

**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)

**DEBTOR’S MOTION FOR ORDER UNDER BANKRUPTCY CODE SECTIONS 105,
361, 362, 363, 1107(a), AND 1108 AUTHORIZING DEBTOR TO MAINTAIN
EXISTING INSURANCE POLICIES AND PAY ALL POLICY PREMIUMS AND
BROKERS’ FEES ARISING THEREUNDER OR IN CONNECTION THEREWITH**

Pumpkin Patch LLC, the debtor and debtor in possession in the above-captioned case (the “Debtor”) hereby moves for entry of an order, under sections 105, 361, 362, 363, 1107(a), and 1108 of title 11 of the United States Code (the “Bankruptcy Code”), authorizing the Debtor to maintain its existing insurance policies and pay all policy premiums and brokers’ fees arising thereunder or in connection therewith. 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 in this District is proper under 28 U.S.C. §§ 1408 and 1409.

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.

2. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105, 361, 362, 363, 1107(a), and 1108.

BACKGROUND

3. 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

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

RELIEF REQUESTED

5. By this Motion, the Debtor seeks entry of an order, under Bankruptcy Code sections 105, 361, 362, 363, 1107(a), and 1108 authorizing the Debtor to maintain, and to pay all premiums and brokers' fees arising under, or in connection with, the Debtor's various insurance policies (collectively, the "Insurance Policies"), which Insurance Policies the Debtor has obtained through several third-party insurance carriers (collectively, the "Insurance Carriers").

BASIS FOR RELIEF

6. In connection with the operation of its business and management of its properties, the Debtor maintains various Insurance Policies. The Insurance Policies include, inter alia, coverage for workers' compensation claims, automobile claims, fiduciary liability claims, claims for losses due to crime, directors' and officers' liability, certain general and

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

excess liability claims, and various property-related liabilities. The third-party claims that are covered by the Insurance Policies are neither unusual in amount, nor in number, in relation to the extent of the business operations conducted by the Debtor.

7. Maintenance of insurance coverage under the various Insurance Policies is essential to the continued operation of the Debtor's businesses and is required under the United States Trustee's Operating Guidelines for Chapter 11 Cases (the "Operating Guidelines"), and the laws of the various states in which the Debtor operates. Thus, the Debtor submits that it should be authorized to continue to pay Insurance Policy premiums as such premiums come due in the ordinary course of the Debtor's business.

8. The Debtor has been represented in their negotiations with their various insurance underwriters by Willis of Illinois, Inc. ("Willis"). The employment of Willis as the Debtor's insurance broker has allowed the Debtor to obtain the insurance coverage necessary to operate its business in a reasonable and prudent manner and to realize considerable savings in the procurement of such policies. The Debtor believes that it is in the best interests of their creditors and estate to continue their business relationship with Willis. Accordingly, the Debtor seeks the Court's authorization to continue their prepetition practice of paying brokerage fees to Willis in connection with their representation of the Debtor in various ongoing negotiations with the Debtor's insurers.

APPLICABLE AUTHORITY

9. Courts have routinely granted to large business debtors the same or substantially similar relief to that requested in this Motion. See, e.g., In re Tweeter Home Entm't. Group, Inc., et al., Case No. 07-10787 (PJW) (Bankr. D. Del. June 13, 2007); In re Musicland Holding Corp., et al., Case No. 06-10064 (SMB) (Bankr. S.D.N.Y. Feb. 1, 2006); In re Collins & Aikman Corp., Case No. 05-55927 (SWR) (Bankr. E.D. Mich. May 17, 2005).

10. The Debtor believes that the ordinary course maintenance of its insurance financing programs and the renewal of or entry into new financing arrangements as may be required as the annual terms of existing arrangements expire, without further order of the Court, is necessary and essential to the Debtor's operation of its business during its reorganization.

11. The Debtor, operating its business as debtor in possession under Bankruptcy Code sections 1107(a) and 1108, is a fiduciary "holding the bankruptcy estate[s] and operating the business[es] for the benefit of [their] creditors and (if the value justifies) equity owners." In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor in possession is the duty "to protect and preserve the estate, including an operating business's going-concern value." Id.

12. Courts have noted that there are instances in which a debtor in possession can fulfill its fiduciary duty "only . . . by the preplan satisfaction of a prepetition claim." Id. The CoServ court specifically noted that preplan satisfaction of prepetition claims would be a valid exercise of a debtor's fiduciary duty when the payment "is the only means to effect a substantial enhancement of the estate," and also when the payment was to "sole suppliers of a given product." Id. at 498. The court provided a three-pronged test for determining whether a preplan payment on account of a prepetition claim was a valid exercise of a debtor's fiduciary duty:

First, it must be critical that the debtor deal with the claimant. Second, unless it deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor's going concern value, which is disproportionate to the amount of the claimant's prepetition claim. Third, there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

Id. at 498.

13. Payment of the insurance premiums and brokers' fees meets each element of the CoServ court's standard. As described above, in the event that the Debtor was unable to

pay the Brokers' Fees, it is likely that the Debtor would lose the services of a knowledgeable broker and be forced to find another entity willing to serve as its broker. Moreover, the Debtor's current broker, Willis, has a unique knowledge of the Debtor's business and insurance needs that would be difficult if not impossible to replace in the event that Willis no longer agreed to serve as the Debtor's insurance broker.

