

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 THE ENTRY OF AN ORDER ESTABLISHING PAYMENT
PROCEDURES FOR POTENTIAL PACA CLAIMS AND GRANTING RELATED
RELIEF**

NOW INTO COURT, through undersigned counsel, come the above-captioned debtors and debtors-in-possession (collectively, the "Debtors"),² who file this motion (the "Motion") for entry of an order (i) establishing payment procedures for potential PACA Claims (defined below) and (ii) granting related relief. In support, the Debtors represent:

JURISDICTION AND PROCEDURAL BACKGROUND

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

2. On September 11, 2012 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"), commencing the above-referenced cases (the "Cases").

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").

3. Since the Petition Date, the Debtors have continued to operate and manage their businesses as debtors in possession pursuant to Bankruptcy Code §§ 1107(a) and 1108. As of the Date of this Motion, no official committee of unsecured creditors has been appointed.

RELIEF REQUESTED AND BASIS FOR RELIEF³

4. The Debtors believe that a certain portion of the products purchased but not yet paid for may qualify for "perishable agricultural commodit[ies]" under the Perishable Agricultural Commodities Act of 1930, as amended, 7 U.S.C. § 499(a) *et seq.* ("PACA"). PACA was originally enacted "to regulate the sale of perishable commodities and promote fair dealing in the sale of fruits and vegetables." *Bocchi Americas Assocs., Inc. v. Commerce Fresh Marketing, Inc.*, 515 F.3d 383, 387 (5th Cir. 2008) (quoting *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 413 (5th Cir. 2003) (internal quotation marks omitted)). In 1984, Congress amended PACA to strengthen the rights of sellers of perishable agricultural commodities⁴ by creating a "nonsegregated 'floating' trust in favor of unpaid sellers, which attaches to the products themselves and any proceeds." *Id.* at 388 (citing 7 U.S.C. § 499 (c)(2); 7 C.F.R. § 46.46(b); *Reaves*, 336 F.3d at 413). Specifically, PACA provides that

Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

³ Nothing in this Motion is intended to be or shall be construed as: (i) an admission as to the validity of any claim against the Debtors or that the Debtors are subject to the provisions of PACA; (ii) a waiver of the Debtors' rights to dispute any claim on any grounds; (iii) a promise to pay any claim; or (iv) an implication or admission that any particular claim against the Debtors is a valid PACA Claim.

⁴ The term "perishable agricultural commodities" is defined generally as "[f]resh fruits and vegetables of every kind and character." See *In re L. Natural Foods Corp.*, 199 B.R. 882, 885 (Bankr. E.D. Pa. 1996).

7 U.S.C. § 499e(c)(2). PACA provides various protections to fresh fruit and vegetable sellers, including the establishment of a statutory constructive trust (the "PACA Trust") consisting of a buyer's (the debtor in this case) entire inventory of food or other derivatives of perishable agricultural commodities, the products derived therefrom and the proceeds related to any sale of the commodities or products (collectively, the "PACA Trust Assets"). *See* 7 U.S.C. 499e(c)(2). Assets subject to PACA Trust are preserved as a non-segregated floating trust and may be commingled with non-trust assets. However, PACA Trust Assets are not property of a debtor's estate. *In re Kornblum & Co.*, 81 F.3d 280, 284 (2d Cir. 1996).

5. To a claim under PACA, the seller must follow specific procedures set forth in PACA. *Bocchi Americas*, 515 F.3d at 388. First, PACA applies only to short-term credit transactions where full payment is due within ten (10) days after the buyer accepts the produce or such longer period as may be agreed to by the seller and the buyer, provided that the aggregate time for payment does not exceed thirty days. *See id.* If a seller agrees in writing to extend the time for payment beyond thirty days from delivery, he may no longer assert any rights to a PACA trust. *See id.* at 388, 390-91.

6. Courts construing PACA have consistently held that PACA Trust Assets are not "property of the estate" under Bankruptcy Code § 541. *See In re Long John Silver's Restaurants, Inc.*, 230 B.R. 29, 32 (Bankr. D. Del. 1999); *Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F. Supp. 346, 348 (S.D.N.Y. 1993); *In re Fresh Approach, Inc.*, 51 B.R. 412, 419 (Bankr. N.D. Tex. 1985). The distribution of trust assets to PACA Trust beneficiaries, however, remains under the jurisdiction of the bankruptcy court presiding over the relevant bankruptcy case. *See In re United Fruit & Produce Co., Inc.*, 86 B.R. 14, 16 (Bankr. D. Conn. 1988); *Fresh Approach*, 51 B.R. at 418.

7. Certain of the Debtors' suppliers (the "PACA Claimants") may assert potential claims under PACA (the "PACA Claims"). In exercising the rights granted to them under PACA, the PACA Claimants may seek to impose a PACA Trust on certain products, thereby granting the PACA Claimants priority ahead of all other secured and unsecured creditors of the Debtors' estates. Accordingly, payment of PACA claims at this stage of the case should not prejudice or affect the amount available for distributions to other creditors of the Debtors. Further, it is imperative that the Debtors' establish procedures for orderly reconciliation and disposition of PACA Claims to ensure that the supply of fresh produce and related products continues without interruption.

