

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

In re:

RESTAURANTS ACQUISITION I, LLC,¹

Debtor.

Chapter 11

Case No. 15-12406 (KG)

**DEBTOR'S MOTION FOR AUTHORIZATION
TO (A) CONTINUE CUSTOMER PROGRAMS IN THE ORDINARY
COURSE OF BUSINESS AND (B) OTHERWISE HONOR
PRE-PETITION OBLIGATIONS RELATED THERETO**

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(a) and 363 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), authorizing, but not directing, the Debtor to (a) continue to maintain and administer certain customer programs (as described below) and (b) honor all pre-petition obligations earned by and owing to its customers related thereto in the ordinary course of business and in a manner consistent with past practice. 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:

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

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 is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The bases for the relief requested herein are sections 105(a) and 363 of the Bankruptcy Code, Bankruptcy Rule 6003, and Local Rule 9013-1(m).

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.²

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.

THE CUSTOMER PROGRAMS

9. As described in greater detail in the First Day Declaration, the Debtor operates in highly competitive food services industries, including operating restaurants offering food and beverages, as well as providing catering services, where the quality of the customer experience is a defining factor in differentiating the Debtor from its competitors. As an integral component of its business, the Debtor has implemented certain customer programs (the "Customer Programs") upon which the Debtor relies to enhance revenues and profitability by, among other things, driving repeat business, attract new customers, and generate revenue and earnings.

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

10. The Debtor's liability for the Customer Programs depends on consumer demand, the Debtor's marketing initiatives and promotions and specific store performance at any given point in time. Due to such variables, it is difficult to quantify the Debtor's obligations attributable to the Customer Programs at a particular point in time. The Customer Programs consist of the following promotional programs:

11. Gift Certificates and Gift Cards. The Debtor has sold gift certificates and cards that could be redeemed like cash at any of the Debtor's restaurant locations (collectively, the "Gift Certificates"). As a result, the Debtor could be liable for any Gift Certificates that are redeemed at any given time. As of the Petition Date, the value of outstanding Gift Certificates is approximately \$286,570.

12. Coupons. The Debtor also issues traditional coupons (the "Coupons") offering promotional items and discounts to current and potential customers. The Coupons enable customers to receive a discounted rate for their purchases at all the Debtor's stores. The Coupons represent a discount effective at the time of sale, and as such, do not constitute pre-petition liabilities. In an abundance of caution, however, the Debtor seeks authority to honor all Coupons, whether issued pre-petition or postpetition, in the ordinary course of its business.

13. The Gift Certificates and Coupons generate revenues by encouraging sales at the Debtor's stores and targeting specific customer segments who may otherwise be unlikely to purchase the Debtor's products and services. Accordingly, the Debtor seeks authority to continue these promotional programs and honor any pre-petition obligations related thereto in the ordinary course of business.

RELIEF REQUESTED

14. By this motion, and pursuant to Bankruptcy Code sections 105(a), 363, Bankruptcy Rule 6003, and Local Rule 9013-l(m), the Debtor requests authority, but not

direction, to (a) maintain and administer its Customer Programs and (b) honor all pre-petition obligations owing on account of its Customer Programs in the ordinary course of business and in a manner consistent with past practice.

BASIS FOR RELIEF

A. Continuing to Honor and Maintain the Customer Programs is Appropriate Pursuant to Bankruptcy Code Section 363

15. The Debtor believes that the Customer Programs constitute “ordinary course of business” practices and, therefore, do not require court approval to continue during the pendency of the Chapter 11 Case. To the extent that honoring and maintaining the Customer Programs would be viewed as a use of property outside the ordinary course of business, however, Bankruptcy Code section 363 authorizes the debtor to, in relevant part, “use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). Under Bankruptcy Code section 363, a court may authorize the debtor to pay certain pre-petition claims if the debtor articulates some business justification, other than the mere appeasement of major creditors. *See Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R.147, 153 (D. Del. 1999) (“In determining whether to authorize the use, sale or lease of property of the estate under [Bankruptcy Code section 363], courts require the debtor to show that a sound business purpose justified such actions.”); *see also In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989).

