

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

IN RE:

PICCADILLY RESTAURANTS, LLC,
ET AL.,

DEBTORS

* CASE NO. 12-51127
*
* (JOINT ADMINISTRATION)¹
*
* CHAPTER 11
*
* JUDGE ROBERT SUMMERHAYS

MOTION FOR AUTHORITY TO (1) ASSUME THE AMENDED AND RESTATED EMPLOYMENT AGREEMENT, AS MODIFIED, WITH THOMAS J. SANDEMAN, PURSUANT TO SECTION 365(a) OF THE BANKRUPTCY CODE, AND (2) PAY INCENTIVE COMPENSATION THAT HAS BEEN EARNED THEREUNDER, PURSUANT TO SECTION 365(a) AND LOCAL BANKRUPTCY RULE 2016-2

NOW INTO COURT, through undersigned counsel, come the debtors and debtors-in-possession (collectively, the “Debtors”),² who submit this Motion for Authority to (1) Assume the Amended and Restated Employment Agreement, as Modified, with Thomas J. Sandeman, Pursuant to Section 365(a) of the Bankruptcy Code, and (2) Pay Incentive Compensation that Has Been Earned Thereunder, Pursuant to Section 365(a) of the Bankruptcy Code and Local Bankruptcy Rule 2016-2 (the “Motion”). In support of this Motion, the Debtors rely upon the attached Declaration of Thomas J. Sandeman (the “Sandeman Declaration”), which is attached hereto as **Exhibit A** and incorporated herein by reference, and respectfully represent as follows:

¹ Joint administration requested with *In re Piccadilly Food Service, LLC*, 12-51128 (Bankr. W.D. La. 2012), and *In re Piccadilly Investments, LLC*, 12-51129 (Bankr. W.D. La. 2012).

² The debtors in these Chapter 11 cases include Piccadilly Restaurants, LLC, Piccadilly Food Service, LLC, and Piccadilly Investments, LLC.

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BACKGROUND

1. On September 11, 2012 (the "Petition Date"), the Debtors filed for relief under Chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108.

2. The Debtors are jointly administrated pursuant to Bankruptcy Code § 105(a) and Bankruptcy Rule 1015(b) (collectively, this "Chapter 11 Case").

3. No trustee or examiner has been appointed. An Official Committee of Unsecured Creditors (the "Unsecured Creditors' Committee") was appointed in this Chapter 11 Case on October 23, 2012.

RELIEF REQUESTED

4. By this Motion, Piccadilly Restaurants, LLC ("Restaurants") seeks authority to assume that certain Amended and Restated Employment Agreement by and between Thomas J. Sandeman ("Sandeman") and Restaurants, effective as of February 8, 2012 (the "Employment Agreement"). A copy of the Employment Agreement is attached to this Motion as **Exhibit B**. As discussed more fully below, if this Motion is granted, Sandeman, while reserving his right to file an unsecured non-priority claim, has agreed to waive any right to assert an administrative expense claim under Section 503 of the Bankruptcy Code for compensation based on the "change of control" provisions contained in Section 3 of the Employment Agreement.

5. By this Motion, the Debtors also seek authority to pay Sandeman the incentive compensation that he has earned under the Employment Agreement, as more fully described below.

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6. To accomplish these goals, the Debtors seek entry of an Order substantially similar to the proposed Order attached to this Motion as Exhibit C.

SANDEMAN'S EMPLOYMENT

(a) Background

7. In the Employment Agreement, Restaurants engaged Sandeman as its Chief Executive Officer, effective February 8, 2012, for a term of two (2) years, or until February 8, 2014. (Employment Agreement, Exhibit B, Article I, page 1.) Before that time, since 2005, Sandeman served as Chief Financial Officer of Restaurants. (Sandeman Declaration, at Paragraph 1.)

8. As Chief Executive Officer, Sandeman is an “insider” within the meaning of Section 101(31)(B)(ii), because he is an officer of Restaurants.

9. On October 30, 2012, the Debtors filed a motion to approve the payment of Sandeman’s base salary and benefits, and reserving to a later date issues regarding the incentive compensation described in the Employment Agreement, as set forth in the Debtors’ *Ex Parte Motion for Authority to Pay Base Salary and Benefits to Chief Executive Officer Thomas J. Sandeman, Nunc Pro Tunc to the Petition Date, Commensurate with Pre-Petition Practices, in accordance with Local Bankruptcy Rule 2016-2* (the “Base Compensation Motion”) (Docket #266).³ A Final Order approving the Base Compensation Motion was entered on November 27, 2012 (Docket #347).

