

**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 ENTRY OF AN
ORDER (I) AUTHORIZING THE DEBTOR TO PAY CERTAIN PRE-PETITION
CLAIMS ARISING UNDER THE PERISHABLE AGRICULTURE COMMODITIES
ACT, AND (II) 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 undersigned counsel, hereby files this motion (the "Motion") seeking entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Order"), (i) authorizing, but not directing, the Debtor, in its sole discretion, to pay, in the ordinary course of business all claims arising under the Perishable Agricultural Commodities Act of 1930 (as amended, modified, or supplemented from time to time, "PACA"), and any and all state statutes of similar effect, of PACA Vendors (as defined herein, whose claims shall be identified herein collectively as the "PACA Claims"); and (ii) granting related relief. 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 are 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 and the last four digits of its tax identification number are 8761.

JURISDICTION

1. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this Motion 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 this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The bases for the relief requested herein are Bankruptcy Code sections 105(a), 363, 503(b), 507(a)(2), 1107(a) and 1108, Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Rule 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”).

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 DEBTOR’S PACA OBLIGATIONS

A. The Perishable Agricultural Commodities Act

9. Congress enacted PACA to regulate the sale of “perishable agricultural commodities” and protect sellers of such commodities. *See* 7 U.S.C. § 499e(c)(2); 7 C.F.R.

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

§ 46.46(b); *see also Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc.*, 67 F.3d 1063, 1067 (2d Cir. 1995). Under PACA, the term “perishable agricultural commodity” is generally defined as “fruits and fresh vegetables of every kind and character” “whether or not frozen or packed in ice.” 7 U.S.C. § 499a(b)(4). PACA provides various protections to fresh fruit and vegetable sellers, including the establishment of a statutory constructive trust (the “PACA Trust”), consisting of a purchaser’s entire inventory of food or other derivatives of perishable agricultural commodities, the product 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); 7 C.F.R. § 46.46(b); *Bear Mountain Orchards, Inc. v. Mich-Kim, Inc.*, 623 F. 3d 163, 167 (3d Cir. 2010) (“The produce purchasers are require[d]... to hold sufficient PACA trust assets in trust to pay all suppliers.”) (internal quotations and citation omitted). Assets subject to a PACA Trust are preserved by statute as a non-segregated floating trust and may be commingled with non-trust assets. *See* 7 U.S.C. § 499e(c)(2). However, courts in this and other districts have consistently held that PACA Trust Assets are not property of a debtor’s estate. *See Stanziale v. Rite Way Meat Packers, Inc. (In re CFP Liquidating Estate)*, 405 B.R. 694, 697 (Bankr. D. Del. 2009); *In re Long John Silver’s Rests., 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).

10. In order for a seller of perishable agricultural commodities to preserve its rights as a PACA Trust beneficiary, PACA requires that such seller take certain procedural steps. Specifically, a PACA Vendor must provide written notice (a “PACA Notice”) to the purchaser of such goods of its intent to preserve the benefits of the PACA Trust. *See Merrill Farms Corp. v. H.R. Hindle & Co. (In re Hindle & Co.)*, 149 B.R. 775, 785 (Bankr, E.D. Pa. 1993); *Debruyn Produce Co. v. Richmond Produce Co. (In re Richmond Produce Co.)*, 112 B.R. 364, 368

(Bankr. N.D. Cal. 1990). Written notice under PACA may be accomplished by either (a) including the statutorily-mandated language on the face of the vendor's invoices or (b) providing written notice to the purchaser of the PACA goods within thirty (30) days after the time payment is due. Beneficiaries of a PACA Trust that adhere to the statutory notice requirements are entitled to prompt payment from the PACA Trust Assets ahead of secured and unsecured creditors of a debtor's estate. See "*R*" *Best Prod, Inc. v. 646 Corp.*, No. 00 Civ 8536 (HB), 2002 WL 31453909, at *1 (S.D.N.Y. Oct. 31, 2002). However, a PACA goods seller's failure to comply with the notice requirements renders its claim a general unsecured claim in a debtor's chapter 11 case. See *In re H.R., Hindle*, 149 B.R. at 786.

11. PACA's application is limited to sales to commission merchants, brokers, and dealers. 7 U.S.C. § 499e(c). "Dealer", as such term is defined in PACA, is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce." 7 U.S.C. § 499a(b).

