

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

In re:)	
)	Chapter 11
PUMPKIN PATCH LLC, ¹)	Case No. 09-12200 (BLS)
)	
Debtor.)	
)	

**MOTION OF THE DEBTOR FOR ORDER PURSUANT TO
BANKRUPTCY CODE SECTIONS 105(a), 506(a), 507(a)(8),
541, AND 1129 AND FED. R. BANKR. P. 6003 AUTHORIZING THE
DEBTOR TO PAY PREPETITION SALES, USE, TRUST FUND AND
OTHER TAXES AND RELATED OBLIGATIONS**

Pumpkin Patch LLC, the debtor and debtor in possession in the above-captioned case (the “Debtor”) hereby moves for entry of an order (the “Motion”), pursuant to sections 105(a), 506(a), 507(a)(8), 541, and 1129 of chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), authorizing the Debtor to pay prepetition sales, use, trust fund, and other taxes and related obligations. In support of the Motion, the Debtor relies on and incorporates by reference the declaration filed in support of the Debtor’s chapter 11 petition and various first day applications and motions (the “Declaration”), filed with the Court concurrently herewith. In further support of the Motion, the Debtor, by and through its undersigned attorneys, respectfully represents as follows:

JURISDICTION

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion

¹ The last four digits of Pumpkin Patch LLC’s federal tax identification number are 4007. The mailing address for Pumpkin Patch LLC is 951 Mariners Island Boulevard, Suite 650, San Mateo, CA 94404.

in this district is proper under 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105(a), 506(a), 507(a)(8), 541, and 1129. Such relief is warranted pursuant to Bankruptcy Rule 6003.

BACKGROUND

2. On the date hereof, (the “Petition Date”), the Debtor filed a voluntary petition in this Court for relief under chapter 11 of the Bankruptcy Code. The factual background regarding the Debtor, including its business operations, its capital and debt structure, and the events leading to the filing of this bankruptcy case, is set forth in detail in the Declaration, filed concurrently herewith and fully incorporated herein by reference.²

3. The Debtor continues to manage and operate its business as debtor in possession under Bankruptcy Code sections 1107 and 1108.

RELIEF REQUESTED

4. By this Motion, the Debtor requests entry of an order, pursuant to Bankruptcy Code sections 105(a), 506(a), 507(a)(8), 541, and 1129 authorizing, but not directing, it to pay prepetition sales, use, and other similar “trust fund” taxes (the “Taxes”) and similar obligations detailed herein to the respective taxing or other appropriate authorities (the “Taxing Authorities”) in the ordinary course of the Debtor’s business. Such relief will be without prejudice to the Debtor’s rights to contest the amounts of any Taxes on any grounds they deem appropriate.

BASIS FOR RELIEF

5. The Debtor, in the ordinary course of its business, incurs various Taxes, including state and local sales and use tax liabilities. Sales and use taxes accrue as the Debtor sells merchandise or consumes goods and are calculated on the basis of statutorily mandated

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Declaration.

percentages of the price at which the Debtor's merchandise is sold and/or cost of merchandise consumed. In some cases, sales and use taxes are paid in arrears once incurred by the Debtor or collected by the Debtor.

6. Certain jurisdictions, however, require the Debtor to remit estimated sales and use taxes and similar collections on a periodic basis during the month or quarter in which sales are made. The Debtor or the Taxing Authority then "true up" any deficiency or surplus on the date on which the taxes are actually due.

7. Prior to the Petition Date, the Debtor was, for the most part, current on its obligations with respect to these Taxes. The only obligations outstanding represent taxes that have accrued, but are not yet legally due.

8. Certain Taxing Authorities either have not been paid or have been sent checks and/or wires for Taxes that may or may not have been presented or cleared as of the Petition Date. Similarly, in other cases, obligations have accrued or are accruing, or are subject to audit or review, but have not yet become due and payable. Accordingly, the Debtor seeks authorization for its banks to honor prepetition checks and wires issued by the Debtor to the Taxing Authorities in payment of prepetition Taxes that, as of the Petition Date, have not cleared or been transferred. In addition, to the extent the Debtor has not yet sought to remit payment to the Taxing Authorities with respect to certain Taxes, the Debtor seeks authorization to issue checks or provide for other means of payment to the Taxing Authorities as necessary to pay the Taxes.

