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8
9 UNITED STATES BANKRUPTCY COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 LOS ANGELES DIVISION

12
13 In re:
14 B&B Liquidating, LLC,
15 Debtor and Debtor in Possession.

Case No. 2:18-bk-11744-NB

Chapter 11

**NOTICE OF MOTION AND EMERGENCY
MOTION FOR ORDER:**

**(1) AUTHORIZING THE MAINTENANCE
AND CONTINUED USE OF CASH
MANAGEMENT SYSTEM;**

**(2) PROHIBITING BANKS FROM
OFFSETTING OR FREEZING DEBTOR'S
EXISTING BANK ACCOUNTS; AND**

**(3) AUTHORIZING CONTINUATION OF
ELECTRONIC PAYMENT PROCESSING
AND THE HONORING OF RELATED
PRE-PETITION OBLIGATIONS IN THE
ORDINARY COURSE OF BUSINESS**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

*[Declaration of Brian Lipman in support of first
day motions, filed concurrently herewith]*

Emergency Hearing

Date: February 22, 2018

Time: 2:00 p.m.

Place: Courtroom 1545

**255 E. Temple Street
Los Angeles, CA 90012**

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1 TO THE HONORABLE NEAL W. BASON, UNITED STATES BANKRUPTCY
2 JUDGE, THE UNITED STATES TRUSTEE, ALL PARTIES-IN-INTEREST HEREIN, AND
3 THEIR RESPECTIVE COUNSEL:

4 **PLEASE TAKE NOTICE** that Debtor and Debtor in Possession B&B Liquidating, LLC,
5 f/k/a B&B Bachrach, LLC, (the “Company” or the “Debtor”) hereby submits this motion¹ (the
6 “Motion”), on an emergency basis, for entry of an order pursuant to sections 105, 363, 1107 and
7 1108 of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”) and
8 Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules” and
9 each a “Bankruptcy Rule”): (i) authorizing maintenance of existing bank accounts, including the
10 authority to pay routine pre-petition banking fees owed to financial institutions; (ii) authorizing
11 continued use of the existing cash management system, bank accounts, checks, and related
12 business forms; (iii) prohibiting the banks identified on Exhibit 1 attached hereto (the “Banks”),
13 from offsetting, affecting, freezing, or otherwise impeding the Debtor’s use of any funds
14 deposited in the existing bank accounts; (iv) authorizing the maintenance, administration and
15 continuation of the Debtor’s electronic payment processing services (“Electronic Payment
16 Processing”) and the honoring of certain pre-petition obligations related thereto; and (v) related
17 relief.

18 As set forth in the accompanying Memorandum of Points and Authorities, there are good
19 and sufficient grounds for granting this Motion. The Company’s business consists of 14 “brick
20 and mortar” retail stores² located in Illinois, Indiana, Kansas, Michigan, New Jersey, Tennessee,
21 Texas, Wisconsin, and Virginia and an online sales e-commerce business and distribution
22 component conducted out of Los Angeles, California. In carrying out these services, the Debtor
23 operates under a cash management system, in which the Company utilizes 8 individual bank
24 accounts (the “Store Accounts”), each managing the cash and check deposits of one or more retail
25

26 _____
27 ¹ This Motion is substantially identical to the motion filed by B&B Bachrach LLC in case no. 2:17-bk-15292-NB,
28 which was previously approved by the Court, but updated to reflect the modified cash management system that the
Debtor has with its current lender, Siena.

² Of the 14 stores, one store, Store No. 20 located at the Chicago Fashion Outlet Center, is operated by the Debtor but
leased by an affiliated party.

1 stores³. Funds contained in the Store Accounts are regularly deposited into a blocked master
2 collateral account (the “Collateral Account”) controlled by Siena Lending Group LLC (“Siena”),
3 which is linked to a revolving debt facility utilized by the Debtor to provide operating capital.
4 Siena then deposits funds available to the Debtor under the revolving loan facility agreement
5 based on a weekly borrowing base calculation into an operating account (the “Operating
6 Account”, collectively with the Store Accounts and the Collateral Account, the “Bank
7 Accounts”), which the Company draws on for operations.