B. PACA and this Chapter 11 Case

12. In the ordinary course of business, the Debtor engages various service providers, goods providers, and other vendors in connection with its operations, the absence of which will threaten the Debtor's ongoing restaurant operations. Without the goods and services provided by certain of these vendors, the Debtor's restaurants and operations as a whole will suffer immediate and irreparable harm. To ensure that the Debtor continues to receive a constant supply of fresh fruits and vegetables postpetition, the Debtor seeks authority, but not direction, in its sole discretion, to continue to pay PACA Claims to those vendors who supply the Debtor with fruits and vegetables (each a "PACA Vendor", and collectively, the "PACA Vendors") in the

ordinary course of business and consistent with its historical practices in effect prior to the Petition Date.

13. The Debtor believes that a certain portion of the goods its purchases from vendors may qualify as “perishable agricultural commodit[ies]” under PACA. As a result, provided that the PACA Vendors abide by the notice requirements of PACA, they will be eligible to assert PACA Claims³ granting them priority head of all other secured and unsecured creditors in this Chapter 11 Case.

14. As of the Petition Date, the Debtor estimates it owes PACA Vendors approximately \$1,425,826.21 in the aggregate for PACA goods delivered prior to the Petition Date. The Debtor expects to be invoiced for substantially all of the amounts owed to PACA Vendors within twenty-one (21) days following the Petition Date.

15. As discussed herein, it is essential that the Debtor be able to maintain its business relationships with, and honor outstanding payment obligations to, its PACA Vendors in light of the role that they play in the Debtor’s continuation of its business. In addition, various third parties who provide goods and services to the Debtor, such as the PACA Vendors, may be able to assert liens against the Debtor’s assets. It is critical to the Debtor’s business operations that the Debtor continue to receive without disruption goods and services from the PACA Vendors. The Debtor believes that without the relief requested herein, many of these vendors will cease

³Certain of the Debtor’s vendors may also be eligible to assert claims under the Packers and Stockyards Act of 1921 as amended, 7 U.S.C. § 181 et seq. (“PASA”), which prescribes the conditions of operations for businesses dealing in livestock. PASA creates a statutory trust scheme which is virtually identical to PACA in respect of delivery of livestock and other eligible goods. *See In re W.L. Bradley Co.*, 75 B.R. 505, 509 (Bankr. E.D. Pa. 1987) (“The Legislative history expressly notes that the PACA Trust was modeled on the trust amendment to the Packers and Stockyards Act.”). To the extent that any claims fall under PASA, the Debtor submits that it is in the best interests of the Debtor’s estate, creditors and parties-in-interest to treat such claims in a manner identical to the claims of the PACA Vendors. Accordingly, for the purposes of the Motion and any related orders, any claims arising under PACA shall also incorporate any claims arising under PASA.

delivering goods and providing services to the Debtor. Any such disruption would have a devastating effect on the Debtor's operations and its reorganization efforts.

16. Accordingly, payment of PACA Claims at the outset of this Chapter 11 Case will not prejudice or affect the amount available for distribution to other creditors of the Debtor. To ensure the continued, uninterrupted supply of fresh produce, it is important that the Debtor be authorized to pay all valid PACA Claims in the ordinary course of business and consistent with its historical practices.

RELIEF REQUESTED

17. The Debtor respectfully request entry of an Order, substantially in the form attached hereto as **Exhibit A**, pursuant to sections 105(a), 363(b), 503, and 507 of the Bankruptcy Code authorizing, but not directing, the Debtor, in its sole discretion, to pay (a) the PACA Claims up to a maximum aggregate of \$1,425,826.21 (the "PACA Claims Cap"), and (b) granting such other and further relief as requested herein or as the Court otherwise deems necessary or appropriate. This relief is necessary to avoid immediate and irreparable harm to the Debtor and its estate

BASIS FOR RELIEF

A. Payment of The PACA Claims is Necessary

18. Courts generally acknowledge that it is appropriate to authorize the payment of pre-petition obligations where necessary to protect and preserve the estate, including an operating business's going-concern value. *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 (Bankr. D. Del. 1999) (noting that, in the Third

Circuit, debtors may pay pre-petition claims that are essential to the continued operation of the debtor's business); *see also In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (“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.”); *Armstrong World Indus., Inc. v. James A. Phillips, Inc., (In re James A. Phillips, Inc.)*, 29 B.R. 391, 398 (S.D.N.Y. 1983) (granting the debtor the authority to pay pre-petition claims of suppliers who were potential lien claimants). When authorizing payments of certain pre-petition obligations, courts have relied upon several legal theories rooted in sections 363(b) and 105(a) of the Bankruptcy Code.

