

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

IN RE:

PICCADILLY RESTAURANTS, LLC, *et al.*,
DEBTORS

CASE NO. 12-51127

(JOINT ADMINISTRATION REQUESTED)¹

CHAPTER 11

JUDGE ROBERT SUMMERHAYS

**MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS
TO HONOR PRE-PETITION OBLIGATIONS TO CUSTOMERS AND OTHERWISE
CONTINUE CUSTOMER PROGRAMS IN THE ORDINARY COURSE OF BUSINESS**

NOW INTO COURT, through undersigned counsel, come the above-captioned debtors and debtors-in-possession (collectively, the "Debtors"),² who move for the entry of an order authorizing the Debtors to honor certain pre-petition obligations to customers and otherwise continue customer programs in the ordinary course of business (this "Motion"). In support, the Debtors represent:

Jurisdiction and Venue

1. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This is a "core" proceeding pursuant to 11 U.S.C. § 157(b)(2).

Background

2. On September 11, 2012 (the "Petition Date"), the Debtors commenced these cases (the "Cases") by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

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

² The debtors in these chapter 11 cases include Piccadilly Restaurants, LLC ("Piccadilly"), Piccadilly Investments, LLC ("Piccadilly Investments") and Piccadilly Food Service, LLC ("Piccadilly Food Service").

The Debtors are operating their businesses and managing their properties as debtors-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108. No trustee or examiner has been appointed, and no official committee of creditors has been established in the Cases.

3. By separate motion (R. at 3), the Debtors have requested joint administration of the Cases pursuant to Bankruptcy Code § 105(a) and Bankruptcy Rule 1015(b).

4. This Court is referred to the Declaration of Thomas J. Sandeman (the "Declaration") (R. at 2) for a detailed discussion of the factual background and circumstances surrounding the Debtors commencement of the Cases.³

Relief Requested

5. Prior to the Petition Date, in the ordinary course of business and as is customary in the cafeteria-style restaurant and food services businesses, the Debtors instituted and engaged in certain activities to develop and sustain a positive reputation and relationship with their customers. To that end, the Debtors implemented various customer programs and policies (collectively, the "Customer Programs") designed to ensure customer satisfaction, drive sales, meet competitive pressures, develop and sustain customer relationships and loyalty, improve profitability, and generate goodwill for the Debtors and their products and services. The Debtors request, pursuant to Bankruptcy Code §§ 105(a), 362(d), 363(b), and 503(b)(1), the entry of an order authorizing continuance of their Customer Programs in the ordinary course of business and to perform and honor, at the Debtors' sole discretion, their pre-petition obligations thereunder.

The Customer Programs

6. The Customer Programs are integral to the Debtors' efforts to stabilize their businesses, restore vitality, and ultimately deliver the most value to all stakeholders in the Cases.

³ All capitalized term used, but not specifically defined herein, shall have the meaning ascribed to such terms in the Declaration.

The Debtors believe they must promptly assure customers of their continued ability to satisfy pre-petition and post-petition obligations under the Customer Programs to maintain their valuable customer base, and myriad other important benefits derived therefrom, following the commencement of the Cases.

7. The Customer Programs that the Debtors seek to continue are the following:

a. **Gift Cards**

The Debtors' gift card provider is Givex. Currently, the Debtors sell plastic gift cards in various outlets, including, Piccadilly Restaurants, www.piccadilly.com, and grocery stores through Blackhawk Network, a company that organizes retail outlets for the purchase of gift cards. The Debtors are in the process of implementing digital gift cards that will be available for purchase at www.piccadilly.com. The Debtors are working with a digital gift card distributor, Buyatab, and expect that the digital gift cards will be available for purchase online before the end of the year.

b. **Discounts**

The Debtors have system wide discounts in place which consists of the following: 10% senior discount for seniors age 60+, Monday – Saturday from 2 – 5 p.m.; 10% military discount for military personnel who show their military ID; 50% off Police Officers in Uniform Program; and \$.99 Kids Meals on Thursdays and 11am – 4 pm on Saturdays.⁴

c. **Coupons**

The Debtors participate in a system wide coupon offer off \$5 off a purchase of \$20 or more with the Entertainment Book, a national company that helps students and groups fundraise through the sale of their coupon books.

⁴ The discounts cannot be combined.

8. The Debtors believe most of the Customer Programs constitute "ordinary course of business" practices, and therefore do not require Court approval. However, out of an abundance of caution, the Debtors seek authority from this Court to honor their pre-petition obligations arising from the Customer Programs in the ordinary course of its business.

9. Pursuant to Bankruptcy Code §§ 105(a), 363, 1107 and 1108, the Debtors request authority in their business judgment to (a) perform and fully honor their pre-petition obligations under and related to the Customer Programs, and any related programs, as they deem appropriate, and (b) continue, renew, replace, implement a new, and/or terminate the Customer Programs, and any related programs, as they deem appropriate, in the ordinary course of business, without further application to the Court.