APPLICABLE AUTHORITY

A. Payment Of The Taxes Is Appropriate Under Bankruptcy Code Section 541.

9. Although the Debtor has not conducted an exhaustive survey of all states in which the Taxes are due, the Debtor believes that many of the Taxes constitute so-called trust fund

taxes that are required to be collected from third parties and held in trust for payment to the Taxing Authorities. See, e.g., DeChiaro v. N.Y. State Tax Comm'n, 760 F.2d 432, 433-34 (2d Cir. 1985) (sales tax required by state law to be collected by sellers from their customers is “trust fund” tax); Rosenow v. Ill. Dept of Revenue (In re Rosenow), 715 F.2d 277, 282 (7th Cir. 1983) (same); Shank v. Wash. State Dep’t of Revenue (In re Shank), 792 F.2d 829, 830 (9th Cir. 1986) (same); see also In re Columbus Gas Sys. Inc., 997 F.2d 1039 (3d Cir. 1993) (refunds required to be collected by federal law created trust fund that was not property of debtor’s estate).

10. Consequently, the funds that would be used to pay the Taxes are not property of the Debtor’s estate within the meaning of Bankruptcy Code section 541. See Begier v. IRS, 496 U.S. 53, 55-67 (1990) (taxes such as excise taxes, FICA taxes and withholding taxes are property held by debtor in trust for another and, as such, do not constitute property of estate); In re Al Copeland Enters., Inc., 133 B.R. 837 (Bankr. W.D. Tex. 1991) (debtor obligated to pay sales taxes plus interest, because such taxes were “trust fund” taxes), aff’d, 991 F.2d 233 (5th Cir. 1993); In re Am. Int’l Airways, Inc., 70 B.R. 102, 103 (Bankr. E.D. Pa. 1987) (funds held in trust for federal excise and withholding taxes are not property of debtor’s estate and, therefore, not available for distribution to creditors); Shipley Co., Inc. v. Darr (In re Tap, Inc.), 52 B.R. 271, 272-77 (Bankr. D. Mass. 1985) (funds paid by employer to debtor for payment of employer’s federal taxes were returnable to employer and not part of debtor’s estate).

11. Accordingly, pursuant to Bankruptcy Code section 541, the Court should authorize payment of the Taxes.

B. Payment Of The Taxes Is Also Appropriate Under Bankruptcy Code Sections 506, 507(a)(8), and 1129.

12. Even if the funds held by the Debtor for the payment of the taxes were not held in Trust, payment of the taxes would nonetheless be proper under sections 506, 507(a)(8) and 1129

of the Bankruptcy Code. Specifically, the Taxes are mostly, if not entirely, either priority claims pursuant to Bankruptcy Code section 507(a)(8), or secured claims pursuant to Bankruptcy Code section 506(a). Their payment should be authorized on the basis that they are required to be paid in full in any event as a condition to satisfying the plan confirmation requirements contained in Bankruptcy Code section 1129.³

13. In particular, if the Taxes are priority claims, Bankruptcy Code section 1129(a)(9)(C) requires that they be paid no less favorably than through regular installment payments, over a period not exceeding five (5) years after the Petition Date, of a total value as of the effective date of the plan equal to the allowed amount of each such claim. 11 U.S.C. § 1129(a)(9)(C). On the other hand, if the Taxes are secured claims, Bankruptcy Code section 1129(b)(2)(A) of the Bankruptcy Code requires that they be satisfied through deferred cash payments totaling at least the allowed amount of each such claim, of a value as of the effective date of the plan equal to the value of the collateral securing the claim, with a continuation of the liens against the collateral; or if the collateral is to be sold, that the lien securing the claim attach to the proceeds of sale; or that the holder realize the indubitable equivalent of the claim. 11 U.S.C. § 1129(b)(2)(A).

14. Therefore, the Debtor's payment of the Taxes now only affects the timing of the payments and not the amounts to be received by the Taxing Authorities. In that regard, by paying the Taxes now, the Debtor avoids any unnecessary fees, interest or penalties that might otherwise accrue. Thus, other creditors and parties in interest will be benefited, not harmed, if the relief sought herein is granted by this Court.

³ The Debtor believes that a significant portion of the Taxes are priority or secured claims, and the remainder are de minimus in light of the circumstances of these cases.