19. A debtor-in-possession is a fiduciary holding its bankruptcy estate and operating its business for the benefit of creditors and, if the value justifies, the equity owners. 11 U.S.C. §§ 1107(a) and 1108; *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.”). Consistent with such fiduciary duties, courts have authorized payment of pre-petition obligations under section 363(b) where a sound business purpose exists for doing so. *See Ionosphere Clubs*, 98 B.R. at 175 (noting that section 363(b) provides “broad flexibility” to authorize a debtor to honor pre-petition claims where supported by an appropriate business justification). Indeed, courts have recognized that there are instances when a debtor’s fiduciary duty can “only be fulfilled by the preplan satisfaction of a pre-petition claim.” *CoServ*, 273 B.R. at 497.

20. Courts have also authorized payment of pre-petition claims in appropriate circumstances under section 105(a) of the Bankruptcy Code, which empowers the 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 this section, courts may authorize pre-plan payment of pre-petition obligations when essential to the continued operation of a debtor’s business and, in particular, where nonpayment of a pre-petition obligation would trigger a withholding of goods or services essential to the debtors’ business reorganization plan. *See In re Just for Feet, Inc.*, 242 B.R.at 825; *In re Ionosphere Clubs*, 98 B.R. at 177 (finding that section 105 empowers bankruptcy courts to authorize payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor). Specifically, the Court may use its power under section 105(a) to authorize payment of pre-petition obligations pursuant to the “necessity of payment” rule (also referred to as the “doctrine of necessity”); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191-92 (Bankr. D. Del. 1994) (confirming doctrine of necessity, *i.e.*, whether payment is essential to continued operation of debtor’s business, is the applicable standard in the Third Circuit for enabling the court to authorize payment of pre-petition claims prior to confirmation of reorganization plan); *In re UNR Indus.*, 143 B.R. 506, 520 (Bankr. N.D. Ill. 1992) (permitting the debtor to pay pre-petition claims of suppliers or employees whose continued cooperation is essential to the debtors’ successful reorganization).

21. Indeed, the Third Circuit recognized the “necessity of payment” doctrine in *In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981), holding that a court could authorize the payment of pre-petition claims if such payment was essential to the continued operation of the debtor. *Id.* (stating courts may authorize payment of pre-petition 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 (3d Cir. 1972) (holding necessity of payment doctrine permits “immediate payment of claims of creditors where those creditors will not supply services or materials essential to the conduct of the business until their pre-reorganization claims have been paid”); *In re Just for Feet*, 242 B.R. at 824-25 (noting that, in the Third Circuit, debtors may pay pre-petition claims that are essential to continued operation of business); *Columbia Gas Sys., Inc.*, 171 B.R. at 191-92 (noting that “the Third Circuit the law is clear that to justify payment of one class of pre-petition creditors in advance of a confirmed plan, the debtor must show that payment is essential to the continued operation of the business.”).

22. The necessity of payment doctrine is designed to foster the rehabilitation of a debtor in reorganization cases, which courts have recognized is “the paramount policy and goal of Chapter 11.” *In re Ionosphere Clubs*, 98 B.R. at 176; *In re Just For Feet*, 242 B.R. at 826 (finding that payment of pre-petition claims to certain trade vendors was “essential to the survival of the debtor during the chapter 11 reorganization.”); *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 II 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”).

23. In this case, the Debtor’s operations require the seamless coordination of a multitude of unrelated third-parties at every stage in the supply chain. Collectively, the Debtor’s

supply chain ensures that the Debtor receives all of the food, products, and supplies necessary to operate its business and provide its customers with the high-quality food expected under the Debtor's brand. Any significant disruption in the Debtor's supply chain, such as a vendor halting delivery of certain necessary goods and/or services, could result in the Debtor not having sufficient food, products and supplies to operate its business. Given the highly-competitive nature of the restaurant business, such a result could be detrimental to the Debtor's business and significantly impair its restructuring efforts.

