

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

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

**DEBTORS' AMENDED MOTION FOR ORDER: (I) AUTHORIZING CONTINUANCE OF PRE-PETITION INSURANCE PROGRAM; AND (II) AUTHORIZING PAYMENT OF ANY PRE-PETITION PREMIUMS AND RELATED OBLIGATIONS; AND (III) DIRECTING BANK TO HONOR CHECKS FOR PRE-PETITION PREMIUMS 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 than Monday, April 24, 2017 at 12:00 p.m. 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.

**A hearing will be held on this Pleading at 1:30 p.m. on April 25, 2017 at 215 Dean A McGee Ave, 9th Floor, Oklahoma City, OK 73102, before Judge Sarah A. Hall.**

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

**If necessary, the Final Hearing on any interim orders entered regarding this pleading will be held on May 12, 2017, at 9:30 a.m. at 215 Dean A McGee Ave, 9th Floor, Oklahoma City, OK 73102, before Judge Sarah A. Hall.**

Eateries, Inc. (“Eateries”) and GRP of Zanesville, LLC (“Zanesville”), debtors and debtors-in-possession (collectively the “Debtors”), hereby file this motion (the “Motion”) for entry of an order authorizing the Debtors to (i) continue pre-petition insurance programs, and (ii) pay any pre-petition premiums and related obligations. In support of this Motion, the Debtors rely on the Affidavit of William C. Liedtke, III, Vice President of Eateries, and Zanesville, in Support of the Debtors’ Chapter 11 Petitions and First Day Motions, sworn to on April 17, 2017 (the “First Day Affidavit”) [Dkt. No. 10]. In further support of the Motion, the Debtors respectfully represent as follows:

**JURISDICTION | VENUE | STATUTORY PREDICATE**

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue of the Debtors’ Chapter 11 cases in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

2. The statutory predicates for the relief requested herein are sections 105 and 363 of the Bankruptcy Code.

### **BACKGROUND**

3. On April 18, 2017 (the “Petition Date”), the Debtors filed their 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”) thereby initiating the above-captioned cases (these “Chapter 11 Cases”).

4. 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 yet been appointed in these 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.

### **RELIEF REQUESTED**

6. By and through this Motion, the Debtors seek authority (but not direction) to make the payments required to continue its Insurance Program (as defined below), including payment of any pre-petition premiums or other obligations under the policies (together, the “Policies”)<sup>2</sup> listed in Exhibit “A” attached hereto.

### **Overview of Debtors’ Insurance Program**

7. In the ordinary course of their businesses, the Debtors maintain a carefully designed, vitally important insurance program (the “Insurance Program”). This program includes seven (7) insurance policies that were in effect as of the Petition Date, providing

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<sup>2</sup> The Debtors reserve the right to seek such other or further relief as they may deem necessary to maintain their Insurance Program.

necessary coverage, including, but not limited to, policies covering the Debtors' General Liability, Liquor, Umbrella, Property, Workers Compensation, Directors and Officers, and Automobile Insurance (collectively, the "Policies"). These Policies are provided by different insurance carriers (the "Carriers").

8. The Debtors pay approximately \$323,028.97 annually in aggregate premiums and related fees and finance charges to procure and maintain the Insurance Program each year. The Debtors' package insurance is paid monthly to a third party financing company, First Insurance Funding ("FIF"), who finances the annual premiums for all policies in order to facilitate Debtors' monthly cash flow. Debtors' monthly payment totals \$26,919.08. As part of the financing terms, FIF is granted lien rights in and to the insurance proceeds allowing them to cancel insurance coverage upon failure to pay the monthly premiums and finance charges. The failure to pay the monthly payment to FIF will result in a cancellation of the insurance policies and result in a diminution in value to the lien rights of FIF, therefore the continued payment of the monthly premiums is a fair and reasonable amount to adequately protect FIF pursuant to section 361 of the Bankruptcy Code. Consequently, the continued use of such financing arrangement and the provision of adequate protection to FIF further facilitates the continued operations of the Debtors and serves to maximize the recovery for creditors of the Debtors.

9. In many cases, the coverage provided by the Policies is required by various regulations, indentures, laws and contracts that govern the Debtors' business conduct under applicable non-bankruptcy law. Likewise, the U.S. Trustee Guidelines for debtors-in-possession operating in chapter 11 cases in this Bankruptcy Court require the Debtors to maintain adequate insurance coverage. Such coverage could not be provided without the continuation of the entire

Insurance Program, including the continued financing of annual premiums through FIF and payment of the monthly payments as adequate protection.