8. It is vital that the Debtors' supply of fresh produce and related products continues without interruption. Thus, the Debtors request the entry of an order establishing procedures for the orderly reconciliation and disposition of potential PACA Claims and authorizing the payment, in the Debtors' discretion and if outside the Debtors' budget submitted in connection with the proposed DIP Facility with the prior written consent of CB Agency Services, the agent under the Debtors' proposed debtor-in-possession credit facility (the "DIP Agent"), of valid pre-petition and post-petition claims that may qualify as PACA Claims. Because PACA Trust Assets are not property of the estate, the payment of valid PACA Claims at this stage in these Cases will not affect the amount of estate assets available for distribution to creditors of the estates. To the extent proceeds of PACA Trust Assets are used to pay valid PACA Claims, this Court has authority under Bankruptcy Code § 105 to grant the requested relief, and to the extent estate funds are used to pay PACA Claimants whose products have been delivered but not converted to cash proceeds, this Court has authority under Bankruptcy Code § 363 to grant the requested relief. It should be noted that, many of the potential PACA Claimants will have

delivered their products within 20 days before the Petition Date in the ordinary course of business of the Debtors, thereby entitling them to administrative expense priority pursuant to Bankruptcy Code §§ 503(b)(9) and 507(a)(2).

9. The Debtors propose that the Court approve the procedures described on **Exhibit A** attached to this Motion (the "PACA Procedures"), which are designed to facilitate the resolution of potential PACA Claims in an orderly and efficient manner. Attached hereto as **Exhibit B** is a list of potential PACA Claimants, which reflects potential PACA Claims for invoices received as of the Petition Date. Further, the Debtors may receive invoices after the Petition Date from potential PACA Claimants for pre-petition goods and additionally requests authority to pay those PACA Claims, to the extent that they are valid.

10. Preservation of the Debtors' relationships with the suppliers of fresh produce is particularly critical due to the nature of the Debtors' restaurant and food service operations, in general, and its fresh salads, in particular, and the highly competitive nature of the Debtors' industries. Any disruption in the supply of fresh produce would prove devastating and would greatly hinder the Debtors' ability to operate and efforts to reorganize.

11. In addition, the failure to provide the relief requested herein could subject the Debtors to an avalanche of actions from vendors seeking enforcement of their claims vis-à-vis PACA, which would result in the unnecessary expenditure of funds by the Debtors in responding thereto. Moreover, the Debtors' operations require an uninterrupted supply of fresh produce from vendors. Any delays in satisfying valid PACA Claims could adversely affect the Debtors' ability to obtain fresh produce in the future, thereby undercutting the Debtors' competitive posture and their ability to successfully reorganize. To the extent any vendor possesses a valid claim under PACA, the relief requested herein does not constitute the Debtors making payment

on account of pre-petition claims, as potential PACA Claimants would be paid from non-estate property.

12. Furthermore, in certain circumstances, pursuant to PACA, officers and directors may be held secondarily liable for amounts owed to a seller of applicable goods. *See Sunkist Growers, Inv. v. Fisher*, 104 F.3d 280,283 (9th Cir. 1997). Thus, to the extent that any obligations potentially arising under PACA remain unsatisfied by the Debtors, the Debtors' officers and directors may be subject to lawsuits during the pendency of these Cases. Any such lawsuit (and the ensuing potential liability) would distract the Debtors and their officers and directors in their attempt to implement a successful reorganization strategy, to the detriment of all parties in interest in these Cases.

13. It is in the Debtors' business judgment that addressing claims that may arise under PACA in accordance with the proposed procedures will best promote the Debtors' rehabilitation and is in the best interests of the Debtors and their customers, creditors, and estates. And, to the extent the Debtors question whether any particular claim arises under PACA and is valid thereunder, the Debtors reserve the right to contest such claims in accordance with applicable law.

14. Other courts have approved similar procedures for the treatment of PACA claims. *See, e.g., In re Buffet Holdings, Inc.*, 08-10141 (Bankr. D. Del. Feb. 13, 2008); *In re Schlotzsky's, Inc.*, 04-54504 (Bankr. W.D. Tex. Aug. 4, 2004).

15. For these reasons, the Debtors respectfully submit that the relief requested in this Motion is: (i) necessary and essential for the Debtor's successful reorganization; (ii) in the best interests of the Debtors and their estates; and (iii) necessary to prevent immediate and irreparable harm to the Debtors and their estates.

The Debtor Satisfies Bankruptcy Rule 6003

16. The Debtors submit that the facts cited herein illustrate that the relief requested is necessary to avoid immediate and irreparable harm to the Debtors and the estates. Based on the foregoing, Bankruptcy Rule 6003 has been satisfied.

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

17. 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

18. 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, (iii) an approval by the DIP Agent of the payment of any specific claim (with any such approval being subject to the DIP Agent's further prior written consent) or consent by the DIP Agent to (x) any payment not in accordance with the budget associated with the proposed debtor-in-possession credit facility or (y) any amendment (whether express or implied) to such budget or (iv) 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

19. 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.

WHEREFORE, the Debtors respectfully requests that, after due consideration, this Court enter an order substantially in the form attached hereto as **Exhibit C** authorizing, but not requiring, the Debtors to pay claims that may arise under PACA, and granting such other and further relief as this Court deems appropriate.

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