24. The Debtor submits that the relief requested herein represents a sound exercise of the Debtor's business judgment, is necessary to avoid immediate and irreparable harm to the Debtor's estate, and will benefit the Debtor's estate and its creditors by allowing the Debtor's business operations to continue without interruption. Specifically, the authority, but not direction, to satisfy the PACA Claims in the initial days of this Chapter 11 Case without disrupting the Debtor's business operations will send a clear signal to the marketplace, including key suppliers and customers, that the Debtor is willing and able to conduct business as usual during this Chapter 11 Case.

B. Payment of Allowed PACA Claims in the Ordinary Course of Business is Warranted

25. The Court should authorize the prompt and full payment of the PACA Claims. Courts in this and other districts routinely grant similar relief with respect to the treatment of PACA Claims. *See, e.g., 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. 57; *In re Perkins & Marie Callender's Inc.*, No. 11-11795 (KG) (Bankr. D. Del. June 14, 2011), Docket No. 43; *In re Harry & David Holdings, Inc.*, No. 11-10884 (MFW) (Bankr. D. Del. April 26, 2011), Docket No. 211; *In re CB Holding Corp.*, No. 10-13683 (MFW) (Bankr. D. Del. Jan. 10, 2011), Docket No. 419; *In re*

Great Atl. & Pac. Tea Co., No. 10-24549 (RDD) (Bankr. S.D.N.Y. Jan. 12, 2010), Docket No. 500; *In re Uno Rest. Holdings Corp.*, No. 10-10209 (MG) (Bankr. S.D.N.Y. Jan. 20, 2010), Docket No. 36; *In re Premier Int'l Holdings, Inc.*, No. 09-12019 (CSS) (Bankr. D. Del. July 13, 2009), Docket No. 206; *In re Buffets Holdings, Inc.*, No. 08-10141 (MFW) (Bankr. D. Del. Feb. 13, 2008), Docket No. 285.⁴

26. As discussed above, assets governed by PACA do not constitute property of the Debtor's estate. See *Tom Lange Co. v. Kornblum & Co. (In re Kornblum & Co)*, 81 F.3d 280, 284 (2d Cir. 1995); *In re Long John Silver's Rests., 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). As a result, the distribution of assets to PACA Vendors falls outside the Bankruptcy Code's priority scheme, and such claimants are entitled to payment from the PACA Trust ahead of the Debtor's other creditors. See, e.g., *In re Magic Rests., Inc.*, 205 F.3d 108,110 (3d Cir. 2000); *Consumers Produce Co., Inc. v. Volante Wholesale Produce, Inc.*, 16 F.3d 1374, 1377-78 (3d Cir. 1994). Moreover, the disposition of PACA Trust Assets is subject to the jurisdiction of the bankruptcy court. See, e.g., *Bear Mountain Orchards, Inc. v. Mich-Kim, Inc.*, 623 F.3d 163, 167 (3d Cir. 2010); *Monterey Mushrooms, Inc. v. Carolina Produce Distribs. (In re Carolina Produce Distrib.)*, 110 B.R. 207, 209 (W.D.N.C, 1990); *Allied Growers Co-Op, Inc. v. United Fruit and Produce Co. (In re United Fruit Produce Co.)*, 86 B.R. 14, 16 (Bankr. D, Conn. 1988). Accordingly, the relief requested herein with respect to the payment of the PACA Claims does not prejudice the Debtor's creditors or any party-in-interest in this Chapter 11 Case.

27. Furthermore, payment of allowed PACA Claims will inure to the benefit of the Debtor's estate by preserving goodwill between the Debtor and its PACA Vendors. Any delays

⁴ 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.

in satisfying amounts owed to PACA Vendors could adversely affect the Debtor's ability to obtain fresh produce, thereby undercutting the Debtor's reorganization prospects. Failing to pay allowed PACA Claims in the ordinary course of business could subject the Debtor to numerous claims and adversary proceedings, including motions by PACA Vendors for relief from the automatic stay and/or injunctive relief, which would result in the unnecessary expenditure of time, effort and money by the Debtor.

