

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

RESTAURANTS ACQUISITION I, LLC,<sup>1</sup>

Debtor.

Chapter 11

Case No. 15-12406 (KG)

**DEBTOR’S MOTION FOR ENTRY OF ORDER (I) AUTHORIZING DEBTOR TO (A) PAY PRE-PETITION WAGES AND OTHER COMPENSATION, AND EMPLOYEE BENEFITS, AND (B) CONTINUE EXISTING EMPLOYEE BENEFIT PLANS AND PROGRAMS, (II) AUTHORIZING BANKS AND FINANCIAL INSTITUTIONS TO PAY ALL CHECKS AND ELECTRONIC PAYMENT REQUESTS, (III) APPROVING THE DEBTOR’S DISCRETIONARY EMPLOYEE INCENTIVE PROGRAMS, AND (IV) GRANTING RELATED RELIEF**

Restaurants Acquisition I, LLC (the “Debtor”), debtor and debtor-in-possession in the above-captioned chapter 11 case (the “Chapter 11 Case”), by and through its undersigned counsel, hereby files this motion (the “Motion”) seeking entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Order”), pursuant to sections 105, 363, and 507 of title 11 of the United States Code (the “Bankruptcy Code”), Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 2015-2 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), (i) authorizing the Debtor, in its sole discretion, to (a) pay pre-petition and post-petition wages and other compensation, employee business expense allowances and reimbursements, employee benefits, and (b) continue existing employee benefit plans and programs, (ii) authorizing banks and other financial institutions to receive, process, honor, and pay all checks and electronic payment requests relating to the foregoing, (iii) approving the Debtor’s discretionary employee incentive programs, and (iv) granting such other and further

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<sup>1</sup> The Debtor’s mailing address is 313 East Main Street, Suite 2, Hendersonville, TN and the last four digits of its tax identification number are 8761.

relief as requested herein or as the Court (defined herein) otherwise deems necessary or appropriate. In support of this Motion, the Debtor submits the *Declaration of W. Craig Barber in Support of Chapter 11 Petition and First Day Pleadings of Restaurants Acquisition I, LLC* (the "First Day Declaration"), which is being filed contemporaneously herewith and is incorporated herein by reference. In further support of this Motion, the Debtor respectfully states as follows:

### **JURISDICTION**

1. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over this Application pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware* dated as of February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2) and, pursuant to Rule 9013-1(f) of the Local Rules, the Debtor consents to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

2. Venue in the Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are sections 105, 363, and 507 of the Bankruptcy Code, as supplemented by Bankruptcy Rules 6003 and 6004 and Local Rule 2015-2.

### **BACKGROUND**

4. On the date hereof (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor continues to operate its businesses and manage its property as a debtor and debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or statutory committee has been appointed in the Chapter 11 Case.

5. The Debtor operates a chain of full-service restaurants throughout Texas, largely located in the Dallas-Fort Worth and Houston metropolitan area, operating under the trade-names Black-eyed Pea and Dixie House. As of January 1, 2015, the Debtor operated thirty (30) restaurant locations (generally, the “Prepetition Stores”).

6. Since late 2013, the Debtor has experienced a decline in its cash flow performance. At the same time, the Debtor’s occupancy costs outpaced its revenues over the same period, further eroding the Debtor’s profitability. Under these circumstances, and despite the Debtor’s best efforts, the Debtor began to fall behind on its obligations to creditors. The Debtor’s liquidity crisis also caused it to fall behind on its payments to various taxing authorities, including the federal government.

7. In December 2013 and again in April 2015, the Debtor engaged investment bankers to address a recapitalization or sale of the Debtor. The Debtor received no offers as a result of this process. Due to its lack of liquidity and its inability to attract new capital, the Debtor has not be able to maintain all of the Prepetition Stores. As of the Petition Date, the Debtor has ceased operations at and/or closed fifteen (15) of its Prepetition Stores; it continues to operate fourteen (14) Black-eyed Pea restaurants and one (1) Dixie House restaurant.<sup>2</sup>

8. Additional details regarding the Debtor’s business, assets, capital structure, and the circumstances leading to the filing of this Chapter 11 Case are set forth in the First Day Declaration filed contemporaneously herewith and incorporated herein by reference as though set forth in full.

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<sup>2</sup> As of the Petition Date, the Debtor has been locked out of one of these operating Prepetition Stores.

**WAGE AND BENEFIT OBLIGATIONS**

**A. Wages and Salaries**

9. As set forth in the First Day Declaration, the Debtor anticipates continuing operations at fifteen (15) of its restaurant locations. The Debtor's success in its restructuring efforts will be highly dependent on the continued support and performance of its workforce.

10. In the ordinary course of the Debtor's business, the Debtor had approximately 1,800 salaried and hourly employees in the period prior to the Petition Date. Following the Petition Date, the Debtor expects to have approximately 875 hourly employees and 75 salaried employees (each an "Employee" and collectively, the "Employees").

