

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

In re:

BUFFETS RESTAURANTS HOLDINGS,  
INC., *et al.*,

Debtors.

Chapter 11

Case No. 12-10237 (MFW)

Jointly Administered

**Objection Deadline: May 7, 2012 at 4:00 p.m.**

**Hearing Date: May 31, 2012 at 10:30 a.m.**

**MOTION OF CALIFORNIA FRANCHISE TAX BOARD TO APPROVE  
STIPULATION MODIFYING THE AUTOMATIC STAY TO ALLOW  
CALIFORNIA FRANCHISE TAX BOARD TO RESPOND TO DEBTORS' APPEAL**

California Franchise Tax Board (“**FTB**”) is the appellee in a bankruptcy appeal pending before the United States District Court for the District of Delaware that was commenced prepetition by debtors Buffets, Inc., HomeTown Buffet, Inc., OCB Restaurant Company, LLC, OCB Purchasing Co., Tahoe Joe’s, Inc., and OCB Leasing Company (collectively, the “**Debtors**”), and that the Debtors intend to continue prosecuting post-petition. The Debtors and FTB have entered into a stipulation modifying the automatic stay, to the extent that it applies, to allow FTB to respond to the Debtors’ appeal. FTB, by its undersigned attorneys, now moves the Court to enter an order approving that stipulation.

**JURISDICTION AND VENUE**

1. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter constitutes a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in the District of Delaware pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The predicates for the relief requested in this motion are section 362 of title 11 of the United States Code (the “**Bankruptcy Code**”), Rule 4001(d) of the Federal Rules of

Bankruptcy Procedure, and Rule 4001-1 of the Local Rules of Bankruptcy Practice and Procedure of this Court.

### **BACKGROUND**

3. Prior to the commencement of the above-captioned chapter 11 cases, the Debtors were each debtors in previous chapter 11 cases filed in this Court that were procedurally consolidated as Case No. 08-10141 (the “**First Bankruptcy Case**”).

4. FTB timely filed priority tax claims and general unsecured claims in the First Bankruptcy Case for amounts FTB claims are due on account of California franchise taxes.

5. On April 13, 2009, the Debtors commenced Adversary Proceeding No. 10-03559 against FTB in the First Bankruptcy Case (the “**Adversary Proceeding**”) by filing a complaint that objected to FTB’s claims and requested that this Court determine the Debtors’ California franchise tax liabilities, if any, to FTB under section 505 of the Bankruptcy Code.

6. Both parties subsequently moved for summary judgment in the Adversary Proceeding. On August 15, 2011, this Court issued a memorandum opinion and order granting, in part, FTB’s motion for summary judgment (the “**Summary Judgment Order**”).

7. On August 26, 2011, the Debtors appealed the Summary Judgment Order to the United States District Court for the District of Delaware, commencing Civil Action No. 11-859-SLR (the “**Debtors’ Appeal**”).

8. Thereafter, on January 18, 2012, the Debtors and certain affiliates commenced the above-captioned chapter 11 cases (collectively, the “**Second Bankruptcy Case**”).

9. On March 2, 2012, FTB filed claims in the Second Bankruptcy Case that include the unpaid amounts that FTB claimed in the First Bankruptcy Case.

10. On March 9, 2012, the Debtors filed their opening brief in support of their appeal.

11. On April 23, 2012, the Debtors and FTB entered into a stipulation, a copy of which is attached hereto as **Exhibit A** (the “**Stipulation**”), modifying the automatic stay, to the extent that it applies, to allow FTB to respond to the Debtors’ appeal.

### **RELIEF REQUESTED**

12. Section 362(d)(1) of the Bankruptcy Code empowers this Court to modify the automatic stay “for cause.” In evaluating whether “cause” exists to modify the automatic stay as to FTB, the Court should consider (1) the prejudice or lack thereof to the Debtors and their estates; (2) the hardship to FTB of maintaining the stay; and (3) the probability of FTB’s success on the merits in the Debtors’ Appeal. *See Am. Airlines, Inc. v. Continental Airlines, Inc. (In re Continental Airlines, Inc.)*, 152 B.R. 420, 424 (D. Del. 1993) (listing factors for consideration).

13. Here, all three factors squarely support modifying the automatic stay to allow FTB to respond to the Debtors’ Appeal.

14. *First*, modifying the automatic stay will not prejudice the Debtors or their creditors. Indeed, the Debtors have agreed to the proposed modification in the Stipulation. Moreover, FTB ultimately must be permitted to respond to the Debtors’ Appeal in order for that appeal to be resolved and FTB’s claims to be determined. Modifying the automatic stay merely affects the time at which that resolution will occur.

15. *Second*, FTB will be prejudiced if the automatic stay is not modified and the resolution of the Debtors’ Appeal and FTB’s ultimate recovery on its claims are further postponed. Considering that FTB’s claims remain outstanding from the First Bankruptcy Case, FTB has already been subjected to a significant delay in recovery.

16. *Third*, because FTB prevailed before this Court on summary judgment in the first instance, FTB plainly has a reasonable chance at success on the merits in the Debtors’ Appeal.

## **CONCLUSION**

WHEREFORE, FTB respectfully requests that the Court (i) enter an order, substantially in the form attached to this motion, approving the Stipulation and modifying the automatic stay, to the extent that it is applicable, to allow FTB to respond to the Debtors' Appeal, including without limitation by filing a brief in opposition to the Debtors' Appeal and participating in oral argument; and (ii) award such other relief as is just and proper.

Dated: April 23, 2012  
Wilmington, DE

Respectfully submitted:

**CAMPBELL & LEVINE LLC**

/s/Mark T. Hurford

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