10. The Debtors submit that continuing and honoring the Customer Programs is essential for maintaining the Debtors' customers' goodwill and continuing the Debtors' businesses. The negative impact of refusing to honor the Customer Programs would harm the Debtors' relationships with its customers and jeopardize the Debtors' ability to reorganize successfully.

Basis for Relief

11. The Debtors believe the continuation of the Customer Programs constitutes "ordinary course of business" practices, and, therefore, does not require court approval. However, out of an abundance of caution, the Debtors seek authorization, but not direction, pursuant to Bankruptcy Code §§ 105(a), 362(a), 363(b), and 503(b)(1) to continue, renew, replace, implement, modify, and/or terminate the Customer Programs as they deem appropriate, and to honor their undisputed prepetition obligations in respect thereof, in the ordinary course of business, without interruption, in accordance with prepetition practices.

12. Bankruptcy Code §§ 1107(a) and 1108 authorize a debtor-in-possession to continue to operate its business. Pursuant to Bankruptcy Code § 503(b)(1), a debtor may incur, and the court, after notice and a hearing, shall allow as administrative expenses, among other things, "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1). In addition, pursuant to Bankruptcy Code § 363(b), a debtor may, in the exercise of its sound business judgment and after notice and a hearing, use property of the estate outside of the ordinary course of business. The Debtors believe the use of estate funds to continue the Customer Programs is a necessary cost of preserving the Debtors' estates. Honoring the Customer Programs will enable the Debtors to retain, maintain, and create valuable relationships which, in turn, will help strengthen the Debtors' businesses and prospects for a successful reorganization.

13. Furthermore, to supplement the explicit powers described above, Bankruptcy Code § 105(a) empowers the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." A bankruptcy court's use of its equitable powers to "authorize the payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept." *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). "Under 11 U.S.C. § 105, the court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor." *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (citing *Ionosphere Clubs*, 98 B.R. at 177). The Debtors strongly believe the honoring of pre-petition obligations under the Customer Programs, and the continuation thereof, is imperative to the ongoing operations and viability of the Debtors.

14. The "doctrine of necessity" functions in a chapter 11 case as a mechanism by which the bankruptcy court can exercise its equitable power to allow payment of critical prepetition claims not explicitly authorized by the Bankruptcy Code and further supports the relief requested herein. *See In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (holding that a court may authorize payment of prepetition claims if such payment is essential to continued operation of the debtor); *Ionosphere Clubs*, 98 B.R. at 176 (authorizing the payment of pre-petition claims while noting that "judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor."). The rationale for the "doctrine of necessity" is consistent with the paramount goal of chapter 11 – "facilitating the continued operation and rehabilitation of the debtor" *Ionosphere Clubs*, 98 B.R. at 176.

15. Moreover, the Court has the power to lift the automatic stay to allow the Debtors to honor their customers' deposits pursuant to the terms of the respective contracts or customary practice. The automatic stay prevents a creditor from setting off a debt that arose prior to the commencement date against any claim against the Debtor. *See* 11 U.S.C. § 362(a)(7). However, pursuant to Bankruptcy Code § 362(d), the Court has the power to lift the automatic stay for cause shown. The Debtors believe sufficient cause exists for the Court to lift the stay to allow the Debtors honor their customers' deposits in accordance with the terms of the Debtors' various Customer Programs. Accordingly, pursuant to Bankruptcy Code § 105(a), 362(d), and 363(b), the Court is empowered to grant the relief requested herein.

16. The pre-petition obligations owed by the Debtors to their customers further qualify for post-petition payment because if the Debtors do not honor their obligations, the Debtors' goodwill and going concern value will be severely and irreparably harmed. *See In re*

CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) (noting that one example where the debtor-in-possession can only fulfill its fiduciary duty by preplan satisfaction of a pre-petition claim are "prepetition warranty or refund claims of consumer customer which, if not honored, could so harm the debtor's good will as to destroy its going concern value"); *In re Equalnet Commc'ns Corp.*, 258 B.R. 368, 370 (Bankr. S.D. Tex. 2000) (holding that "such a failure to pay and its consequent loss of customer base would impair value of the business on either a going concern or liquidation basis").

17. The continuity, viability, and revitalization of the Debtors' businesses are dependent on the development and maintenance of the loyalty of their customers. Customers are the keystone to the Debtors' businesses and success. It is essential to the Debtors' businesses that the Debtors be permitted to continue the Customer Programs and honor the pre-petition obligations relating to deposits thereunder. If the Debtors are unable to do so, their operations, and corresponding prospects for a successful reorganization, will be immediately and irreparably harmed.

18. Further, if the Debtors were not permitted to honor their customers' deposits pursuant to the terms of the respective contracts or customary practice, it would have a deleterious effect on the Debtors' relationships to existing clients and the prospect of obtaining future customers. Present customers would not likely continue to do business with the Debtors, future customers would also be less likely to enter into contractual relationships with the Debtors, fearful that the Debtors may ultimately fail to honor these industry-common deposit Customer Programs. Therefore, there is a serious need for the Debtors to be permitted to honor the pre-petition Customer Programs in order to maintain their existing client base and preserve their goodwill on a going-forward basis.