11. The Employees perform a broad spectrum of services, including, without limitation, marketing, food and supply procurement, restaurant management, catering management, front of house service, kitchen services, finance and accounting, and information technology services. A vast majority of the Employees rely exclusively on the payments and other benefits they receive from the Debtor for their basic living necessities. If the Debtor does not pay the obligations for compensation, benefits and reimbursable expenses, the Employees will face significant financial difficulties. Moreover, Employee morale and loyalty will be jeopardized at a time when the support of the Employees is critical to the Debtor's success. In the absence of honoring the Debtor's pre-petition obligations to the Employees, the Employees may seek alternative employment opportunities. Accordingly, it is essential to pay and honor obligations to Employees.

12. In the ordinary course of business, the Debtor incurs payroll obligations for wages and salaries to Employees. The Debtor's average gross bi-weekly compensation for Employees, including wages, salaries, and other compensation totaled approximately \$631,744.00 immediately prior to the Petition Date. As of the Petition Date, the Debtor estimates that the

Debtor's average gross bi-weekly compensation for Employees, including wages, salaries, and other compensation will be \$290,000.00 (collectively, the "Employee Wages").

13. As of the Petition Date, the Debtor estimates that the aggregate amount of accrued Employee Wages (excluding Payroll Taxes and Deductions, defined below) earned prior to the Petition Date that remain unpaid totals approximately \$631,744.00 (the "Unpaid Wages").

14. By this Motion, the Debtor requests authority to pay all Unpaid Wages to its Employees in the ordinary course of business. The Debtor has made careful inquiries and has taken diligent steps to ensure that none of its Employees are owed more than \$12,475 for Unpaid Wages as of the Petition Date. Accordingly, the Debtor believes that no individual Employee will be paid more than the statutory priority cap if this Court grants the requested relief.

**B. Employee Business Expenses**

15. In the ordinary course of the Debtor's business, the Debtor reimburses Employees for certain expenses the Employees incur in the scope of their employment (the "Reimbursable Expenses"). The Reimbursable Expenses are largely composed of ordinary and necessary expenses including cell phone, internet, hotel and airfare charges, meals, equipment, marketing inserts, airfare, tolls, parking, mileage, employee incentives, and postage.

16. As of the Petition Date, the Debtor estimates that it owes approximately \$3,000.00 in accrued but unpaid Reimbursable Expenses.

**C. Pre-petition Withholdings and Deductions**

17. The Debtor is required by law to withhold amounts from the Employees' wages that are related to federal, state, provincial and local income taxes, including social security, Medicare taxes and employment insurance (collectively, the "Payroll Taxes") for remittance to the appropriate taxing authorities (collectively, the "Taxing Authorities"). As of the Petition Date, the Debtor estimates that approximately \$209,770.00 in Payroll Taxes have been collected

from Employees and former employees of the Debtor who were terminated prior to the Petition Date. However, the Debtor has not yet remitted this amount to the Taxing Authorities.

18. In addition to Payroll Taxes, during each applicable pay period, the Debtor also routinely deducts other amounts from certain of the Employees' paychecks, including without limitation: (a) garnishments, child support, and similar deductions; and (b) other pre-tax and after-tax deductions payable pursuant to certain of the Employee benefit plans discussed below (*e.g.*, an Employee's share of health care benefits, insurance premiums, *etc.*) (collectively, the "Deductions"), which the Debtor forwards to appropriate third-party recipients. Based on historical payments, the Debtor on average deducts approximately \$21,156.00 in Deductions from the Employees' paychecks per month.

19. By this Motion, the Debtor requests authority to continue to collect and remit Deductions and Payroll Taxes (including any pre-petition amounts collected but not yet remitted), as applicable, in the ordinary course of business.

**D. Health Care Programs**

20. The Debtor offers several benefit programs to salaried and certain hourly Employees for medical, dental, vision, disability and life insurance coverage, including prescription medication and flexible spending accounts (the "Health Care Programs"). On average, the Debtor pays approximately \$49,000.00 per month for the Health Care Programs. As of the Petition Date, approximately \$49,000.00 of accrued and outstanding pre-petition obligations with respect to the Health Care Programs was outstanding.

21. By this Motion, the Debtor seeks authority to: (a) continue to provide the Health Care Programs for the Employees in the ordinary course of business; (b) continue to honor obligations under such benefit programs, including any premiums and administrative fees; and

(c) pay any amounts owed under the Health Care Programs to the extent that they remain unpaid as of the Petition Date.