**Direction to Banks Regarding Pre-petition Checks and Electronic Transfers**

10. The Debtors request that, to the extent of funds on deposit, all applicable banks and other financial institutions be directed to receive, process, honor and pay all checks or electronic transfers drawn on any of the Debtors' accounts relating to the pre-petition premiums and obligations related to the Policies, whether presented before or after the Petition Date. The Debtors request that such banks be authorized and directed to rely on the representations of the Debtors as to which checks are in payment of such obligations. To the extent that any such checks are refused payment, the Debtors additionally request authority to issue replacement checks.

**BASIS FOR RELIEF REQUESTED**

11. This Court has authority to grant the relief requested herein pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). Moreover, Section 105(a) of the Bankruptcy Code allows the Court to authorize payments on account of certain pre-petition claims when necessary. This is generally referred to as the “necessity of payment rule” or the “doctrine of necessity.” See *In re NVR, L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (stating that, under Section 105(a), a court “can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor”); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (stating that a bankruptcy court’s use of its equitable powers 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”); *In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (necessity of payment doctrine “teaches no more than, if payment of a claim which arose prior to reorganization is essential to the continued operation of the [business] during the reorganization, payment may be authorized even if it is made out of corpus”).<sup>3</sup>

12. For the reasons described above, and in view of the Debtors’ need to maintain substantial insurance to operate their businesses and prudently manage and preserve cash flow, authorizing the Debtors to maintain the Insurance Program is in the best interests of all parties-in-interest in these Chapter 11 Cases. Thus, the Debtors respectfully request that they be provided with the authority (but not direction) to fully retain in place their existing Insurance Program, including the continued financing of annual premiums through FIF as adequate protection pursuant to §361, and honor the obligations described herein.

13. If the Court grants the relief sought in this Motion, the Debtors request that all applicable banks and other financial institutions be authorized, when requested by the Debtors in their discretion, without any duty of inquiry or liability to any party for following the Debtors’ instructions, to receive, process, honor and pay any and all checks drawn on the Debtors’ accounts to pay amounts owed under the Insurance Program, whether those checks are presented prior to or after the Petition Date, and to make other transfers, provided that sufficient funds are available in the applicable accounts to make the payments.

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<sup>3</sup> See also *In re Financial News Network, Inc.*, 134 B.R. 732, 736 (Bankr. S.D.N.Y. 1991) (pre-petition claims may be paid when so doing is “critical to the debtor’s reorganization”); *In re Eagle-Pitcher Indus.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (payment must be “necessary to avert a serious threat to the Chapter 11 process”); *In re Structurlite Plastics Corp.*, 86 B.R. 922, 931 (Bankr. S.D. Ohio 1988) (payment necessary to “permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately”) (*quoting In re Chateaugay Corp.*, 80 B.R. 279, 287 (S.D.N.Y. 1987)).

14. Similar relief to that requested herein has been granted in this district. *In re Roma Foods of Oklahoma, Inc.*, Case No. 09-12488 (Bankr. W.D. Okla., May 12, 2009). Likewise, courts in other jurisdictions have granted similar relief in other chapter 11 cases. *In re ATP Oil & Gas Corp.*, Case No. 12-36187 (Bankr. S.D. Tex. August 21, 2012); *In re Otero Cnty. Hosp. Ass'n, Inc.*, Case No. 11-13686 (Bankr. D. N.M. August 17, 2011); *In re Dynegey Holdings, LLC*, Case No. 11-38111 (Bankr. S.D.N.Y. December 6, 2011); *In re Stallion Oilfield Services, Inc.*, Case No. 09-13562 (Bankr. D.Del. October 20, 2009).

### **NOTICE**

15. Notice of this pleading has been provided by e-mail, facsimile, or overnight delivery to: (i) the Office of the United States Trustee; (ii) SpiritBank, care of counsel Kevin Blaney; (iii), Fresh Capital, LLC, Practical Investors, LLC, and Fiesta Holdings, Inc. care of counsel Jared Giddens, Dillon Curran, Justin Pybas (“Secured Lenders”); (iv) Debtors’ landlords listed on Schedule G, and (v) the twenty largest unsecured creditors for each of the Debtors.

### **CONCLUSION**

The Debtors respectfully request that the Court enter an order granting the relief requested by this Motion and such further relief as may be just and necessary under the circumstances.

Attached as Exhibit “B” hereto is a proposed order granting the relief requested herein.