28. Lastly, in certain circumstances, officers, or directors, or members of a corporate entity who are in a position to control trust assets but breach the fiduciary duty to preserve those assets may be held personally liable under PACA. *See Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280,282-283 (9th Cir. 1997); *see also Golman-Hayden Co., v. Fresh Source Produce Inc.*, 217 F.3d 348, 350 (5th Cir. 2000) (court will require (a) whether the individual's involvement with the corporation was sufficient to establish legal responsibility and (b) whether the individual, in failing to exercise any appreciable oversight of the corporation's management, breached a fiduciary duty owed to PACA creditors, to determine personal liability). Thus, to the extent that any valid obligations arising under PACA remain unsatisfied by the Debtor, the Debtor's officers or members may be subject to lawsuits during the pendency of this Chapter 11 Case. Any such lawsuit (and ensuing potential liability) would distract the Debtor and its officers or members in its efforts to implement a successful reorganization strategy and, moreover, could lead to the assertion of substantial indemnification claims under the Debtor's governing documents, employment agreements and applicable laws to the detriment of the Debtor.

C. Paying the PACA Claims Will Not Affect Creditor Recoveries

29. The relief requested herein will not affect the recovery of creditors in this Chapter 11 Case. As stated above, assets governed by PACA do not constitute property of the Debtor's estate. Holders of PACA Claims are entitled to payment from the PACA Trust ahead of the

Debtor's other creditors. The Debtor's requested relief affects only the timing of the payment of the PACA Claims, and will not prejudice the recovery of other creditors. In such instances, timely and immediate payment now only provides the PACA Vendors with what they would be entitled to receive under a plan of reorganization, only without any interest costs that might otherwise accrue during this Chapter 11 Case. Accordingly, payment to such claimants at the outset of this Chapter 11 Case will not affect recoveries to other creditors under any chapter 11 plan, and instead, solely impacts the timing of these payments.

D. Cause Exists To Authorize the Debtor's Financial Institutions To Honor Checks and Electronic Fund Transfers

30. 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.⁵ Also, under the Debtor's existing cash management system, the Debtor has made arrangements to 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.

THE REQUIREMENTS OF BANKRUPTCY RULE 6003 ARE SATISFIED

31. For a debtor to obtain relief to make pre-plan payments within 21 days of the Petition Date, it must establish that making such payments satisfies the requirements mandated

⁵ 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.

by Bankruptcy Rule 6003—namely, the relief requested is necessary to avoid “immediate and irreparable harm.” Fed. R. Bankr. P. 6003. If a debtor’s prospect of reorganizing is threatened, or swift diminution in value of the debtor’s estate is likely, absent the granting of the requested relief, immediate and irreparable harm likely exists. *See In re WorldSpace, Inc.*, No. 08–12412 (PJW), 2008 WL 8153639, at *2 (Bankr. D. Del. Oct. 20, 2008) (granting emergency motions for postpetition financing, adequate protection and modification of the stay where the court found that the relief was necessary to avoid irreparable harm to the debtors and their estates because such relief was essential for the continued operations of the Debtor’s business); *In re New World Pasta Co.*, No. 04-02817 (MDF), 2004 WL 5651052, at *5 (Bankr. M.D. Pa. July 9, 2004) (same); *see also In re Ames Dep’t Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (finding that “immediate and irreparable harm” exists where loss of the business threatens the ability to reorganize).

32. As discussed above, the continuity and viability of the Debtor’s business operations depends heavily on the uninterrupted delivery of essential food, products and supplies. The failure of any vendor to deliver essential food, products or supplies or to render services to the Debtor would have immediate and detrimental consequences to the Debtor’s business and would decrease value to the detriment and prejudice to the Debtor. The Debtor cannot risk even the perception that its restaurants will offer anything but the highest level of food and beverage quality and quantity for the duration of this Chapter 11 Case. Moreover, it is the Debtor’s business judgment that continuation of its positive relationship with the PACA Vendors is critical to its continued operations and greatly increases the likelihood of a successful reorganization. Accordingly, the Debtor respectfully submits that the relief requested herein is

necessary to avoid immediate and irreparable harm and, therefore, Bankruptcy Rule 6003 is satisfied.