**E. Vacation, Sick, Holiday and Leave Benefits**

22. The Debtor provides certain of the Employees with paid vacation time (the “Vacation Time”) as well as paid sick time and other paid time off (collectively, with the Vacation Time, the “Paid Time Off”). According to the Debtor’s policies, the amount of Paid Time Off available to Employees and the rate at which such Paid Time Off accrues is generally determined by the Employee’s length of employment with the Debtor. Ordinarily, when an Employee elects to take Paid Time Off, that Employee is paid his or her regular hourly or salaried rate. Generally, Employees are required to use their Paid Time Off during the year in which it is earned and may not carry unused days into the next year. If an Employee ceases to be employed by the Debtor, the Employee’s final paycheck will include any accrued but unused Vacation Time for the current year.

23. The Debtor estimates that approximately \$360,000 of earned but unused Paid Time Off has accrued as of the Petition Date. This amount is not, however, a current cash payment obligation, as Employees are only entitled to cash payment for accrued and unused Vacation Time in the event the Employee ceases to be employed by the Debtor.

24. By this Motion, the Debtor seeks authority to: (a) continue to provide Paid Time Off to its Employees in the ordinary course of business; (b) continue to honor obligations under such benefit programs, including any premiums and administrative fees; and (c) pay any amounts owed to Employees on account of Paid Time Off to the extent that such amounts remain unpaid as of the Petition Date.

**F. Employee Incentive and Bonus Programs**

25. The Debtor has various other practices, programs and policies that provide important benefits for the Employees. These programs include, but are not limited to, a number of discretionary incentive plans designed to provide additional compensation and other benefits to Employees to encourage exceptional Employee performance for the benefit of the Debtor's business (collectively, the "Discretionary Employee Incentive Programs"). Specifically, the Debtor offers, *inter alia*, an Operational Leadership Bonus Program (the "Operational Leadership Program"), a Guest Count Incentive Contest (the "Guest Count Incentive Contest"), and a Sales and Catering Manager Incentive Plan (the "Catering Incentive Plan"), each as described below.

**1. Operational Leadership Bonus Plan**

26. The Operational Leadership Bonus Plan provides operational leadership (*i.e.* General Managers, Assistant Managers, District Managers, and Vice President) for each restaurant location with a percentage bonus based on (a) increasing sales and (b) delivering a corresponding increase in operating cash flow (controllable profit less advertising and delivery fees) for the 2015 fiscal year. The potential bonus percentage payout is distributed to operational leadership as follows: (i) General Manager: 50%; (ii) Assistant General Manager: 25%; (iii) Assistant Manager: 12.5%; (iv) District Manager: 10%; and (v) Vice President: 2.5%. The bonus payout is subject to an additional twenty-five percent (25%) additional incentive kicker when the increased sales for the applicable store is two percent (2%) or more.

**2. Guest Count Incentive Contest**

27. The Guest Count Incentive Contest provides the General Manager for each region who has the highest percent increase in guest counts for the 2015 fiscal year with a \$250 incentive payment and an entry in a "grand prize" drawing.



28. Each General Manager who wins the guest count contest for a period will be included in a drawing at the end of the fiscal year for the “grand prize”, which is a two year lease for the car of their choice, limited to a net lease value of \$35,000.

### **3. Catering Incentive Plan**

29. The Catering Incentive Plan provides catering sales coordinators with an opportunity to achieve a bonus of up to four percent (4%) of catering sales that the sales coordinator personally generates after a set quarterly base amount of sales is achieved.

30. Subject to the requirements of section 503 of the Bankruptcy Code, the Debtor requests authority to continue to honor each of the Discretionary Employee Incentive Programs after the Petition Date, as such programs may be modified, amended or supplemented from time to time in the ordinary course of the Debtor’s operations, including payment of any pre-petition amounts outstanding on account of the Discretionary Employee Incentive Programs, solely upon entry of a final order granting this Motion.

### **RELIEF REQUESTED**

31. By this Motion, the Debtor requests entry of an Order (a) authorizing the Debtor to pay, in its sole discretion, all payments required under or related to Employee Wages, Unpaid Wages, Reimbursable Expenses, Payroll Taxes, and Deductions (each as defined above and collectively, the “Employee Compensation”); (b) authorizing the Debtor to continue to satisfy or honor, in its sole discretion, the Health Care Programs, Paid Time Off Policies (collectively, the “Employee Benefits” and, together with the Employee Compensation, the “Employee Obligations”)<sup>3</sup> and all costs incident to the foregoing, and to

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<sup>3</sup> The Debtor believes that the Employee Obligations described herein constitute a comprehensive list of such obligations. To the extent any plan, program or other obligation was inadvertently omitted, however, the term “Employee Obligations” includes such plan, program or other obligation.

continue to honor its practices, programs and policies for its Employees, as those practices, programs and policies were in effect as of the Petition Date and as such practices, programs and policies may be modified, amended, or supplemented from time to time in the ordinary course of the Debtor's business; and (c) authorizing and directing the applicable banks and other financial institutions (collectively, the "Disbursement Banks") to receive, process and pay any and all checks drawn on the Debtor's payroll and general disbursement accounts (collectively, the "Disbursement Accounts"), and automatic payroll transfers to the extent that those checks or transfers relate to any of the foregoing; and (d) approving the Discretionary Employee Incentive Programs.

