

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

_____)	
)	Chapter 11
In re:)	
)	Case No. 17-11444-SAH
EATERIES, INC., <i>et al.</i> ¹)	
)	Jointly Administered
Debtors.)	
_____)	

**MOTION TO ASSUME EXECUTORY CONTRACT, BRIEF IN SUPPORT,
AND NOTICE OF OPPORTUNITY FOR HEARING**

Your rights may be affected. You should read this document carefully and consult your attorney about your rights and the effect of this document. If you do not want the Court to grant the requested relief, or you wish to have your views considered, you must file a written response or objection to the requested relief with the Clerk of the United States Bankruptcy Court for the Western District of Oklahoma, 215 Dean A. McGee Ave., Oklahoma City, OK 73102 no later fourteen (14) days from the date of filing of this request for relief. You should also serve a file-stamped copy of your response or objection to the undersigned movant's attorney and all others required to be served and file a certificate of service with the Court. If no response or objection is timely filed, the Court may grant the requested relief without a hearing or further notice.

The 14-day period for response includes the three (3) days allowed for mailing provided for in Bankruptcy Rule 9006(f).

Eateries, Inc. (“Eateries”) and GRP of Zanesville, LLC (“Zanesville”), debtors and debtors-in-possession in the above-captioned cases (collectively, “Debtors”), hereby file this motion (the “Motion”) for entry of an order under to assume the existing services agreement by

¹ The affiliated Debtors are Eateries, Inc. and GRP of Zanesville, LLC, Case No. 17-11445-SAH.

and between Eateries and Performance Food Group, Inc. (“PFG”) pursuant to 11 U.S.C. § 365 and Fed. R. Bankr. P. 2002, 6006 and 9014. The services agreement between Eateries and PFG shall hereinafter be referred to as the “PFG Distribution Agreement”. In support of this Motion, the Debtors rely on the Affidavit of William C. Liedtke, III, Vice-President and Managing Member of Debtors, in Support of Debtors’ Chapter 11 Petitions and First Day Motions (the “First Day Affidavit”).² In further support of this Motion, the Debtor respectfully represents as follows:

JURISDICTION AND VENUE

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

2. The statutory predicate for the relief sought herein is 11 U.S.C. §§ 105(a) and 365.

BACKGROUND AND OVERVIEW

3. On April 18, 2017 (the “Petition Date”), the Debtors filed voluntary petitions for relief pursuant to chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Western District of Oklahoma (the “Bankruptcy Court”).

4. The Debtors continue to operate their businesses as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors continue to operate their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. An official committee of unsecured creditors has not been appointed in these

² Capitalized terms used herein and not otherwise defined have the meaning set forth in the First Day Affidavit.

Chapter 11 Cases.

5. A description of the Debtors' businesses, the reasons for filing these Chapter 11 Cases and the relief sought from the Bankruptcy Court to allow for a smooth transition into operations under chapter 11 of the Bankruptcy Code is set forth in the First Day Affidavit. The Debtors hereby adopt and incorporate the First Day Affidavit as if fully set forth herein.

6. Immediately prior to the filing of this bankruptcy, Eateries (directly or through its various subsidiaries, including Zanesville) operated a chain of 15 restaurants located in 9 states, and employed more than 450 people. These restaurants are located in various shopping malls whose business is directly related to the volume of shoppers visiting the anchor tenants in such malls. The continued increase in online shopping has left brick-and-mortar shopping centers to fight over a smaller group of consumers. As a result, over the last year, certain segments of the retail shopping industry have experienced a significant downturn resulting in announcements by Macy's, Sears, and, most recently, JCPenney that they have or will close hundreds of these anchor stores. This downturn has had a direct impact on this business of those restaurants located in shopping malls experiencing decreased business.

7. As a result of the decreased business, Eateries has been attempting to renegotiate its lease terms with various of its landlords without success. Indeed, the downturn has resulted in the closure of 4 of Eateries' restaurant locations in advance of the filing of this bankruptcy, leaving 11 locations in operation in 6 states, employing approximately 375 people, at the time of the filing of this case.

