

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

In re:

PUMPKIN PATCH LLC,¹

Debtor.

)
) Chapter 11

)
) Case No. 09-12200 (BLS)

**MOTION OF THE DEBTOR PURSUANT TO
11 U.S.C. §§ 105, 363, AND 506(b) FOR AN ORDER AUTHORIZING
THE PAYMENT OF CERTAIN PREPETITION CLAIMS OF FREIGHT CARRIERS**

Pumpkin Patch LLC, the debtor and debtor in possession in the above-captioned case (the “Debtor”) files this motion (the “Motion”) seeking entry of an order authorizing the payment of certain prepetition claims of freight carriers (the “Freight Carriers”) pursuant to sections 105, 363, and 506(b) of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”). In support of the Motion, the Debtor relies upon 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”). In further support of the Motion, the Debtor, by and through its proposed undersigned counsel, respectfully represents:

JURISDICTION

1. This Court has jurisdiction to hear the Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are sections 105, 363 and 506(b) of the Bankruptcy Code.

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.

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 seeks entry of an order authorizing the Debtor, in its sole discretion, to pay the Freight Claims (as defined below) and thereby discharge any liens (as defined below) that are asserted against the Debtor’s property.

A. Freight Claims

5. In connection with the day-to-day operation of its business, the Debtor utilizes certain Freight Carriers that are operated by third parties to transport goods or equipment that are necessary in the operation of its business. As a result, at any point in time, the Freight Carriers may be in possession of certain of the Debtor’s goods or equipment and may have claims for transportation and services related thereto (collectively, the “Freight Claims”).

6. While the Debtor believes the Freight Claims are de minimis, it is nonetheless essential to the Debtor’s continued viability and the success of its business that it maintain the reliable and efficient flow of goods and equipment to its stores. Moreover, the Debtor believes that the Freight Carriers may argue that they are entitled to possessory or similar liens for the

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

storage and/or transport of the goods or equipment in their possession as of the Petition Date and may refuse to deliver or release such goods or equipment before their claims have been satisfied and their liens discharged. Accordingly, it is imperative that the Debtor be authorized to pay the Freight Claims to (a) ensure that the essential services provided by the Freight Carriers are available to the Debtor without interruption, and (b) preserve to the fullest extent possible the Debtor's relationships with its customers and, in turn, the value of the Debtor's business for the benefit of its estate and its creditors.

7. The Debtor estimates that, as of the Petition Date, the aggregate amount of prepetition Freight Claims for which it seeks authority to pay postpetition will not exceed \$150,000.

BASIS FOR RELIEF

8. The Court's general equitable powers are codified in section 105(a) of the Bankruptcy Code. Section 105(a) empowers the Court to "issue any order, process, or judgment that is necessary to carry out the provisions of this title." 11 U.S.C. § 105(a). A bankruptcy court's use of its equitable powers to "authorize the payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept." In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (citing NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984)). Under section 105(a), a court "can permit pre-plan payment of a prepetition obligation when essential to the continued operation of the debtor." In re NVR L.P., 147 B.R. 126, 127 (Bankr. E.D. Va. 1992); see also In re Just for Feet, Inc., 242 B.R. 821, 826 (D. Del. 1999) ("To invoke the necessity of payment doctrine, a debtor must show that payment of the prepetition claims is critical to the debtor's reorganization.") (internal quotation omitted).

9. Section 363(b)(1) of the Bankruptcy Code authorizes the trustee to use property of the estate other than in the ordinary course of business after notice and a hearing. 11 U.S.C. § 363(b)(1). Pursuant to Fed. R. Bankr. P. 6003(b), authorization to utilize property of the estate, “including a motion to pay all or part of a claim that arose before the filing of the petition... [,]” may not be granted in the first twenty days of a bankruptcy case, except “to the extent that relief is necessary to avoid immediate and irreparable harm...” Fed. R. Bankr. P. 6003(b).

10. The “necessity of payment” rule further supports the relief requested in this Motion. See, e.g., In re Just for Feet, Inc., 242 B.R. at 826 (authorizing payment of prepetition claims of trade creditors that continue customary trade terms). The “necessity of payment” doctrine “recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor.” Ionosphere Clubs, 98 B.R. at 176; In re Chateaugay Corp., 80 B.R. 279 (S.D.N.Y. 1987). This rule is consistent with the paramount goal of chapter 11, i.e., “facilitating the continued operation and rehabilitation of the debtor . . .” Ionosphere Clubs, 98 B.R. at 176.

11. The Debtor believes that continuation of its favorable business relations with the Freight Carriers is important to the successful outcome of its chapter 11 case and that the payment of certain prepetition claims is essential to assure the same. With respect to the Freight Carriers, in addition to the justifications set forth above, the Debtor believes that its failure to pay the Freight Claims may result in the assertion of possessory liens by the respective claimants under applicable state law with respect to any goods or equipment in their possession. Pursuant to section 362(b)(3) of the Bankruptcy Code, the act of perfecting such liens, to the extent

consistent with section 546(b) of the Bankruptcy Code,³ is expressly excluded from the automatic stay otherwise imposed by section 362(a) of the Bankruptcy Code.