32. Additionally, the Debtor seeks authority to honor, pay, satisfy, or remit all claims and pre-petition obligations related to the Discretionary Employee Incentive Programs.

#### **BASIS FOR RELIEF**

33. To maintain the Debtor's operations and preserve the value of its estate, it is essential that the Debtor continues to operate, to the extent possible, in the ordinary course of its business. To achieve that result, the Debtor must retain the uninterrupted service and loyalty of its lifeline, which is its Employees. Payment of the Employee Compensation and continuation or satisfaction of the Employee Obligations and related arrangements is essential to this goal.<sup>4</sup> Accordingly, the Debtor submits that the relief requested herein is critical to its ability to operate effectively and to preserve the value of its estate throughout this Chapter 11 Case and, therefore, is in the best interests of the Debtor and its estate. Moreover, this relief is necessary to avoid immediate and irreparable harm to the Debtor and its estate.

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<sup>4</sup> For the avoidance of doubt, the Debtor is not seeking blanket authority to cash out accrued pre-petition Paid Time Off or to otherwise deviate from its prepetition policies.

**A. The Court Should Authorize the Debtor to Honor Its Employee Obligations**

**1. Certain of the Employee Obligations are Entitled to Priority Treatment**

34. Pursuant to sections 507(a)(4) and (a)(5) of the Bankruptcy Code, certain of the unpaid Employee Obligations are entitled to priority treatment in an amount up to \$12,475 for each individual Employee (the “Statutory Cap”). *See* 11 U.S.C. § 1129(a)(9)(B) (requiring payment of certain allowed unsecured claims for (i) wages, salaries, or commissions, including vacation, severance and sick leave pay earned by an individual, and (ii) contributions to an employee benefit plan); 11 U.S.C. § 507(a)(4) (providing that allowed unsecured claims for “(A) wages, salaries, or commissions, including vacation severance, and sick leave pay earned by an individual; or (B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor . . .” up to \$12,475 per individual are entitled to a fourth priority ahead of general unsecured claims); 11 U.S.C. § 507(a)(5) (providing that “allowed unsecured claims for contributions to an employee benefit plan . . . ,” with offsets for payments made under section 507(a)(4), are entitled to a fifth priority).

35. The Debtor is not seeking to satisfy the Employee Obligations in amounts that exceed the Statutory Cap in the aggregate per Employee, as calculated under sections 507(a)(4) and (a)(5) of the Bankruptcy Code. Accordingly, granting the relief sought with respect to compensation affects only the timing of payments to Employees. Indeed, the Debtor submits that payment of Employee Obligations up to the Statutory Cap per individual will enhance value for the benefit of the Debtor’s estate because it will help ensure that the Employees--the lifeblood of the Debtor’s business operations--will continue to provide vital services to the Debtor at this critical juncture. In addition, to the extent that the Debtor is authorized, in a reasonable exercise of its business judgment, to honor or satisfy the

Employee Obligations on a postpetition basis in the ordinary course of business, such payments will enhance the value of the Debtor's estate by preserving the going-concern value of the Debtor's business.

**2. Payment of Certain of the Employee Obligations is Required by Law**

36. The Debtor also seeks authority to pay Payroll Taxes and other Deductions to the appropriate entities. These amounts principally represent Employee earnings that Employees, governments and judicial authorities have designated for withholding from Employees' paychecks. Indeed, certain withholdings, including child support and alimony payments, are not property of the Debtor's estate because the Debtor has withheld such amounts from Employees' paychecks on another party's behalf. *See* 11 U.S.C. §§ 541(b)(7) and (d) (amounts withheld from employee paychecks by employer for contribution to employee benefit plan are not property of the estate). In addition to causing undue hardship to certain Employees, the failure to pay such Payroll Taxes and Deductions may result in the Debtor being inundated with inquiries from taxing authorities and garnishors regarding its failure to submit, among other things, taxes and child support and alimony payments, which are not the Debtor's property but have been withheld from Employee paychecks. Moreover, if the Debtor cannot remit these amounts, the affected Employees may face legal action and/or imprisonment due to the Debtor's failure to submit these payments.

37. Further, applicable federal and state laws require the Debtor to withhold certain tax payments from Employees' paychecks and to pay such amounts to the appropriate taxing authority. *See* 26 U.S.C. §§ 6672 and 7501(a); *see also City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95-96 (3rd. Cir. 1994) (finding that state law requiring a corporate debtor to withhold city income tax from its employees' wages created a trust relationship between debtor and the city for payment of withheld income taxes);

*DuCharmes & Co. v. State of Michigan (In re DuCharmes & Co.)*, 852 F.2d 194, 195-96 (6th Cir. 1988) (per curiam) (noting that individual officers of a company may be held personally liable for failure to pay trust fund taxes). Moreover, because the Payroll Taxes are not property of the Debtor's estate, the Debtor requests that the Court authorize the Debtor to transmit the Payroll Taxes to the proper parties in the ordinary course of business.