8. Debtors previously analyzed the available suppliers and vendors and have determined the suppliers and vendors that are critical (the "Critical Trade Vendors") and necessary to the continued operation of Debtors' businesses based on the goods and services

supplied and the availability of other sources of supply of similar cost and quality. Debtors requested permission from this Court to allow it to continue to pay its vendors which it has identified as critical to their continued operations. *See* Amended Motion for Order Pursuant to 11 U.S.C. § 105 Authorizing Payment of Prepetition Claims of Critical Trade Vendors and Notice of Opportunity for Hearing [Dkt. No. 36]. Such request was granted by this Court by way of Order entered on April 26, 2017 [Dkt. No. 76] (the “Critical Vendor Order”).

9. Of the amounts owed to Critical Trade Vendors, 80% of the total debt is owed to PFG, Debtors’ primary food supplier for all of its restaurants.

10. Debtors engaged in substantial pre-petition negotiations with PFG in an effort to continue its relationship with PFG to induce PFG to continue to provide the food and other supplies critical to the continued operation of the Debtors’ business. One of the terms negotiated was that PFG would be listed as a critical vendor and that its executory contract(s) be assumed early in the bankruptcy case.

11. Debtors’ believe that it would be prohibitively expensive, disruptive and cumbersome to locate and secure a new contract with a food supplier unfamiliar with Debtors’ restaurants and their food supply needs in sufficient time to continue effective operation of the Debtors’ restaurants.

I. REQUEST FOR AN ORDER ALLOWING ASSUMPTION OF THE PFG DISTRIBUTION AGREEMENT.

A. Relief Requested

12. In the exercise of its business judgment, Debtors respectfully seek to assume the PFG Agreement and to cure the prepetition default in an amount not to exceed \$375,000.00 as provided under 11 U.S.C. § 365(a) and Fed. R. Bankr. P. 6006. This amount has already been

approved for payment in the Critical Vendor Order.

13. To provide adequate assurances to PFG, the Debtors negotiated an agreement to grant liens upon its assets that are inferior to the liens proposed to be granted to SpiritBank (the proposed debtor-in-possession lender) herein but with priority over the liens of Fiesta Holdings, Inc., Fresh Capital LLC and Practical Investors LLC (collectively, the “Secured Creditors”) in the event the Secured Creditors are not the ultimate purchaser of the Debtors’ assets and assume the PFG Agreement as a part of the sale of Debtors’ assets. Debtors, as a part of the *Motion for Interim and Final Orders (A) Authorizing the Debtors to Use Cash Collateral, (B) Authorizing the Debtors to Obtain Post-Petition Financing, (C) Granting Superpriority Security Interests and Superpriority Administrative Expense Status to Lender, (D) Scheduling a Final Hearing; and (E) Granting Related Relief* have sought authority to grant such liens. Additionally, in the Debtor’s business judgment, the PFG Agreement is an integral component to achieving the highest and best results with respect to the proposed asset sale.

9. Debtors are aware that the Secured Creditors desire to assume the PFG Agreement and assumes that any other interested bidder would likewise wish to assume that agreement where it would be not be cost effective, disruptive and cumbersome to locate and secure a new contract with a food supplier unfamiliar with Debtors’ restaurants and their food supply needs in sufficient time to continue effective operation of the Debtors’ restaurants.

10. This Motion is not intended to encompass each and every executory contract or unexpired lease of the Debtors. There are other unexpired leases and executory contracts not addressed herein and it is not the intention of the Debtors by omission of any such lease or contract from this Motion to imply the assumption or rejection of such lease or contract by the filing of this Motion.

WHEREFORE Debtors request the following relief:

- A. That the Court make and enter its Order authorizing and permitting the assumption of the PFG Agreement between Debtors and PFG with prepetition defaults up to \$375,000.00 to be cured; and
- B. That the Debtors and their estates have such other and further relief as may be justified in the premises.

CONCLUSION

WHEREFORE, Debtors respectfully request entry of an order granting the relief requested herein and such other and further relief as this Court deems just and proper.