16. Maintaining the Customer Programs is critical for the Debtor to retain its most valuable customers, which are integral to the Debtor’s operations. If the Debtor is unable to honor its obligations arising from the Customer Programs, it risks losing customers to its competitors. To the extent that honoring the Customer Programs requires a cash payment or otherwise imposes a cost on the Debtor’s bankruptcy estate, the Debtor believes use of the estate

property is permitted by Bankruptcy Code section 363(b) as a necessary cost of operating the Debtor's business and thereby preserving the Debtor's estates. Moreover, this relief is necessary to avoid immediate and irreparable harm to the Debtor and its estate.

B. The Relief Requested Herein Should be Granted Pursuant to Bankruptcy Code Section 105(a) and the Doctrine of Necessity

17. In addition, to the extent amounts are outstanding under the Customer Programs as of the Petition Date or obligations related thereto arise from pre-petition services rendered by the Debtor, the Court may authorize payment of such pre-petition claims under Bankruptcy Code section 105(a). Bankruptcy Code section 105(a) 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). Courts in this Circuit and elsewhere have consistently held that Bankruptcy Code section 105(a) authorizes the bankruptcy court to exercise its broad grant of equitable powers to permit payment of pre-petition obligations when essential to the continued operation of the debtor's business. *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 pre-petition 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) (holding that Bankruptcy Code section 105(a) provides a statutory basis for the payment of pre-petition claims under the doctrine of necessity and noting that "[t]he 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.*, 171 B.R. 189, 191-92 (Bankr. D. Del. 1994) (confirming that the doctrine of necessity, i.e., whether the payment is essential to the continued operation of the business, is the standard in the

Third Circuit for enabling a court to authorize the payment of pre-petition claims prior to the confirmation of a reorganization plan).

18. Indeed, bankruptcy courts regularly rely upon their authority under Bankruptcy Code section 105(a) to grant a debtor-in-possession the discretionary authority to pay certain pre-petition claims “where the payment is necessary to permit the effectuation of the rehabilitative purposes of the Bankruptcy Code.” *Pension Benefit Guaranty Corp. v. Sharon Steel Corp. (In re Sharon Steel Corp.)*, 159 B.R. 730, 736 (Bankr. W.D. Pa. 1993). *See also In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (holding that a court may authorize payment of pre-petition claims if such payment is essential to continued operation of the debtor); *see also In re Ionosphere Clubs, Inc.*, 98 B.R. at 175 (“The ability of a Bankruptcy Court to authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept”). As these courts have noted, the rationale for making payments to pre-petition creditors under the doctrine of necessity is consistent with the paramount goal of chapter 11—“facilitating the continued operation and rehabilitation of the debtor” *Id.*

19. Given that any interruption or discontinuation of the Customer Programs could have a devastating effect on the Debtor’s business, the Debtor submits that the resulting benefits to its stakeholders of granting the relief requested herein will far exceed any costs associated with the Customer Programs. Considering the potential loss of customer loyalty, goodwill and revenue absent the relief requested herein, the continuation of the Customer Programs is essential to the ongoing vitality of the Debtor’s business. Accordingly, the Debtor requests authorization to continue the Customer Programs in the ordinary course of business and to perform and honor the pre-petition obligations thereunder, as the Debtor deems appropriate in its business judgment.

20. Courts in this District frequently have granted similar relief in other chapter 11 cases. *See, e.g., In re Amicus Wind Down Corp. (f/k/a Friendly's Ice Cream Corp.)*, No. 11-13167 (KG) (Bankr. D. Del. Oct 6, 2011), Docket No. 49; *In re Neb. Book Co.*, No. 11-12005 (PJW) (Bankr. D. Del. July 25, 2011), Docket No. 227; *In re L.A. Dodgers LLC*, No. 11-12010 (KG) (Bankr. D. Del. June 28, 2011), Docket No. 45; *In re Perkins & Marie Callender's Inc.*, Case No. 11-11795 (KG) (Bankr. D. Del. June 14, 2011), Docket No. 39; *In re Allen Family Foods, Inc.* Case No. 11-11764 (KJC) (Bankr, D. Del. June 10, 2011), Docket No. 29.³

CAUSE EXISTS TO AUTHORIZE THE DEBTOR'S FINANCIAL INSTITUTIONS TO HONOR CHECKS AND ELECTRONIC FUND TRANSFERS

21. The Debtor believes that it has sufficient availability of funds to pay the amounts described herein in the ordinary course of business by virtue of cash reserves, expected cash flows from business operations, and/or debtor-in-possession financing received from a post-petition lender.⁴ 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 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.

