

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In Re: Case No. 18-17542-EPK
H2O BAGEL NO. 2, LLC, Chapter 11
Debtor. (Lead Case)
(Jointly Administered)

In Re: Case No. 18-17544-EPK
THE ORIGINAL BROOKLYN STORE, LLC, Chapter 11
Debtor.

In Re: Case No. 18-18264-EPK
H2O BAGEL PARKLAND, LLC, Chapter 11
Debtor.

**MOTION TO ASSIGN LEASE AND TO SELL SUBSTANTIALLY ALL
PROPERTY FREE AND CLEAR VIA PRIVATE SALE**

Local Rule 6004-1(B) Concise Statement:

a. Purchaser: Parkland Bagel, LLC, which is owned by Richard Tompkins, who is the son of the wife of Joseph Wortley, who is the principal of the Debtor's debtor in possession financier, 52318 Bagel, LLC.

b. Terms: Free and clear assignment/sale of: (i) assumed lease of nonresidential real property located at 7679 N. State Road, Parkland, Florida 33067; and (ii) substantially all property of the Debtor, for \$100,000;

c. Private Sale: Not subject to higher and better offers;

d. Additional Purchaser Protection: Not applicable;

e. Transfer of Personal Identifiable Information: Not applicable;

f. Lienholders: (i) 52318 Bagel, LLC, holder of super-priority debtor in possession lien; and (ii) Paradise Bank, lien on all personal property.

H2O Bagel Parkland, LLC (the “Debtor”), by and through its undersigned counsel and pursuant to 11 U.S.C. §§ 363(b), 363(f), 365(f), Federal Rules of Bankruptcy Procedure 6004 and 6006, and Local Rule 6004-1, hereby requests approval of the Debtor’s assignment of its lease, and sale of substantially all of its personal property, to Parkland Bagel, LLC (the “Purchaser”). In support, the Debtor states as follows:

BACKGROUND

1. On July 9, 2018, the Debtor filed a voluntary petition under Chapter 11, thereby commencing this case.¹ The Debtor has continued to manage its property as a debtor in possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

2. As of the date hereof, no creditor’s committee has been appointed in this case. In addition, no trustee or examiner has been appointed.

3. The Debtor operates a Brooklyn Water Bagels restaurant franchise located at 7679 N. State Road, Parkland, Florida 33067, which the Debtor leases from BREM Parkland (the “Landlord”) pursuant to a ten-year renewable lease (the “Lease”).

4. On March 1, 2019, the Court approved the Debtor’s assumption of the Lease. ECF No. 168.

5. On September 11, 2018, the Court entered its *Final Order Authorizing (A) Debtors in Possession to Obtain Secured Post-Petition Financing, and Modifying the Automatic Stay* [ECF No. 67], thereby approving debtor in possession financing from 52318 Bagel, LLC.

¹ On June 22, 2018, a voluntary petition under Chapter 11 was filed by The Original Brooklyn Store, LLC. On June 22, 2018, a voluntary petition under Chapter 11 was filed by H2O Bagel No. 2, LLC. On July 20, 2018, the Court issued an order for joint administration of the three abovementioned Chapter 11 cases.

6. The Debtor's assets consist of the Lease and equipment.

7. Paradise Bank holds an undisputed claim (Claim No. 6-1) in the amount of \$4,883,472.01 secured by a first-position lien on the Debtor's personal property, including the Lease.

8. The Debtor's property is worth significantly less than Paradise Bank's claim.

9. Recently, the Debtor entered into the *Contract of Sale of All Business Assets* (the "Contract") with the Purchaser to, free and clear of all claims, liens, and encumbrances, assign the Lease, and sell substantially all of the Debtor's non-cash property, to the Purchaser for \$100,000. A copy of the Contract is attached hereto as Exhibit A.