**B. Satisfaction of the Employee Obligations is Warranted Under the Doctrine of Necessity**

38. Courts in this jurisdiction and others generally acknowledge that, under appropriate circumstances, a court may authorize a debtor to pay (or provide special treatment for) certain prepetition obligations. *See, e.g., In re Motor Coach Indus. Int'l Inc.*, 2009 WL 330993 \*at 2 n. 5 (Bankr. D. Del. Feb. 10, 2009) (“The ‘doctrine of necessity’ or ‘necessity of payment’ doctrine is a general rubric for the proposition that a court can authorize the payment of prepetition claims if such payment is essential to the continued operation of the debtor.”); *In re Just for Feet, Inc.*, 242 B.R. 821, 824-25 (D. Del. 1999) (“The Supreme Court, the Third Circuit and the District of Delaware all recognize the court’s power to authorize payment of pre-petition claims when such payment is necessary for the debtor’s survival during chapter 11.”); *In re Columbia Gas Sys., Inc.*, 136 B.R. 930, 939 (Bankr. D. Del. 1992) (citing *In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (recognizing that “[i]f payment of a pre-petition claim ‘is essential to the continued operation of [the debtor], payment may be authorized.”); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (finding sound business justification for payment of certain pre-petition claims); *In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15, 20 (Bankr. M.D. Fla. 2005) (holding that “[Bankruptcy Code] section 363 is a source for authority to make critical vendor payments, and section 105 is used to fill in the blanks.”). When authorizing such payments, courts have relied

upon several legal theories rooted in Bankruptcy Code sections 1107(a), 1108, 363(b), and 105(a).

39. Pursuant to Bankruptcy Code sections 1107(a) and 1108, debtors-in-possession are fiduciaries holding the bankruptcy estate and operating the business for the benefit of creditors and, if the value justifies, the equity owners. *See, e.g., In re CoServ, L.L.C.*, 273 B.R. 487,497 (Bankr. N.D. Tex. 2002) (noting that “[i]mplicit in the duties of a Chapter 11 trustee or a debtor in possession as set out in Sections 1106 and 704 of the Bankruptcy Code is the duty of such a fiduciary to protect and preserve the estate, including an operating business’s going-concern value.”).

40. Inherent in a debtor-in-possession’s fiduciary duties is the obligation to “protect and preserve the estate, including an operating business’s going-concern value,” which, in certain instances, can be fulfilled “only. . . by the preplan satisfaction of a pre-petition claim.” *Id.* Indeed, the *CoServ* court specifically noted that the pre-plan satisfaction of pre-petition claims would be a valid exercise of the debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate . . . .” *Id.* Consistent with a debtor’s fiduciary duties, where there is a sound business purpose for the payment of prepetition obligations, and where the debtor is able to “articulate some business justification, other than the mere appeasement of major creditors,” courts have authorized debtors to make such payments under section 363(b) of the Bankruptcy Code. *In re Ionosphere Clubs, Inc.*, 98 B.R. at 175 (finding that a sound business justification existed to pay prepetition wages); *see also, e.g., Armstrong World Indus., Inc. v. James A. Phillips, Inc. (In re James A. Phillips, Inc.)*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying upon Bankruptcy Code section 363 as

a basis to allow a contractor to pay the pre-petition claims of suppliers who were potential lien claimants).

41. Courts have also authorized payment of prepetition claims in appropriate circumstances pursuant to section 105(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code, which codifies the inherent equitable powers of the bankruptcy court, empowers the bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Under section 105(a) of the Bankruptcy Code, courts may permit pre-plan payments of prepetition obligations when such payments are essential to the continued operation of the debtor’s business and, in particular, where nonpayment of a pre-petition obligation would trigger a withholding of goods or services essential to the debtor’s business reorganization plan. *See In re UNR Indus., Inc.*, B.R. 506, 520 (Bankr. N.D. Ill. 1992), *rev’d on other grounds, sub nom. Rohn, Inc. v. Bloomington Factory Workers (In re UNR Indus., Inc.)*, 173 B.R. 149 (N.D. Ill. 1994) (permitting the debtor to pay prepetition claims of suppliers or employees whose continued cooperation is essential to the debtors’ successful reorganization); *In re Ionosphere Clubs, Inc.*, 98 B.R. at 177 (finding that section 105 of the Bankruptcy Code empowers bankruptcy courts to authorize payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor).

