilege
9

10 Tenant is granted the right and privilege to cancel and terminate this Lease
11 at the end of the "Measuring Period", which means the period of time commencing
12 March 1, 2017 and ending February 28, 2018 by giving a written notice of its
13 intention to do so after said Measuring Period, provided:

- 14
15 (a) Tenant is not in default beyond any applicable notice and cure
16 period of any of the terms, covenants and provisions of this
17 Lease at the time Landlord receives Tenant's notice or at any
18 time throughout the Measuring Period until Tenant's
19 cancellation becomes effective;
20
21 (b) Tenant's gross sales, as defined in Clause 5 of this Lease, are
22 less than \$1,100,000.00 during the Measuring Period, to be
23 evidenced by a certification of a certified public accountant or
24 Tenant's Chief Executive Officer or Chief Financial Officer
25 submitted to Landlord within thirty (30) days after said
26 Measuring Period;
27
28 (c) Tenant has continuously operated in the Demised Premises
29 throughout the Measuring Period; and
30
31 (d) Tenant provides said written notice to Landlord within thirty
32 (30) days after the Measuring Period.
33

34 Provided Tenant has complied with subsections (a), (b), (c), and (d) above,
35 this Lease shall be cancelled and terminated effective August 31, 2018.

36 The foregoing right and privilege to cancel and terminate this Lease shall
37 terminate automatically on Tenant's default of this Lease beyond notice and cure
38 periods, Tenant's cessation of business in the Demised Premises, Tenant's

1 change in use from that as set forth in Clause 6 of this Lease, Tenant's assignment
2 of this Lease, transfer of this Lease by operation of law outside of the Bankruptcy,
3 subletting of any portion of the Demised Premises, or any renewal or extension of
4 this Lease.

5
6 In the event Tenant's gross sales are less than \$1,100,000.00 as set forth
7 in (b) above, Landlord shall have the right to cancel and terminate this Lease at
8 any time thereafter by providing Tenant thirty (30) days' notice.

9 3. Tenant agrees that the Landlord's Agreement Regarding Equipment dated
10 December 26, 2002 is hereby deemed null and void and of no further force as of the Effective
11 Date of this Lease Amendment No. 4, due to the passage of time and Tenant's and GE Capital's
12 failure to notify Landlord of the expiration of said agreement.

13 4. Landlord hereby waives and forgives past due rentals and other existing monetary
14 defaults through April 30, 2017. Accordingly, should Tenant reject the Lease in the Bankruptcy
15 pursuant to 11 U.S.C. Section 365, then the damages of Landlord shall be calculated on the
16 basis of the rent and charges due to Landlord for the balance of the term calculated according
17 to the provisions of the Lease prior to this Lease Amendment No. 4, giving no effect to the
18 provisions of this Lease Amendment No. 4 that either waive and forgive past due rentals and
19 other existing monetary defaults through April 30, 2017 or that reduce the amount of rent and
20 other charges otherwise due under the Lease; in such an instance, that portion of this Lease
21 Amendment No. 4 shall be null and void as if never executed.

22 5. Tenant may assign this Lease through the Bankruptcy pursuant to a sale under 11
23 U.S.C. Section 363. Tenant acknowledges that nothing contained in this Lease Amendment No.
24 4 may be considered to affect the enforceability under applicable nonbankruptcy law of any
25 provision in the Lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

1 6. Landlord and Tenant acknowledge that this Lease Amendment No. 4 remains
2 subject to the approval of the Bankruptcy Court identified above. Tenant shall diligently attempt
3 to gain such Bankruptcy Court approval, and assume the Lease, as quickly as practicable. If the
4 document approval and the lease assumption have not been accomplished within sixty (60) days
5 following execution of this Lease Amendment No. 4, Landlord may, in its sole discretion, treat
6 this Lease Amendment No. 4 as null and void.

7 7. In the event Tenant remains in possession of all or any part of the Demised
8 Premises after the expiration of the term of this Lease, Tenant shall be deemed a tenant of the
9 Demised Premises from month to month and shall pay holdover charges as specified in Clause
10 17 of the Lease without regard to the provisions set forth in this Lease Amendment No. 4 or any
11 other previous amendment, if any, that reduced the amount of rent and other charges.