SATISFACTION OF BANKRUPTCY RULE 6004(a) AND 6004(h)

33. For the reasons described above, the immediate payment of the PACA Claims is essential to prevent potentially irreparable damage to the Debtor's operations, value and ability to reorganize. Accordingly, given the nature of the relief requested herein, the Debtor respectfully requests a waiver of the notice requirements of Bankruptcy Rule 6004(a) and of the 14-day stay imposed by Bankruptcy Rule 6004(h), to the extent that either applies.

NOTICE

34. 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, FBS; and (h) any known PACA Vendors; and (i) 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 Motion 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 herein and in the First Day Declaration, the Debtor respectfully requests that the Court enter an order, in substantially the form attached hereto as **Exhibit A**, granting the relief requested herein and such other and further relief as may be just, proper and equitable.

Respectfully submitted,

Dated: December 2, 2015

DUANE MORRIS LLP

/s/ Sommer L. Ross

Sean J. Bellew (DE 4072)
Sommer L. Ross (DE 4598)
Jarret P. Hitchings (DE 5564)
222 Delaware Avenue, Suite 1600
Wilmington, DE 19801-1659
Telephone: 302.657.4900
Facsimile: 302.657.4901
sjbellew@duanemorris.com
slross@duanemorris.com
jphitchings@duanemorris.com

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 GRANTING DEBTOR'S MOTION FOR ENTRY OF AN
ORDER (I) AUTHORIZING THE DEBTOR TO PAY CERTAIN PRE-PETITION
CLAIMS ARISING UNDER THE PERISHABLE AGRICULTURE COMMODITIES
ACT, AND (II) GRANTING RELATED RELIEF**

Upon the motion (the "Motion")² of Restaurants Acquisition I, LLC (the "Debtor"), the debtor and debtor-in-possession in the above-captioned chapter 11 case (the "Chapter 11 Case"), for entry of an order (this "Order") (i) authorizing, but not directing, the Debtor to pay the PACA Claims, and (ii) authorizing the financial institutions, when requested by the Debtor, to receive, possess, honor and pay all checks presented for payment and electronic payment requests, all as set forth more fully in the Motion; and upon the First Day Declaration; and this Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and venue being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and all other parties-in-interest; and the Debtor having provided appropriate notice of the Motion and the opportunity for a hearing on the Motion under the circumstances and no other or further notice need be provided; and the Court having reviewed the Motion and having heard the statements in support of the relief requested therein at

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.

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 the Court having found that the relief requested in the Motion is necessary to prevent immediate and irreparable harm; and upon all of the proceedings had before the Court; 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 its sole discretion, to pay or otherwise satisfy all valid PACA Claims; provided, however, that all payments shall be subject to the PACA Claims Cap.
3. Any PACA Vendor who accepts payment from the Debtor in satisfaction of its valid PACA Claim will be deemed to have waived any and all claims of whatever type, kind, or priority against the Debtor, its property, its estate and any PACA Trust Assets, but only to the extent that payment has been received by such PACA Vendor on account of its PACA Claim.
4. Nothing in the Motion or this Order shall impair the Debtor’s right to contest the validity or amount of any PACA Claim that may be asserted, and all of the Debtor’s rights with respect thereto are hereby reserved.
5. The Debtor is authorized, but not directed, to issue postpetition checks or to effect postpetition fund transfer requests in replacement of any checks or fund transfer requests that are dishonored as a consequence of this Chapter 11 Case with respect to the payments approved by this Court hereunder.
6. The banks and financial institutions on which checks were drawn or electronic payment requests were made in payment of the obligations approved herein are authorized and directed, when requested by the Debtor, 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 Order.

7. Nothing herein shall prohibit the Debtor from seeking Court authority to increase the pre-petition amounts authorized to be paid herein.

8. Nothing in this Order or any action taken by the Debtor in furtherance of the implementation hereof shall be deemed to constitute an assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code, and all of the Debtor's rights with respect to such matters are expressly reserved.

9. Nothing in this Order nor the Debtor's payment of claims pursuant to this Order shall be construed as (a) an agreement or admission by the Debtor as to the validity of any claim on any grounds, (b) a waiver or impairment of any of the Debtor's rights 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 this Order. 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.

10. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied.

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

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

13. The Debtor is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

14. 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