12. Moreover, to protect their asserted lien rights, the Freight Carriers may refuse to release goods or equipment in their possession unless and until their prepetition claims for services have been satisfied. Therefore, notwithstanding the automatic stay imposed by section 362 of the Bankruptcy Code, the Freight Carriers (a) may be entitled to assert and perfect liens against the Debtor's property, which would entitle them to payment ahead of other general unsecured creditors in any event; and (b) may hold the property subject to the asserted liens pending payment, to the direct detriment of the Debtor and its estate.

13. Because the amount of any Freight Claims likely is less than the value of any property securing those claims, the Freight Carriers holding lien rights arguably are fully secured creditors. In general, pursuant to section 506 of the Bankruptcy Code, fully secured creditors are entitled to receive (a) payment in full of their prepetition claims pursuant to any confirmed plan(s) of reorganization in these chapter 11 cases, and (b) the postpetition interest accruing on such claims to the extent such claims are oversecured. Consequently, payment of the Freight Claims will: (a) give the Freight Carriers no more than that to which they otherwise would be entitled under a plan(s); and (b) save the Debtor the interest costs that otherwise may accrue on the Freight Claims during this chapter 11 case.

14. The Debtor submits that nothing in this Motion is intended or should be construed: (a) as an admission as to the validity of any claim or lien, including, but not limited to, any claim or Lien of a Freight Carrier against the Debtor or its estate; (b) as a waiver of the

³ Under section 546(b) of the Bankruptcy Code, a debtor's lien avoidance powers "are subject to any generally applicable law that ...permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection" 11 U.S.C. § 546(b)(1)(A).

Debtor's right to dispute any claim or lien, including, but not limited to, any claim or lien asserted by a Freight Carrier; (c) as approval or assumption of any agreement, contract or lease pursuant to section 365 of the Bankruptcy Code; or (d) to prejudice any of the Debtor's rights to seek relief under any section of the Bankruptcy Code on account of any amounts owed or paid to any Freight Carrier.

15. For all of the foregoing reasons, the Debtor seeks authority, pursuant to sections 105(a), 363 and 506(b) of the Bankruptcy Code, to pay, in the Debtor's sole discretion, the undisputed amounts owed by the Debtor on account of outstanding Freight Claims, and discharge any liens asserted against the Debtor's property.

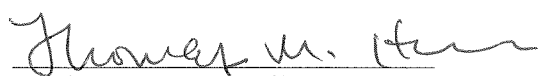
NOTICE

16. 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; and (ii) the parties included on the Debtor's list of twenty (20) largest unsecured creditors.

WHEREFORE, the Debtor respectfully hereby moves this Court for entry of an order, substantially in the form annexed hereto, granting the relief requested in the Motion and such further relief as is just and proper.

Dated: June 29, 2009

**WOMBLE CARLYLE SANDRIDGE
& RICE, PLLC**



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

**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.)	Re: D.I. _____
)	

**ORDER AUTHORIZING THE PAYMENT OF CERTAIN PREPETITION
CLAIMS OF CERTAIN CRITICAL VENDORS AND FREIGHT CARRIERS**

Upon the Motion² of the above-captioned debtor and debtor-in-possession for entry of an order authorizing the Debtor, in its discretion, to pay the prepetition claims of certain Freight Carriers; and upon consideration of the Motion and all pleadings related thereto, including the Declaration; and the Court finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and (c) notice of the Motion was due and proper under the circumstances; and it appearing that the relief requested in the Motion is in the best interests of the Debtor, its estate and creditors; and after due deliberation and good and sufficient cause appearing therefor, it is hereby:

ORDERED, that the Motion is GRANTED; and it is further

ORDERED, that the Debtor is authorized, in the Debtor's sole discretion, to pay Freight Claims in an amount not to exceed \$ 150,000 absent further order of the Court; and it is further

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² Capitalized terms used but otherwise not defined herein shall have the meaning ascribed to such terms in the Motion.

ORDERED, that upon the Debtor's payment of the Freight Claims, any lien securing such Freight Claim shall be immediately released, void and of no further force and effect, without further action by the Debtor; and it is further

ORDERED, that nothing in the Motion or this Order, or the Debtor's payment of any claims pursuant to this Order, shall be deemed or construed: (a) as an admission as to the validity of any claim or lien, including, but not limited to, any claim or Lien of a Freight Carrier against the Debtor or its estate; (b) as a waiver of the Debtor's right to dispute any claim or lien, including, but not limited to, any claim or lien asserted by a Freight Carrier; (c) as approval or assumption of any agreement, contract or lease pursuant to section 365 of the Bankruptcy Code; or (d) to prejudice any of the Debtor's rights to seek relief under any section of the Bankruptcy Code on account of any amounts owed or paid to any Freight Carrier; and it is further

ORDERED, that this Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order; and it is further

ORDERED that notwithstanding any applicability of Federal Rule of Bankruptcy Procedure 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

Dated: Wilmington, Delaware

_____, 2009

UNITED STATES BANKRUPTCY JUDGE