42. In addition to the authority granted a debtor-in-possession under sections 1107(a), 1108, 363(b), and 105(a) of the Bankruptcy Code, courts have developed the “doctrine of necessity” or the “necessity of payment” rule, which originated in the landmark case of *Miltenberger v. Logansport, C. & S. W.R. Co.*, 106 U.S. 286, 310 (1882). Since *Miltenberger*, courts have expanded their application of the doctrine of necessity to cover

instances of a debtor's reorganization, *see Dudley v. Mealey*, 147 F.2d 268, 271 (2d Cir. 1945) (holding, in a hotel reorganization matter, that the court was not “helpless” to apply the rule to supply creditors where the alternative was the cessation of operations), including the United States Court of Appeals for the Third Circuit, which recognized the doctrine in *In re Lehigh & New England Ry. Co.*, 657 F. 2d at 581-82.

43. In *In re Lehigh & New England Ry. Co.*, the Third Circuit held that a court could authorize the payment of prepetition claims if such payment was essential to the continued operation of the debtor. *See id.* at 581 (noting that courts may authorize payment of prepetition claims when there “is the possibility that the creditor will employ an immediate economic sanction, failing such payment”); *see also In re Penn Cent. Transp. Co.*, 467 F. 2d 100, 102 n. 1 (3rd. Cir. 1972) (noting that the necessity of payment doctrine permits “immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims have been paid”); *In re Just for Feet, Inc.*, 242 B.R. at 824-25 (noting that, in the Third Circuit, debtors may pay prepetition claims that are essential to continued operation of business); *In re Columbia Gas Sys., Inc.*, 171 R. 191-92 (same).

44. Today, the rationale for the necessity of payment rule—the rehabilitation of a debtor-in-possession cases is “the paramount policy and goal of Chapter 11.” *In re Ionosphere Clubs, Inc.*, 98 B.R. at 176; *In re Just for Feet, Inc.*, 242 B.R. at 826 (finding that payment of prepetition claims to certain trade vendors was “essential to the survival of the debtor during the chapter 11 reorganization”) (citations omitted); *see also In re Quality Interiors, Inc.*, 127 B.R. 391,396 (Bankr. N.D. Ohio 1991) (“[P]ayment by a debtor-in-possession of pre-petition claims outside of a confirmed plan of reorganization is generally



prohibited by the Bankruptcy Code,” but “[a] general practice has developed where . . . bankruptcy courts permit the payment of certain pre-petition claims, pursuant to 11 U.S.C. § 105, where the debtor will be unable to reorganize without such payment.”); *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (approving payment of pre-petition unsecured claims of tool makers as “necessary to avert a serious threat to the Chapter 11 process”); *Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1490 (9th Cir. 1987) (finding that it is appropriate to provide for the “unequal treatment of pre-petition debts when [such treatment is] necessary for rehabilitation . . .”); 2 *Collier On Bankruptcy 105.02[4][a]* (16th ed. rev. 2011) (discussing cases in which courts have relied upon the doctrine of necessity or the necessity of payment rule to pay pre-petition claims immediately).

45. Courts in this district frequently have granted relief similar to that requested in this Motion in other chapter 11 cases. *See, e.g., In re Geokinetics Inc.*, No. 13-1 0472 (KJC) (Bankr. D. Del. Apr. 2, 2013), Docket No. 163; *In re Overseas Shipholding Grp., Inc.*, No. 12-20000 (PJW) (Bankr. D. Del. Dec. 7, 2012), Docket No. 45; *In re B456 Sys. Inc. (f/k/a/ Al23 Sys., Inc.)*, No. 12-12859 (KJC) (Bankr. D. Del. Nov. 8, 2012) Docket No. 310; *In re Amicus Wind Down Corp. (f/k/a Friendly Ice Cream Corp.)*, No. 11-13167 (KG) (Bankr. D. Del. Oct. 6, 2011), Docket No. 52; *In re Perkins & Marie Callender’s, Inc.*, No. 11-1795 (KG) (Bankr. D. Del. June 14, 2011), Docket No. 46.

46. The Debtor submits that the relief requested herein will benefit the Debtor’s estate and creditors by allowing the Debtor’s business operations to continue without interruption while the Debtor seeks to consummate its proposed restructuring. Absent such payments, the Employees may seek alternative employment opportunities. Such a development

will deplete the Debtor's workforce, hinder or preclude the Debtor's ability to meet its customer obligations at a time when the Debtor seeks to conduct operations in a "business as usual" manner.

**C. Cause Exists to Authorize the Debtor's Financial Institutions to Honor Checks and Electronic Fund Transfers**

47. To facilitate the implementation of the requested relief, the Debtor further requests that the Court authorize and direct all Disbursement Banks to receive, process, honor and pay any and all checks drawn or electronic fund transfers from the Disbursement Accounts whether such checks or transfer requests were presented before or after the Petition Date, to the extent that such checks or electronic fund transfers are expressly identified by the Debtor as relating directly to the authorized payments with respect to the Employee Obligations. The Debtor also seeks authority to issue new postpetition checks or electronic fund transfer requests that may be dishonored or rejected as a result of the filing of this Chapter 11 Case.