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

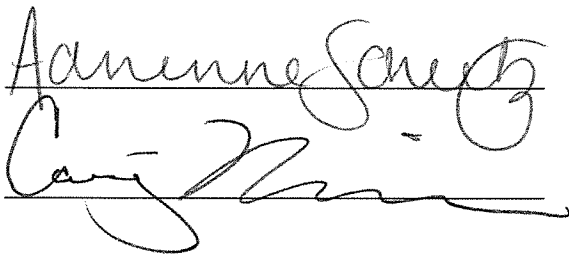
18 9. **Cure Costs.** Upon execution of this Agreement by all Parties and payment of all
19 obligations due hereunder at the time of the entry of the Assumption Order, then all of the
20 Tenant's obligations pursuant to 11 U.S.C. §365(b)(1)(A), (B) and (C) shall be deemed fully
21 satisfied.

1 All of the terms, covenants and conditions of said Lease, except as are herein specifically
2 modified and amended, shall remain in full force and effect and are hereby adopted and
3 reaffirmed by the parties hereto.

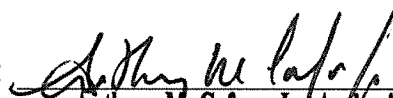
4 This Lease Amendment No. 4 shall inure to the benefit of, and be binding upon, the parties
5 hereto and their respective successors and assigns.

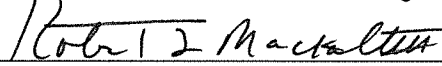
6 IN WITNESS WHEREOF, the parties hereto have caused this Lease Amendment No. 4
7 to be signed upon the day and year first above written.

Signed in the presence of:
(Each as to both signatures)

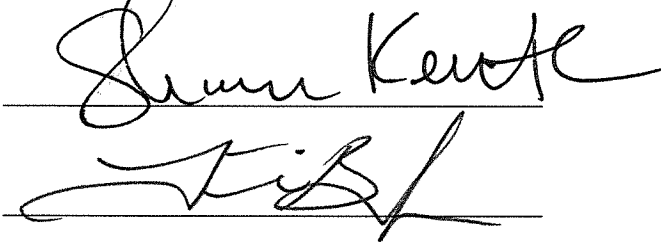


LANDLORD: OHIO VALLEY MALL
COMPANY


By: 
Anthony M. Cafaro, Jr., Authorized Agent

By: 
Robert L. Mackall III
Authorized Agent

Signed in the presence of:
(Each as to both signatures)



TENANT: EATERIES, INC.



By: 
Preston Stockton, President

By: 
William C. Liedtke III, Vice President

1 STATE OF OHIO)
2) SS:
3 COUNTY OF TRUMBULL)
4

5 Personally appeared before me, the undersigned, a Notary Public in and for said County
6 and State, Anthony M. Lafaro, Jr. and Robert L. Mackall, III, known to me to be
7 the Authorized Agents of OHIO VALLEY MALL COMPANY, the partnership which executed the
8 foregoing instrument for and on behalf of said partnership, being thereunto duly authorized; that
9 the same is their free act and deed as such Authorized Agents and the free act and deed of said
10 partnership.

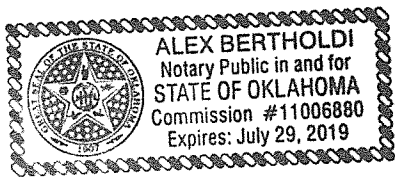
11
12 IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at Niles, Ohio,
13 this 26th, day of June, 2017.
14

15
16
17 
18 Notary Public
19 
20 CASSIDY NICHOLSON
21 Notary Public - State of Ohio
22 Commission Expires April 18, 2021

23 STATE OF OKLAHOMA)
24) SS:
25 COUNTY OF OKLAHOMA)
26

27 Personally appeared before me, the undersigned, a Notary Public in and for said County
28 and State, Preston Stockton and William C. Liedtke III, known to me to be the President and
29 Vice President, respectively, of EATERIES, INC., the corporation which executed the foregoing
30 document, who acknowledged that they did sign and seal the foregoing instrument for and on
31 behalf of said corporation, being thereunto duly authorized by its Board of Directors; that the
32 same is their free act and deed as such officers and the free act and deed of said corporation.
33

34 IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at
35 Oklahoma, this 25 day of July, 2017.
36

37
38 
39 ALEX BERTHOLDI
40 Notary Public in and for
41 STATE OF OKLAHOMA
42 Commission #11006880
43 Expires: July 29, 2019

44

Notary Public

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

)	
In re:)	Chapter 11
)	
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 OHIO VALLEY MALL SHOPPING CENTER LOCATION AND PAY COMMISSIONS
[RELATES TO THE MOTION AT DKT. _____]**

Upon the *Motion to Assume Unexpired Lease of Non-Residential Real Property for Ohio Valley Mall Shopping Center 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. §

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

157(b)(2); and 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 \$2,500.00 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.

###

Submitted for Entry:

s/ Mark A. Craige

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