19. The Debtors' ability to continue the Customer Programs, which have proven beneficial, is necessary to reassure customers of the ongoing viability of the Debtors, preserve goodwill, and maintain critical business relationships. The Debtors submit that the resulting benefit of continued customer satisfaction during the pendency of the Cases will far exceed the cost of such Customer Programs. Further, the Debtors expect to have sufficient resources available to maintain their Customer Programs, to the extent described herein. Considering the potential for loss of competitiveness, goodwill, and relationships, absent the relief requested herein, and the resulting negative impact on the Debtors' businesses and reorganization efforts, the Debtors submit that the request for authorization to continue the Customer Programs in the ordinary course of business and to perform and honor the pre-petition obligations thereunder, as the Debtors deem appropriate in their sole business judgment, without further application to the Court, is in the best interest of the Debtors, their estates, and their creditors, and should be approved in all respects.⁵

20. Courts have granted relief similar to that requested herein in other cases where retaining the loyalty and patronage of customers was critical to a successful chapter 11 reorganization. *See, e.g., In re Pilgrim's Pride Corp.*, 08-45664 (Bankr. N.D. Tex. Dec. 3, 2008); *In re Keys Fitness Prods., L.P.*, 08-31790 (Bankr. N.D. Tex. Apr. 18, 2008); *In re Kimball Hill, Inc.*, 08-10095 (Bankr. N.D. Ill. April 25, 2008); *In re Bombay Co., Inc.*, 07-44084 (Bankr. N.D. Tex. Sept. 20, 2008); *In re Steve & Barry's Manhattan LLC*, 08-12579 (Bankr. S.D.N.Y. July 10, 2008); *In re Sharper Image Corp.*, 08-10322 (Bankr. D. Del. Feb. 20, 2008);

⁵ With respect to the continuation of any gift card, gift certificate and/or voucher programs, the Debtors submit that any amounts paid by customers and unused as of the Petition Date would arguable be entitled to priority treatment pursuant to Bankruptcy Code § 507(a)(7) as a customer deposit. The Debtors would therefore be required to pay these claims in full in order to confirm a plan of reorganization. Accordingly, granting the relief requested herein would only affect the timing, and not the amount, of the payment of these obligations to the extent that they constitute priority claims.

In re TOUSA, Inc., 08-10928 (Bankr. S.D. Fla. Jan. 31, 2008); *In re N.Y. Racing Assoc., Inc.*, 06-12618 (Bankr. S.D.N.Y. Nov. 3, 2006).

**Request for Authority for Banks to Honor and Pay Checks
Issued and Electronic Funds Transferred on Account of Customer Programs**

21. The Debtors further request that the Court authorize and direct all applicable banks and other financial institutions to receive, process, honor and pay any and all checks drawn or electronic funds transferred to pay the Customer Programs, whether such checks were presented prior to or after the Petition Date; ***provided, however***, that such checks or electronic transfers are identified by the Debtors as relating directly to the authorized payment of the Customer Program claims. The Debtors also seek authority to issue new post-petition checks, or effect new electronic fund transfers, on account of such claims to replace any pre-petition checks or electronic fund transfer requests that may be dishonored or rejected as a result of the commencement of the Cases.

The Requested Relief Satisfies Bankruptcy Rule 6003

22. The Debtors submit the facts cited herein and in the Declaration, filed contemporaneously herewith, illustrate that the authority requested is necessary to avoid immediate and irreparable harm to the Debtors and their estates. Based on the foregoing, Bankruptcy Rule 6003 has been satisfied.

Waiver of Bankruptcy Rules 6004(a) and (h)

23. To implement the foregoing successfully, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).

Reservation of Rights

24. Nothing contained herein is intended or shall be construed as (i) an admission as to the validity of any claim against the Debtors, (ii) a waiver of the Debtors' or any party in interest's rights to dispute any claim, or (iii) an approval or assumption of any agreement, contract, program, policy or lease under Bankruptcy Code § 365. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission to the validity of any claim or a waiver of the Debtors' rights to dispute such claim subsequently. Finally, the relief requested herein shall not oblige the Debtors to accept any services, to accept the shipment of goods, or prevent the Debtors from returning or rejecting goods.

Notice

25. Notice of this Motion has been given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee for the Western District of Louisiana; (b) Atalaya Capital Management LP and its counsel of record; (c) the Debtors' thirty (30) largest unsecured creditors on a consolidated basis; and (d) the managing member of Piccadilly Investments, LLC. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

No Prior Request

26. No previous request for the relief sought herein has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto as Exhibit A, granting the relief requested in this Motion, and granting such other and further relief as may be just and proper.

**GORDON, ARATA, MCCOLLAM,
DUPLANTIS & EAGAN, LLC**

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