C. Payment Of The Taxes Is Authorized By Bankruptcy Code Section 105, The Doctrine Of Necessity and Fed. R. Bankr. P. 6003.

15. Finally, the Debtor’s proposed payment of the Taxes should be authorized pursuant to Bankruptcy Code section 105 and under the “doctrine of necessity.”

16. The doctrine of necessity is a well-settled doctrine that permits a bankruptcy court to authorize payment of certain prepetition claims prior to the completion of the reorganization process where the payment of such claims is necessary to the reorganization. See In re Just for Feet, Inc., 242 B.R. 821, 826 (D. Del. 1999) (stating that where the debtor “cannot survive” absent payment of certain prepetition claims, the doctrine of necessity should be invoked to permit payment.);⁴ see also In re NVR L.P., 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (“[T]he court can permit the pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor.”); In re Eagle-Picher Indus., Inc., 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (“[T]o justify payment of a prepetition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the chapter 11 process.”).

17. The doctrine of necessity is a widely accepted component of modern bankruptcy jurisprudence. See Just For Feet, 242 B.R. at 826 (approving payment of key inventory suppliers’ prepetition claims when such suppliers could destroy debtor’s business by refusing to deliver new inventory on eve of debtor’s key sales season); In re Payless Cashways, Inc., 268

⁴ The Court’s power to utilize the doctrine of necessity in Chapter 11 cases derives from the Court’s inherent equity powers and its statutory authority 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). The United States Supreme Court first articulated the doctrine of necessity over a century ago, in Miltenberger v. Logansport Railway, 106 U.S. 286 (1882), in affirming the authorization by the lower court of the use of receivership funds to pay pre-receivership debts owed to employees, vendors and suppliers, among others, when such payments were necessary to preserve the receivership property and the integrity of the business in receivership. See id. at 309-14. The modern application of the doctrine of necessity is largely unchanged from the Court’s reasoning in Miltenberger. See In re Lehigh & New Eng. Ry., 657 F.2d 570, 581-82 (3d Cir. 1981) (“In order to justify payment under the ‘necessity of payment’ rule, a real and immediate threat must exist that failure to pay will place the [debtor’s] continued operation . . . in serious jeopardy.”).

B.R. 543, 546-47 (Bankr. W.D. Mo. 2001) (authorizing payment of critical prepetition suppliers' claims when such suppliers agree to provide postpetition trade credit); see also In re Columbia Gas Sys., Inc., 171 B.R. 189, 191-92 (Bankr. D. Del. 1994); In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989).

18. Similarly, Bankruptcy Rule 6003 provides that the relief requested in this Motion may be granted if the "relief is necessary to avoid immediate and irreparable harm." Fed. R. Bankr. P. 6003. See also In re First NLC Fin. Servs., LLC, 382 B.R. 547, 549-50 (Bankr. S.D. Fla. 2008). Although there has not yet been a published decision interpreting Bankruptcy Rule 6003, the Third Circuit has interpreted the language "immediate and irreparable harm" in the context of preliminary injunctions. In that context, irreparable harm is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation. See, e.g., Norfolk S. Ry. Co. v. City of Pittsburgh, 235 Fed. Appx. 907, 910; 2007 U.S. App. LEXIS 13291, at *6 (3d Cir. June 7, 2007) (citing Glasco v. Hills, 558 F.2d 179, 181 (3d Cir. 1977)). Furthermore, the harm must be shown to be actual and imminent, not speculative or unsubstantiated. See, e.g., Acierno v. New Castle County, 40 F.2d 645, 653-5 (3d Cir. 1994). The Debtor submits that for the reasons already set forth herein, the relief requested in this Motion is necessary to avoid immediate and irreparable harm such as exposure to litigation and the risk of expensive audits.

19. The Debtor submits that the payment of the Taxes is necessary in order to preserve the value of the Debtor's estate, as well as avoiding the cost and expense of audits or litigation regarding the Taxes. Therefore, such payment should be authorized pursuant to Bankruptcy Code section 105, the doctrine of necessity and Fed. R. Bankr. P. 6003.