³ A copy of the Employment Agreement is also attached to the Base Compensation Motion.
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10. Exhibit 2 to the Sandeman Declaration is a summary of the base wages and incentive compensation that Sandeman has received for the 12-month period preceding the Petition Date. All of that compensation has been paid by Restaurants, including payment or reimbursement of certain ordinary medical expenses and premiums that are not listed on the summary. (Sandeman Declaration, at Paragraph 4.)

11. At the time that the Employment Agreement was executed, Sandeman was granted, as part of his overall compensation package, an option to acquire up to 3.5% of the equity interests in Restaurants (the “Option”), subject to the terms and conditions of an Equity Incentive Plan. (Employment Agreement, Art. 2, page 2.) With the exception of the Option, Restaurants has paid Sandeman all of the compensation he has received as both as Chief Executive Officer and Chief Financial Officer. (Sandeman Declaration, at Paragraph 6.)

12. Other than the Option, to the best of Sandeman’s knowledge, he has never been paid any remuneration or compensation from Piccadilly Investments, LLC, or any of the members of Piccadilly Investments, LLC. (Sandeman Declaration, at Paragraph 7.)

(b) Incentive Compensation under the Employment Agreement

13. Since well before the Petition Date, Restaurants has had a corporate incentive plan for 2012 (the “2012 Incentive Plan”). The 2012 Incentive Plan relates to certain qualified participants, and does not include Sandeman. It is more fully described in the Debtors’ *Motion for Authority, in Accordance with Local Bankruptcy Rule 2016-2, (1) to Pay Incentive Compensation, as Part of the Debtors’ Established Pre-Petition Incentive Plan, to Certain Eligible Participants, and (2) to Continue to Pay Base Compensation and Benefits to the same*

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Eligible Participants, Nunc Pro Tunc to the Petition Date (Docket #481) (the “2012 Incentive Plan Motion”).⁴ A copy of the 2012 Incentive Plan is attached to the 2012 Incentive Plan Motion as **Exhibit B**. Sandeman Declaration, at Paragraph 8.

14. Like the 2012 Incentive Plan, incentive compensation under the Employment Agreement is directly tied to Restaurants’ financial performance, based on a pre-set EBITDA target for the first and last six months of the year. See Exhibit B, and Sandeman Declaration, at Paragraph 9.

15. Incentive compensation under the Employment Agreement is paid on a semi-annual basis **if and only if** Restaurants’ meets its pre-set EBITDA target. In order to be eligible to receive incentive compensation under the Employment Agreement, Restaurants must meet 100% of EBITDA target for the applicable period. For the preceding six-month period, Restaurants exceeded the pre-set EBITDA target established for the Employment Agreement and the Incentive Plan, as summarized below.

<u>Description</u>	<u>Actual Results</u>	<u>Target/Plan</u>	<u>Variance</u>
Operating EBITDA	\$2,735	\$2,569	\$166 (6.5% increase)
EBITDA	\$2,709	\$2,539	\$170 (6.7% increase)

Restaurants’ EBITDA target called for a **doubling of EBITDA from 2011**. The actual results exceed the target by 6.5% and 6.7%, respectively, for the six month period. Results would have been higher if these Chapter 11 cases not been filed. The Chapter 11 cases resulted in non-recoverable higher prices charged by Merchants FoodService of approximately \$400,000 on the

⁴ The hearing on the Incentive Compensation Motion is set for February 26, 2012.
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Debtors' proprietary products. Sandeman Declaration, at Paragraphs 9 and 10.

16. Because Restaurants exceeded the 100% EBITDA target, the Employment Agreement provides that Sandeman should receive incentive compensation equal to 50% of his annual base salary. Employment Agreement, at Article 2, pages 1 and 2; Sandeman Declaration, at Paragraph 11. Under this formula, Sandeman's incentive compensation for the six month period is equal to \$68,750. Sandeman Declaration, at Paragraph 11.

17. In connection with the assumption of the Employment Agreement, the payment of the incentive compensation to Sandeman constitutes the payment of "cure" as required by the Bankruptcy Code.