14. As a fiduciary for the bankruptcy estate, the Debtor would be violating its duties if it permitted any of the Insurance Policies to lapse. Accordingly, the Debtor seeks authority to pay all premiums that may become due with respect to the Insurance Policies if such payment is necessary in the Debtor's judgment in order to avoid cancellation or interruption of insurance coverage.

15. The Debtor's proposed payment of prepetition fees and obligations should also be authorized under 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);³ see also In re NVR L.P., 147 B.R. 126, 127 (Bankr. E.D. Va. 1992)

³ The Court's power to use 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, C. & S.W. R. Co., 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.").

("[T]he court can permit 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 pre-petition 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 Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989); In re Payless Cashways, Inc., 268 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).

18. As set forth above, the Debtor believes that payment of policy premiums and brokers' fees is necessary to maintain good relationships with the Debtor's insurers, thereby ensuring the continued availability of insurance coverage and reasonable pricing of such coverage.

19. The Debtor's payment of the Insurance Carriers' and Willis' claims, including any prepetition claims, is similarly appropriate under the "doctrine of necessity" and Bankruptcy Code section 105(a).

20. To the extent that the Insurance Policies or related agreements may be deemed executory contracts within the meaning of Bankruptcy Code section 365, the Debtor does not at this time seek authority to assume such contracts.

21. 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. Although there has not yet been a published decision in the Third Circuit interpreting Bankruptcy Rule 6003, it has interpreted the language “immediate and irreparable harm” in the context of preliminary injunctions. In that context, the court instructed that 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 (3d Cir. 2007) (citing references omitted). 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.

22. The Debtor also requests that the Court waive the stay imposed by 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 Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

NOTICE

23. 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) Willis of Illinois, Inc.;

and (iv) the Insurance Carriers listed on Exhibit A. The Debtor submits that no other or further notice need be provided.

NO PRIOR REQUEST

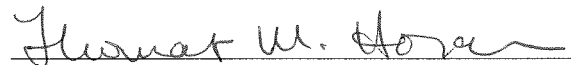
24. No prior request for the relief requested herein has been made to this or any other Court.

CONCLUSION

WHEREFORE, the Debtor respectfully requests this 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
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*Proposed Counsel for the Debtor and
Debtor-in-Possession*

EXHIBIT A
Policy Schedule

Policy Type	Policy Number	Effective Date	Expiration Date	Carrier
Workers Compensation	76 WEG PS5671	January 13, 2009	January 13, 2010	The Hartford Philadelphia Indemnity Insurance Co.
Motor Vehicle Insurance	PHPL2000098	May 1, 2009	May 1, 2010	The Hartford
Motor Vehicle Insurance	83UECAH2309	July 30, 2008	July 30, 2009	American International Group, Inc.
Material Damage and Business Interruption	SR 6993	May 31, 2009	May 31, 2010	American International Group, Inc.
D&O Liability (primary layer)	DO 7336 03	May 31, 2009	May 31, 2010	American International Group, Inc.
D&O Liability (excess layer)	DO 7336 03	May 31, 2009	May 31, 2010	American International Group, Inc.
General Liability	PEL 9118 03	May 31, 2009	May 31, 2010	American International Group, Inc.
US Employer's Liability (excess layer)	XS 9316 03	May 31, 2009	May 31, 2010	American International Group, Inc.
US Employer's Liability (primary layer)	77 WEG NZ7817	May 31, 2009	May 31, 2010	The Hartford
Marine Cargo (covers the shipment of all PP ¹ goods anywhere in the world)	MC 2054 03	May 31, 2009	May 31, 2010	American International Group, Inc.
Corporate Travel (covers business travel by any PP employees outside of their country of residence)	TG 7247 03	May 31, 2009	May 31, 2010	American International Group, Inc.

¹ "PP" means Pumpkin Patch LLC.

2. The Debtor is authorized, but not directed, to continue its Insurance Policies and to pay the premiums and related charges arising under or in connection with the Insurance Policies as such premiums and charges become due.

3. The Debtor is authorized to pay brokerage fees arising under or in connection with the Insurance Policies as they become due, including brokerage fees attributable to prepetition periods.

4. Neither the provisions contained herein, nor any actions or payments made by the Debtor under this Order, shall be deemed an assumption of any executory contract arising out of an insurance program, agreement or contract, or otherwise shall constitute a waiver of the Debtor's rights under Bankruptcy Code section 365 or an admission by the Debtor that any such insurance program, agreement or contract constitutes an executory contract within the meaning of Bankruptcy Code section 365.

5. Neither the provisions contained herein, nor any actions or payments made by the Debtor under this Order, shall be deemed an admission as to the validity of the underlying obligation or a waiver of any rights the Debtor may have to subsequently dispute such obligation on any ground that applicable law permits.

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

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

Dated: Wilmington, Delaware
_____, 2009

The Honorable Brendan Linehan Shannon
United States Bankruptcy Judge