³ Due to the voluminous nature of the orders cited herein, such orders have not been attached to this motion. Copies of these orders are available upon request to the Debtor's proposed counsel.

⁴ The Debtor is exploring various debtor-in-possession financing opportunities and expects to file, either contemporaneously with the filing of this Motion or soon thereafter, a motion seeking authority to use cash collateral.

DEBTOR SATISFIES BANKRUPTCY RULE 6003

22. 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.

23. Any failure to honor its Customer Programs would unquestionably have a detrimental effect on the Debtor’s reputation and customer relations and result in immediate and irreparable harm to the Debtor’s business. The Customer Programs are therefore essential to ensure that the Debtor remains competitive notwithstanding the commencement of the Chapter 11 Case.

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

24. 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

25. 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.

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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** authorizing the Debtor to (a) maintain and administer its Customer Programs and (b) honor all pre-petition obligations owing on account of its Customer Programs in the ordinary course of business and in a manner consistent with past practice.

Respectfully submitted,

Dated: December 2, 2015

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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,¹

Debtor.

Chapter 11

Case No. 15-12406 (KG)

Related to Docket No. ____

**ORDER AUTHORIZING THE DEBTOR TO
(A) CONTINUE CUSTOMER PROGRAMS IN THE ORDINARY COURSE OF
BUSINESS AND (B) OTHERWISE HONOR PRE-PETITION
OBLIGATIONS RELATED THERETO**

Upon the motion (the “Motion”)² 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 Bankruptcy Code sections 105(a) and 363, authorizing, but not directing, the Debtor to (a) maintain and administer certain Customer Programs and (b) honor all pre-petition obligations earned by and owing to its customers related thereto in the ordinary course of business and in a manner consistent with past practice; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding in accordance with 28 U.S.C. § 157(b)(2); and venue being proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion being adequate and appropriate under the particular circumstances; and upon the First Day Declaration and the record of all proceedings had before the Court; and the Court having found and determined that the relief sought in the Motion is in the best interests of the Debtor’s estate,

¹ 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.

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

its creditors and other parties-in-interest and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and any objections to the requested relief having been withdrawn or overruled on the merits; 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, pursuant to Bankruptcy Code sections 105(a) and 363 to continue, renew, replace, implement, modify and/or terminate the Customer Programs as it deems appropriate, in the ordinary course of business and without further order of the Court.
3. The Debtor is authorized, but not directed, in its business judgment, to honor all pre-petition obligations relating to the Customer Programs in the ordinary course of business and post-petition obligations relating to the Customer Programs in the ordinary course of business.
4. The banks and financial institutions on which any checks were drawn or electronic payment requests were made in payment of the pre-petition obligations approved herein are authorized and directed to receive, process, honor, and pay all such checks and electronic payment requests when presented for payment, and all such banks and financial institutions are authorized to rely on the Debtor's designation of any particular check or electronic payment request as being approved by this Court.
5. Notwithstanding the relief granted herein and any actions taken hereunder, nothing contained in this order shall constitute an admission as to the validity or priority of any claim against the Debtor, the creation of an administrative priority claim on account of the pre-petition obligations sought to be honored, or the assumption or adoption of any contract or agreement under Bankruptcy Code section 365.

6. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied by the contents of the Motion or are otherwise deemed waived.

7. Notice of the Motion as provided therein shall be deemed good and sufficient and such notice satisfies the requirements of Bankruptcy Rule 6004(a) and the Local Rules.

8. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h), this order shall be immediately effective and enforceable upon its entry.

9. The Debtor is authorized to take all actions necessary to effectuate the relief granted pursuant to this order in accordance with the Motion.

10. The Court retains jurisdiction with respect to all matters arising from or related to the interpretation or implementation of this order.

Dated: December __, 2015
Wilmington, Delaware

Honorable Kevin Gross
United States Bankruptcy Judge