10. The Purchaser's principal is the son of the wife of Joseph Wortley, who is the principal of 52318 Bagel, LLC.

11. While Section 3 of the Contract provides that Paradise Bank shall receive "all of the net proceeds from this transaction," the Debtor, the Purchaser, 52318 Bagel, LLC, and Paradise Bank have subsequently agreed that the \$100,000 in proceeds of the sale shall vest in the Debtor's estate to be distributed, pursuant to a subsequent Court order, to fund carveouts for: (a) U.S. Trustee's fees; (b) administrative claims; (c) repayment of the debtor in possession loan to 52318 Bagel, LLC, and (d) a 5% dividend to holders of allowed unsecured claims, with Paradise Bank receiving a replacement lien on the \$100,000 in proceeds subject to such carveout.

RELIEF REQUESTED

12. Through this Motion, the Debtor seeks approval of the Contract, as modified in Paragraph 11 above, and authorization to assign the Lease, and to sell all of the Debtor's non-cash/non-motor-vehicle property, to the Purchaser.

13. 11 U.S.C. § 363(b)(1) provides, in relevant part, that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate” Pursuant to Federal Rule of Bankruptcy Procedure 6004(f)(1), “[a]ll sales not in the ordinary course of business may be by private sale or by public auction.” Courts have uniformly held that approval of a proposed sale under section 363(b) is appropriate if found to be in the sound business judgment of the trustee. *See, e.g., In re Chateaugay Corp.*, 973 F.2d 141, 143 (2d Cir. 1992). Such a sale should then be approved if the sale price is fair and reasonable, interested parties are provided with reasonable and adequate notice, and the purchaser is proceeding in good faith. *See In re Weatherly Frozen Food Group, Inc.*, 149 B.R. 480, 483 (Bankr. N.D. Ohio 1992); *see In re Abbotts Dairies of Pennsylvania*, 788 F.2d 143, 147 (3d Cir. 1986). Pursuant to 11 U.S.C. § 363(f), the Debtor can sell property free and clear of all liens and encumbrances if one of several conditions is met.

14. The Debtor’s secured creditors, 52318 Bagel, LLC and Paradise Bank, have consented to the above-referenced free-and-clear assignment and sale. Accordingly, the assignment of the Lease, and the sale of the Debtor’s assets, can be approved by the Court on a free-and-clear basis pursuant to 11 U.S.C. § 363(f)(2).

15. The Debtor submits that the proposed assignment and sale discussed herein is in the best interest of the estate and its creditors and will cause the estate to realize the highest value for the Lease and the subject property. Such sale will result in a price that is fair and reasonable after adequate and reasonable notice to parties in interest.

16. Further, the fact that the Purchaser intends to continue operations at the leased premises provides adequately assurance to the Landlord pursuant to 11 U.S.C. § 365(f)(2)(B).

17. Therefore, the Debtor submits that the proposed assignment and sale constitutes the proper exercise of its sound business judgment and should be authorized.

18. Due to the fact that the Debtor is continuing to pay monthly rent on the leased premises, the Debtor requests that the 14-day stay of the effectiveness of an order granting this Motion be waived pursuant to Federal Rule of Bankruptcy Procedure 6004(h).

WHEREFORE, the Debtor respectfully requests an order of the Court: (a) approving Contact as modified herein; (b) authorizing the Debtor to assign the Lease and sell its non-cash assets to the Purchaser; and (c) waiving the Federal Rule of Bankruptcy Procedure 6004(h) fourteen-day stay of any order authorizing the proposed the same.

ATTORNEY CERTIFICATION

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this Court set forth in Local Rule 2090-1(A).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via Notice of Electronic Filing to those parties registered to receive electronic notices in this case on March 26, 2019.

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EXHIBIT A

CONTRACT OF SALE OF ALL BUSINESS ASSETS

THIS CONTRACT is made in Palm Beach County, Florida on February 25, 2019 by PARKLAND BAGEL, LLC, a Florida limited liability company and/or its assigns (Purchaser), and H2O BAGEL PARKLAND, LLC (Seller).

RECITAL

Purchaser desires to purchase and receive from Seller, and Seller desires to sell and assign to Purchaser, all of Seller's properties, assets, and business located at 7679 N. State Road 7, Parkland, Florida, 33067.