48. The Debtor has sufficient funds to remit the amounts described herein, if any, in the ordinary course of business by virtue of expected cash flows from ongoing business operations, cash reserves and/or through funds it may receive as the result of a debtor-in-possession loan.<sup>5</sup> Also, under the Debtor's existing cash management system, the Debtor has made arrangements to readily identify checks or wire transfer requests as relating to an authorized payment in respect of the relief requested herein. Accordingly, the Debtor believes that checks or wire transfer requests, other than those relating to authorized payments, will not be honored inadvertently and the Court should authorize all applicable

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<sup>5</sup>As of the date hereof, the Debtor is exploring debtor-in-possession financing options and, either contemporaneously with the filing of this Motion or soon thereafter, the Debtor will seek authority to use cash collateral.

financial institutions, when requested by the Debtor, to receive, process, honor and pay any and all checks or wire transfer requests in respect of the relief requested herein.

**RESERVATION OF RIGHTS**

49. To the extent that any contract or agreement in connection with any of the Employee Obligations or the Discretionary Employee Incentive Programs is based upon or deemed an executory contract within the meaning of section 365 of the Bankruptcy Code, the Debtor does not at this time intend to assume or reject such contract or agreement. As such, the Court's authorization of payment shall not be deemed to constitute an assumption of such contract or agreement pursuant to section 365 of the Bankruptcy Code. The Debtor is currently in the process of reviewing all of its contracts and agreements and reserve all of its rights with respect thereto. Nothing herein shall acknowledge, grant, or otherwise permit any right of offset or recoupment by a non-debtor with respect to any claim asserted against the Debtor. If the Court grants the relief sought herein, any payments made pursuant to the Court's order are not intended and should not be construed as an admission to the validity of any claim or a waiver of the rights of the Debtor to dispute such claim subsequently.

50. Additionally, except as expressly stated herein, nothing contained herein is intended or should be construed as (a) an agreement or admission by the Debtor as to the validity of any claim against its estate, (b) a waiver or impairment of the Debtor's right to dispute any claim on any grounds, (c) a promise by the Debtor to pay any claim, or (d) an implication or admission by the Debtor that such claim is payable pursuant to an Order granting the relief requested in this Motion.

**DEBTOR SATISFIES BANKRUPTCY RULE 6003**

51. Bankruptcy Rule 6003 provides that, "[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the

filing of the petition, grant relief regarding . . . a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate . . .” Fed. R. Bankr. P. 6003(b). The Debtor submits that, because the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor for the reasons set forth herein, Bankruptcy Rule 6003 has been satisfied.

**WAIVER OF BANKRUPTCY RULE 6004(A) AND 6004(H)**

52. To implement the foregoing successfully, the Debtor respectfully requests a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h). Pursuant to Bankruptcy Rule 6004(h), “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” As set forth above, the payments proposed herein are essential to prevent potentially irreparable damage to the Debtor’s operations, value, and ability to reorganize. Accordingly, the Debtor submits that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004 (h), to the extent it applies.

**NOTICE**

53. The Debtor will provide notice of this Motion to: (a) the Office of the U.S. Trustee; (b) the holders of the 20 largest unsecured claims against the Debtor; (c) the United States Attorney’s Office for the District of Delaware; (d) the Internal Revenue Service; (e) Grove Family Investments, L.P and its counsel.; (f) CNL Financial Group, Inc. and its counsel; (g) American Express Bank, FSB and its counsel; and (h) any party that has requested notice pursuant to Bankruptcy Rule 2002. As this Motion is seeking “first day” relief, within two business days of the hearing on this Motion, the Debtor will serve copies of this Application and any order entered with respect to this Motion as required by Local Rule 9013-1(m). The Debtor

submits that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, for the reasons set forth above and in the First Day Declaration, the Debtor respectfully requests that the Court enter the Order substantially in the form attached hereto as **Exhibit A** (i) authorizing the Debtor, in its sole discretion, to (a) pay pre-petition and post-petition wages and other compensation, employee business expense allowances and reimbursements, and employee benefits, and (b) continue existing employee benefit plans and programs, (ii) authorizing banks and other financial institutions to receive, process, honor, and pay all checks and electronic payment requests relating to the foregoing, (iii) approval of the Discretionary Employee Incentive Programs, and (iv) granting such other and further relief.

Respectfully submitted,

Dated: December 2, 2015

DUANE MORRIS LLP

/s/ Sommer L. Ross

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*Proposed Counsel to Debtor and Debtor-in-Possession Restaurants Acquisition I, LLC*

**EXHIBIT A**

**Proposed Order**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

RESTAURANTS ACQUISITION I, LLC,<sup>1</sup>

Debtor.