Attached hereto as Exhibit 1 is a proposed order granting the relief requested herein.

Respectfully submitted,

s/ Mark A. Craige

Mark A. Craige, OBA No. 1992
-Of the Firm-
CROWE & DUNLEVY
A Professional Corporation
500 Kennedy Building
321 South Boston Avenue
Tulsa, Oklahoma 74103-3313
Telephone: 918.592.9800
Facsimile: 918.592.9801
mark.craige@crowedunlevy.com

and

William H. Hoch, OBA No. 15788
Lysbeth L. George, OBA No. 30562
-Of the Firm-
CROWE & DUNLEVY
A Professional Corporation

Braniff Building
324 North Robinson Avenue, Suite 100
Oklahoma City, OK 73102-8273
Telephone: (405) 234-3245
Facsimile: (405) 272-5203
Will.hoch@crowedunlevy.com
lysbeth.george@crowedunlevy.com

COUNSEL FOR DEBTOR

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

_____)	
In re:)	Chapter 11
)	
EATERIES, INC., <i>et al.</i> ¹)	Case No. 17-11444-SAH
Debtors.)	
_____)	(Jointly Administered)

**ORDER GRANTING DEBTORS’ MOTION TO ASSUME EXECUTORY CONTRACT,
BRIEF IN SUPPORT, AND NOTICE OF OPPORTUNITY FOR HEARING**
[PERTAINS TO MOTION AT DKT. NO. ___]

Upon the *Motion to Assume Executory Contract, Brief in Support, and Notice of Opportunity for Hearing* (the “Motion”) [Dkt. No. ___] filed on May 10, 2017, no objections being timely filed; and this Court having subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1334; and this being a core proceeding under 28 U.S.C. § 157(b); and venue before this Court being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the relief

¹ The affiliated Debtors are Eateries, Inc. and GRP of Zanesville, LLC, Case Nos. 17-11444 and 17-11445

requested in the Motion is in the best interests of all parties-in-interest; and the Debtors having provided adequate and appropriate notice of this Motion under the circumstances; and based upon the representations of the moving parties set forth in the Motion, and after due deliberation and sufficient cause appearing therefor, it is hereby

ORDERED, DETERMINED, ADJUDGED AND DECREED THAT:

1. The Motion is GRANTED.
2. Debtors, by separate Order of this Court [Dkt. No. ____] have received authority to provide adequate assurances to PFG, through the grant of certain liens and other adequate assurances negotiated with PFG, as set forth therein, in order to facilitate the assumption and continued performance under the PFG Distribution Agreement between Debtor and PFG and in further consideration for PFG's consent to the terms of the DIP Financing.
3. The Debtors are authorized and permitted to assume the PFG Distribution Agreement and to cure the prepetition default in an amount not to exceed \$375,000.00 as provided under 11 U.S.C. § 365(a) and Fed. R. Bankr. P. 6006, this amount having already been approved for payment in the Critical Vendor Order [Dkt. No. 76].
4. Findings of fact in this Order are based upon representations of counsel.

IT IS SO ORDERED.

###

[The remainder of this page is intentionally left blank.]

SUBMITTED FOR ENTRY:

s/ Mark A. Craige

Mark A. Craige, OBA No. 1992

-Of the Firm-

CROWE & DUNLEVY

A Professional Corporation

500 Kennedy Building

321 South Boston Avenue

Tulsa, Oklahoma 74103-3313

Telephone: 918.592.9800

Facsimile: 918.592.9801

mark.craige@crowedunlevy.com

and

William H. Hoch, OBA #15788

Lysbeth L. George, OBA No. 30562

-Of the Firm-

CROWE & DUNLEVY

A Professional Corporation

Braniff Building

324 North Robinson Avenue, Suite 100

Oklahoma City, OK 73102-8273

Telephone: (405) 234-3245

Facsimile: (405) 272-5203

will.hoch@crowedunlevy.com

lysbeth.george@crowedunlevy.com

COUNSEL FOR DEBTORS