Seller is currently a debtor in bankruptcy proceedings in Case Number 18-17542-EPK in the United States Bankruptcy Court for the Southern District of Florida. The effectiveness of this Contract is subject to approval by such bankruptcy court.

THEREFORE, in consideration of the mutual promises and conditions contained in this Contract, the parties agree as follows:

Purchase and Sale

1. Purchaser agrees to purchase from Seller, and Seller agrees to sell and deliver to Purchaser on the closing date, all of Seller's assets described in the attached schedule (Exhibit A).

Purchase Price

2. The purchase price is \$100,000. A 10% deposit of \$10,000 is due concurrent with the execution of this Contract. The remaining \$90,000 is payable at the closing, in the form of a cashier's check or wire.

Seller's Debts, Liabilities, and Obligations

3. Purchaser shall not assume any debts, liabilities, or obligations of Seller with the exception of the Seller's lease for the property located at 7679 N. State Road 7, Parkland, Florida, 33067. Seller shall pay to Paradise Bank, 2420 N. Federal Hwy, Boca Raton, FL 33432, all of the net proceeds from this transaction in exchange for releases of any and all liens held by Paradise Bank on Sellers' assets.

Closing Date

4. The closing shall be within 30 days unless the parties agree to a different date or the bankruptcy court orders that closing shall take place at some time later than 30 days from the execution of this agreement. The time and place of the closing shall be established by agreement of the parties.

Seller's Obligations on Closing

5. At the closing, Seller shall deliver to Purchaser all deeds, bills of sale, endorsements, assignments, and other good and sufficient instruments of conveyance and transfer in a form satisfactory to Purchaser's counsel, and containing full warranties of title effective to vest in Purchaser good, absolute, and marketable title to the properties, assets, and business being transferred to Purchaser by Seller, free and clear of all liens, charges and encumbrances, and restrictions whatsoever. Seller shall deliver to Purchaser all contracts, and agreements, commitments, and rights pertaining to Seller's business, and other data relating to its assets, business, and operation, except its books of account and supporting records, corporate minute books, and stock transfer records of Seller. Seller shall take all

steps that may be required to put Purchaser in actual possession, operation, and control of the properties, assets, and business to be transferred under this Contract. All applicable sales, transfer, documentary, use, filing, and other taxes and fees that may be due or payable as a result of the conveyance, assignment, transfer, or delivery of the property, assets, or business to be conveyed and transferred under this Contract, whether levied on Seller or Purchaser, shall be paid by Seller.

Seller's Continuing Obligations

6. From time to time, after the closing, at the request of Purchaser, Seller shall execute and deliver to Purchaser other instruments of conveyance and transfer and take other action as Purchaser may reasonably require more effectively to convey, transfer to, and vest in Purchaser, and to put Purchaser in possession of, any of the properties or assets to be conveyed, transferred, and delivered to Purchaser under this Contract.

Organization of Seller

7. Seller represents that Seller is a limited liability company duly organized, validly existing, and in good standing under the laws of Florida and has all requisite corporate power and authority to carry on its business as it is presently being conducted, to enter into this Contract, and to carry out and perform the terms and provisions of this Contract.

Lawsuits and Proceedings; Subject to Court Approval

8. Seller discloses, and Purchaser accepts, that, Seller is currently the debtor in bankruptcy proceedings in Case Number 18-17542-EPK in the United States Bankruptcy Court for the Southern District of Florida. The effectiveness of this Contract may be subject to approval by such bankruptcy court. Upon full execution of this Contract, Seller will take steps reasonably necessary to secure the approval of the bankruptcy court.

Corporate Acts and Proceedings

9. Seller represents that the sale and transfer of assets by Seller, as provided for in this Contract, have been approved and consented to by the majority of the members of Seller, and all actions required by any applicable law or otherwise by members of Seller with regard to the sale and transfer of assets by Seller have been appropriately authorized and accomplished.