20. The relief requested in this Motion has been granted in comparable chapter 11 cases in this district and in other jurisdictions. See, e.g., In re Tweeter Home Entm't Group, Inc., Case No. 07-10787 (PJW) (Bankr. D. Del. June 13, 2007); In re Radnor Holdings Corp., Case No. 06-10894 (PJW) (Bankr. D. Del. Aug. 23, 2006); In re Werner Holding Co. (DE), Inc., Case No. 06-10578 (KJC) (Bankr. D. Del. June 13, 2006); In re Russell-Stanley Holdings, Inc., Case No. 05-12339 (PJW) (Bankr. D. Del. Aug. 22, 2005); In re Birch Telecom, Inc., Case No. 05-12237 (PJW) (Bankr. D. Del. Aug. 16, 2005); In re Ultimate Electronics, Inc., Case No. 05-10104 (PJW) (Bankr. D. Del. Jan. 13, 2005); In re Plastech Engineered Products, Inc., Case No. 08-42417 (PJS) (Bankr. E.D. Mich. Feb. 27, 2008).

21. The Debtor submits that the present circumstances warrant similar relief in this chapter 11 case.

22. Nothing in this Motion shall be construed as impairing the Debtor's right to contest the amount, classification or allowability of any Taxes asserted in these cases.

23. The Debtor also requests that the Court waive the stay imposed by Interim Bankruptcy Rule 6004(h), which provides that "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise." As described above, the relief that the Debtor seeks in this Motion is immediately necessary in order for the Debtor to be able to continue to operate its business and preserve value for its estate. The Debtor respectfully requests that the Court waive the ten-day stay imposed by Interim Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

NOTICE

24. No trustee or examiner has been appointed in this chapter 11 case. Notice of this Motion has been provided by facsimile, electronic transmission, overnight delivery, or hand

delivery to: (i) the United States Trustee for the District of Delaware; (ii) the parties included on Debtor's list of twenty (20) largest unsecured creditors; (iii) all known entities holding or asserting a lien in the Merchandise; (iv) the Landlords of the Stores; and (v) for each state in which the Stores are located (a) the Attorney General's Office, and (b) the applicable taxing authorities. The Debtor submits that no other or further notice need be provided.

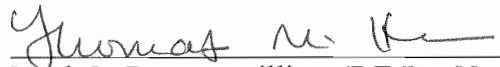
25. No previous request for the relief sought herein has been made to this or any other court.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court enter an Order, substantially in the form annexed hereto, granting the relief requested in the Motion and such other and further relief as may be just and proper

Dated: June 29, 2009

**WOMBLE CARLYLE SANDRIDGE
& RICE, PLLC**



Mark L. Desgrosseilliers (DE Bar No. 4083)
Thomas M. Horan (DE Bar No. 4641)
222 Delaware Avenue, Suite 1501
Wilmington, DE 19801
Telephone: (302) 252-4320
Facsimile: (302) 252-4330
E-mail: mdesgrosseilliers@wcsr.com
E-mail: thoran@wcsr.com

-and-

Dennis J. Drebsky
Joseph M. Gitto
NIXON PEABODY LLP
437 Madison Avenue
New York, New York 10022
Telephone: (212) 940-3000
Facsimile: (212) 940-3111

*Proposed Counsel for the Debtor and
Debtor-in-Possession*

Proposed Order

2. The Debtor is hereby authorized to pay all Taxes to the Taxing Authorities in the ordinary course of its business, including, but not limited to the payment of taxes relating to tax audits that have been completed, are in progress or which may commence in the ordinary course of business for prepetition periods.

3. All applicable banks and other financial institutions are hereby authorized and directed to receive, process, honor and pay any and all checks evidencing amounts paid by the Debtor pursuant to the Motion, whether presented prior to or after the Petition Date.

4. To the extent the Debtor has not yet sought to remit payment to the Taxing Authorities, the Debtor is authorized, but not directed, to issue checks or provide for other means of payment to the Taxing Authorities, to the extent necessary to pay Taxes.

5. This Order is without prejudice to the Debtor's right to contest the amounts of any Taxes on any grounds that they deem appropriate.

6. The Court finds and determines that the requirements of Bankruptcy Rule 6003 are satisfied and that the relief requested is necessary to avoid immediate and irreparable harm.

7. Notwithstanding Bankruptcy Rule 6004(h), this Order shall be effective and enforceable immediately upon entry hereof.

8. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation and/or interpretation of this Order.

Dated: Wilmington, Delaware

_____, 2009

The Honorable Brendan Linchan Shannon
United States Bankruptcy Judge