18. The Debtors will seek an additional finding that that payment of the foregoing incentive compensation to Sandeman shall constitute the cure of all defaults arising under the Employment Agreement that are required to be cured by the Debtors under section 365(b)(1)(A) of the Bankruptcy Code (after giving effect to section 365(b)(2) of the Bankruptcy Code).

(c) Change of Control Provisions in the Employment Agreement

19. The Employment Agreement provides that, in the event of a change of control, Sandeman will have the option of receiving the "greater of the balance of base compensation due under this Agreement or one year's base compensation" upon a change of control. Exhibit B; Employment Agreement, Section 3, at page 3. If he is retained after a change of control, the Employment Agreement further provides that Sandeman will have sixty days to evaluate the position offered to him in terms of title, duties and compensation, and then may elect to stay on such terms as are offered and agreed upon, or terminate with severance as provided in the

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Employment Agreement. *Id.*

20. Notwithstanding these provisions in Employment Agreement, if this Motion is granted, Sandeman while reserving his right to file an unsecured non-priority claim, has agreed to waive any right to assert an administrative expense claim for compensation under Section 503 of the Bankruptcy Code for compensation based on the “change of control” provisions contained in Section 3 of the Employment Agreement. Sandeman Declaration, at Paragraph 12.

LEGAL STANDARD

21. Section 363 of the Bankruptcy Code addresses the debtor’s use of property of the estate and incorporates a business judgment standard. *In re ASARCO, LLC*, 650 F.3d 593, 601 (5th Cir. 2011). Subsection 363(b) provides that “a trustee, after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b). In such circumstances, “for the debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business.” *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986); *see also In re Moore*, 608 F.3d 253, 263 (5th Cir. 2010)(“A sale of assets under § 363 . . . is subject to court approval and must be supported by an articulated business justification, good business judgment, or sound business reasons.”).

22. The business judgment standard incorporated in section 363 is flexible and encourages discretion. *ASARCO*, 650 F.3d at 601. “Whether the proffered business justification is sufficient depends on the case . . . [T]he bankruptcy judge should consider all salient factors

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pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike.” *Continental Air Lines*, 780 F.2d at 1226 (citing *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983)). See also *In re Rosbottom*, No. 09-11674, 2010 WL 4956924 (Bankr. W.D. La. Dec. 1, 2010).

23. Similarly, courts apply the business judgment rule when examining a debtor’s decision to assume or reject a contract. See *In re OCA, Inc.*, No. 06-10179, 2007 WL 2460994 (Bankr. E.D. La. Aug. 24, 2007); *In re Orion Pictures Corp.*, 4 F.3d 1095, 1098 (2d Cir. 1993).

24. Because Sandeman has agreed to waive any right to assert an administrative expense claim under Section 503 of the Bankruptcy Code for compensation based on the “change of control” provisions contained in Section 3 of the Employment Agreement, the Debtors submit that the assumption of the Employment Agreement does not violate the provisions of section 503(c) of the Bankruptcy Code.

NOTICE

25. Notice of this Motion has been given to the following: (a) the secured creditor, through Atalaya Administrative, LLC, and its counsel of record, Brent R. McIlwain and David F. Waguespack; (b) the thirty (30) largest unsecured creditors, the identity of which may be amended from time to time; (c) the twenty (20) additional random unsecured creditors; (d) all parties who have requested special notice pursuant to Bankruptcy Rule 2002; (e) the Unsecured Creditors Committee; and (f) the Office of the United States Trustee.

WHEREFORE, the Debtors request that the Court enter an Order substantially similar to the proposed Order attached to this Motion as **Exhibit C**, that (i) grants this Motion, (ii) grants

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authority to the Debtors to assume the employment agreement with Thomas J. Sandeman, as modified, (iii) grants authority to the Debtors to pay Thomas J. Sandeman the incentive compensation that he has earned under the Employment Agreement, and (iv) grants all other legal and equitable relief as is just and proper.

Respectfully submitted,

/s/Elizabeth J. Futrell

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EXHIBITS

EXHIBIT A SANDEMAN DECLARATION

EXHIBIT B AMENDED AND RESTATED EMPLOYMENT AGREEMENT

EXHIBIT C PROPOSED ORDER

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