Condition of Tangible Assets: As-Is, Where-Is

10. Purchaser agrees that the furniture, fixtures, equipment, and other tangible assets of Seller being sold under this Contract are being purchased "As-Is, Where-Is."

Brokers

11. Seller and Purchaser both represent and agree that no brokers are involved in this transaction and that no broker-related commissions or fees shall arise out of this transaction

Conditions Precedent to Purchaser's Obligations

12. The obligation of Purchaser to consummate this Contract is subject to and conditioned on the satisfaction, at or prior to the closing, of all of the terms and conditions of this Contract to be complied with or performed by Seller at or prior to the closing, and subject to the following conditions:

(a) Purchaser shall obtain from the lessor of the premises located at 7679 N. State Road 7, Parkland, Florida, 33067, consent to the assignment of the rights of the lessee under the lease agreement dated June 30, 2016, between BREM Parkland, L.P., as Lessor, and H2O Bagel Parkland,

LLC as Lessee, and the lessor's agreement and/or the bankruptcy court's approval to substitute Parkland Bagel, LLC as the primary lessee under the terms of the lease agreement.

(b) The submission and court approval of a plan of reorganization by the Debtors-in-Possession and/or other motions or court filings necessary to effectuate the purposes of this contract.

Satisfaction of Debts

13. From and after the closing, Seller will not engage in any business or other activity, except as required to wind up and dissolve the corporation through its ongoing bankruptcy proceedings.

Fire or Casualty

14. Seller assumes all risk of destruction, loss, or damage due to fire or other casualty up to the date of closing. On the destruction, loss, or damage due to fire or other casualty of substantially all of the assets listed in Exhibit A, Purchaser shall have the option to terminate this Contract, and all rights of Purchaser and Seller shall terminate. Purchaser shall notify Seller within five days after receiving written notice of the destruction, loss, or damage due to fire or other casualty, of its decision to terminate this Contract. If Purchaser does not timely notify Seller of termination, this Contract shall remain in full force and effect, provided, however, that the purchase price shall be adjusted at the closing to reflect the destruction, loss, or damage. If Purchaser and Seller are unable to agree on the amount of the adjustment, the dispute shall be determined by an independent appraiser, and the determination shall be binding on both Purchaser and Seller.

Assignment

15. Rights under this Contract shall not be assignable by Seller without the consent of the Purchaser, which shall be unreasonably withheld. Purchaser may elect to assign its rights under this contract. Nothing in this Contract, expressed or implied, is intended to confer on any person, other than the parties and their successors, any rights or remedies under or by reason of this Contract.

Costs and Expenses

16. Each party shall pay the fees and charges of the attorneys retained by that party. All other expenses incurred shall be paid by the party that incurs them.

Amendment and Waiver

17. This Contract may be amended or modified at any time and in all respects, or any provision may be waived, by an instrument in writing executed by Purchaser and Seller or by either of them in the case of a waiver.

Counterpart Execution

18. This Contract may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute but one and the same instrument.

Parties in Interest

19. All the terms and provisions of this Contract shall be binding on and inure to the benefit of, and be enforceable by, Seller and Purchaser and their successors and assigns.

Integrated Contract

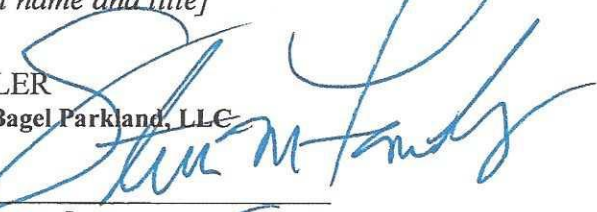
20. This Contract constitutes the entire agreement between the parties, and there are no agreements, understandings, restrictions, warranties, or representations between the parties other than those set forth or provided for in this Contract.

PURCHASER
Parkland Bagel, LLC

By 
[signature]

RICHARD Tompkins
[print name and title]

SELLER
H2O Bagel Parkland, LLC

By 
[signature]

STEVEN FASSBERG
[print name and title]