Respectfully submitted,

s/ Mark A. Craige

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PROPOSED COUNSEL FOR DEBTORS

Policy	Carrier	Policy Number	Policy Period	Finance Company	Annual Premium	Annual Finance Charge	Annual Premium w/finance	Monthly payment	Due Date of Payments	Payments made	Remaining Balance
General Liability	Liberty Mutual Fire Insurance Co.	TB2-Z11-261059-046	10/1/16-10/1/2017	First Insurance Funding	\$ 86,999.00						
Liquor	Liberty Mutual Fire Insurance Co.	T02-Z11-261059-066	10/1/16-10/1/2017	First Insurance Funding	\$ 17,767.44						
Umbrella	Liberty Insurance Corporation	T17-Z11-261059-015	10/1/16-10/1/2017	First Insurance Funding	\$ 15,721.00						
Property	Liberty Mutual Insurance Company	T2-Z11-261059-056	10/1/16-10/1/2017	First Insurance Funding	\$ 35,013.00						
Workers Comp	Employer's Insurance Company of Wausau	WCC-Z11-261059-076	10/1/16-10/1/2017	First Insurance Funding	\$ 127,573.00						
Auto	The First Liberty Insurance	AS6-Z11-261059-026	10/1/16-10/1/2017	First Insurance Funding	\$ 923.00						
Total					\$ 283,996.44	\$ 6,408.20	\$ 290,404.64	\$ 24,200.39	1st of month	\$ 145,202.32	\$ 145,202.32
D&O	Zurich American InsCo	WPL015913800	10/1/16-10/1/2017	First Insurance Funding	\$ 31,780.84	\$ 843.49	\$ 32,624.33	\$ 2,718.69	1st of month	\$ 16,312.17	\$ 16,312.17

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EATERIES, INC., <i>et al.</i> <sup>1</sup>	)	Case No. 17-11444-SAH
	)	
Debtors.	)	(Jointly Administered)

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**ORDER GRANTING AMENDED EMERGENCY MOTION FOR ORDER  
(I) AUTHORIZING CONTINUANCE OF PRE-PETITION INSURANCE  
PROGRAM; AND (II) AUTHORIZING PAYMENT OF ANY PRE-PETITION  
PREMIUMS AND RELATED OBLIGATIONS; AND (III) DIRECTING BANK  
TO HONOR CHECKS FOR PRE-PETITION PREMIUMS AND NOTICE OF  
OPPORTUNITY FOR HEARING  
[RELATES TO DKT. NO. \_\_]**

Upon consideration of the Amended Emergency Motion for Order (I) Authorizing Continuanace of Pre-Petition Insurance Program; and (II) Authorizing Payment of Any Pre-Petition Premiums and Related Obligations; and (III) Directing Bank to Honor Checks for Pre-

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

Petition Premiums (the "Motion")<sup>2</sup> [Dkt. No. \_\_\_]; and upon consideration of the Affidavit of William C. Liedtke, III, Vice President of Eateries, and Zanesville, in Support of the Debtors' Chapter 11 Petitions and First Day Motions, sworn to on April 17, 2017 (the "First Day Affidavit") [Dkt. No. 10]; and the Court having determined that it has jurisdiction over the matters raised by the Motion and that the relief requested in the Motion is in the best interests of the Debtors, their estates, and creditors; and it appearing that proper and adequate notice has been given under the circumstances and that no other or further notice is necessary; and upon the record herein and at the hearing on the Motion; and after due deliberation thereon; and good and sufficient cause appearing therefore, it is hereby:

**ORDERED, DETERMINED, ADJUDGED AND DECREED** by the Court that the Motion is **GRANTED** as follows:

1. The Debtors are authorized, but not directed, to make any and all payments required to continue its Insurance Program, including the continued financing of annual premiums through First Insurance Funding as adequate protection pursuant to § 361 and the payment of any pre-petition premiums or other obligations under the Policies.
2. Nothing in this Order shall alter the rights of the Debtors to seek such other or further relief as they may deem necessary to maintain their Insurance Programs.
3. Any party receiving payment from the Debtors is authorized and directed to rely upon the representation of the Debtors as to which payments are authorized by this Order.
4. All payments authorized by this Order shall be made pursuant to and in compliance with the terms of any Order entered by this Court approving the use of cash collateral.

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<sup>2</sup> Capitalized terms not defined herein shall be given the meaning as set forth in the Motion.

5. Neither the provisions contained herein, nor any actions or payments made by the Debtors pursuant to the Motion, shall be deemed as assumption or adoption of any policy, program, practice, contract or agreement, or shall otherwise affect the Debtors' right under 11 U.S.C. § 365 to assume or reject any executory contract.

6. Notwithstanding any Rule of the Federal Rules of Bankruptcy Procedure to the contrary, this Order shall take effect immediately upon its entry.

**IT IS SO ORDERED.**

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Approved for entry:

s/ Mark A. Craige

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