Chapter 11

Case No. 15-12406 (KG)

Related to Docket No. \_\_\_\_

**ORDER (I) AUTHORIZING DEBTOR TO (A) PAY PRE-PETITION WAGES AND OTHER COMPENSATION, AND EMPLOYEE BENEFITS, AND (B) CONTINUE EXISTING EMPLOYEE BENEFIT PLANS AND PROGRAMS, (II) AUTHORIZING BANKS AND FINANCIAL INSTITUTIONS TO PAY ALL CHECKS AND ELECTRONIC PAYMENT REQUESTS, (III) APPROVING THE DEBTOR'S DISCRETIONARY EMPLOYEE INCENTIVE PROGRAMS, AND (IV) GRANTING RELATED RELIEF**

Upon the motion (the "Motion")<sup>2</sup> of Restaurants Acquisition I, LLC (the "Debtor"), debtor and debtor-in-possession in the above-captioned chapter 11 case (the "Chapter 11 Case"), for entry of an order (this "Order") pursuant to sections 105, 363, and 507 of the Bankruptcy Code, Bankruptcy Rules 6003 and 6004, and Local Rule 2015-2, (i) authorizing the Debtor, in its sole discretion, to (a) pay pre-petition and postpetition amounts relating to the Employee Obligations, and (b) continue existing Employee Benefit Programs, (ii) authorizing banks and other financial institutions to receive, process, honor, and pay all checks and electronic payment requests relating to the foregoing, (iii) scheduling a hearing date to be held within three weeks of the Petition Date to consider approval of the Discretionary Employee Incentive Programs, and (iv) granting such other and further relief as requested in the Motion or as the Court otherwise deems necessary or appropriate; and the Court having jurisdiction over

<sup>1</sup> The Debtor's mailing address is 313 East Main Street, Suite 2, Hendersonville, TN and the last four digits of its tax identification number are 8761.

<sup>2</sup> Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Motion or the First Day Declaration, as applicable.

this matter pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that this proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and that the Court may enter a final order consistent with Article III of the United States Constitution; and the Court having found that venue of this proceeding and the Motion in the Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties-in-interest; and the Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and the Court having reviewed and considered the Motion and the First Day Declaration, and the Court having heard the statements in support of the relief requested in the Motion at a hearing before the Court (the "Hearing"); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED:

1. The Motion is granted as set forth herein.
2. The Debtor is authorized, but not directed, in a reasonable exercise of its business judgment, to pay, satisfy or continue to satisfy the Employee Obligations to the extent described in the Motion, in accordance with the Debtor's pre-petition policies and practices, up to an aggregate of approximately \$937,000, as follows: (a) \$650,000 in Unpaid Wages; (b) \$5,000 in Reimbursable Expenses; (c) \$210,000 in Payroll Taxes; (d) \$22,000 in Deductions; and (e) \$50,000 in outstanding Health Care Program obligations. The Debtor shall not pay any amounts set forth in this paragraph over the Statutory Cap to any individual



Employee on account of such Employee's pre-petition Employee Obligations, not including Reimbursable Expenses.

3. The Debtor is authorized, in its sole discretion, to continue to honor the Employee Benefits, as applicable, in the ordinary course of business.

4. The Discretionary Employee Incentive Programs are hereby approved and the Debtor is authorized, in its sole discretion, to continue to operate the Discretionary Employee Incentive Programs in the ordinary course of business.

5. The banks and financial institutions on which checks were drawn or electronic payment requests made in payment of the prepetition obligations approved herein are authorized to receive, process, honor, and pay all such checks and electronic payment requests when presented for payment.

6. All banks and financial institutions are authorized to rely on the Debtor's designation of any particular check or electronic payment request as approved by this Order.

7. Notwithstanding anything in the Motion or this Order to the contrary, any payment made by the Debtor pursuant to the authority granted herein shall be subject to any order authorizing the Debtor's access to and use of cash collateral.

8. Notwithstanding the relief granted herein and any actions taken hereunder, nothing contained in the Motion nor this Order nor any payment made pursuant to this Order shall constitute, nor is it intended to constitute, an admission as to the validity or priority of any claim or lien against the Debtor, a waiver of the Debtor's rights to subsequently dispute such claim or lien, or the assumption or adoption of any agreement, contract, or lease under section 365 of the Bankruptcy Code.

9. Entry of this Order is necessary to avoid immediate and irreparable harm. The requirements of Bankruptcy Rule 6003(b) have been satisfied.

10. Adequate notice of the Motion has been provided. Such notice satisfies the requirements of Bankruptcy Rule 6004(a).

11. Notwithstanding Bankruptcy Rules 6004(h), 7062, and 9014, the terms and conditions of this Order are immediately effective and enforceable upon its entry.

12. The Debtor is authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

13. The Court retains jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

Dated: December \_\_, 2015  
Wilmington, Delaware

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Honorable Kevin Gross  
United States Bankruptcy Judge