8 All credit card and other electronic transactions processed by electronic payment
9 processors (the “Payment Processors”) and deposited directly into the Collateral Account, as
10 opposed to the individual Store Accounts. Such electronic transactions constitute approximately
11 90% of all transactions conducted at the Debtor’s retail stores and 100% of e-commerce
12 transactions.

13 By this Motion, the Debtor proposes to maintain its cash management system and
14 electronic payment processing. Maintaining an uninterrupted flow of funds through existing
15 Payment Processors and bank accounts is essential to the Debtor’s ongoing operations during its
16 liquidation. Therefore, the Debtor requests that this Motion be heard on an emergency basis.

17 This Motion is based upon these moving papers, the accompanying Memorandum of
18 Points and Authorities, the concurrently filed *Omnibus Declaration of Brian Lipman in Support*
19 *of First Day Motions*, (the “Lipman Declaration”) the records and pleadings in this case, the
20 arguments and representations of counsel, and any oral or documentary evidence presented at or
21 prior to the time of the hearing.

22 **PLEASE TAKE FURTHER NOTICE** that pursuant to Local Bankruptcy Rule 2081-1
23 this Motion may be heard pursuant to Local Bankruptcy Rule 9075-1 as an emergency motion.
24 Further, pursuant to Local Bankruptcy Rule 9075-1(a)(2), counsel for the Debtor has contacted
25 the chambers for the Honorable Neal W. Bason and has obtained approval for an emergency
26 hearing on the Motion to be held on **February 22, 2018 at 2:00 p.m.** in Courtroom 1545, located
27

28 ³One Store Account at Bank of America, N.A., account no. xx8874 also serves as the Operating Account, as defined and discussed below.

1 at 255 E. Temple Street, Los Angeles, California 90012. Pursuant to Local Bankruptcy Rule
2 9075-1, any response, written or oral, to the moving papers may be presented before or at the time
3 of the hearing on the Motion.

4 **PLEASE TAKE FURTHER NOTICE** that the Debtor will serve this Notice and
5 Motion, the attached Memorandum of Points and Authorities, and the Lipman Declaration on the
6 following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States
7 Trustee; (b) the largest twenty unsecured creditors appearing on the list filed in accordance with
8 Bankruptcy Rule 1007(d) by the Debtor unless and until an official committee of unsecured
9 creditors (the "Committee") is appointed, then in that event, to counsel for the Committee; (c)
10 Siena; (d) any other known secured creditors; (e) the Payment Processors; and (f) parties that file
11 with the Court and serve upon the Debtor requests for notice of all matters in accordance with
12 Bankruptcy Rule 2002. The Debtor also requests that the Court waive compliance with Local
13 Bankruptcy Rule 9075-1(a)(5) requiring telephonic notice of the hearing set hereon and substance
14 thereof, and approve in lieu thereof service by overnight delivery or email. In the event that the
15 Court grants the relief requested by the Motion, the Debtor shall provide notice of the entry of the
16 order granting such relief upon each of the foregoing parties and any other parties in interest as
17 the Court directs. The Debtor submits that such notice is sufficient and that no other or further
18 notice need be given.

19 **WHEREFORE**, for all the foregoing reasons, and such additional reasons as may be
20 advanced at or prior to the hearing on this Motion, the Debtor respectfully requests that the Court
21 enter an Order, on an emergency basis: (1) authorizing the maintenance of the Bank Accounts,
22 including the authority to pay routine pre-petition banking fees owed to financial institutions, as
23 set forth in detail in the Memorandum of Points and Authorities; (2) authorizing continued use of
24 the existing cash management system, including the use of the Bank Accounts, existing checks,
25 and related business forms; (3) prohibiting the Banks from offsetting, affecting, freezing, or
26 otherwise impeding the Debtor's use of any funds deposited in the Bank Accounts; (4)
27 authorizing the maintenance, administration and continuation of the Debtor's Electronic Payment
28

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1 Processing and the honoring of certain pre-petition obligations related thereto; and (5) such other
2 and further relief as is just and proper.

3
4 DATED: February 19, 2018

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& MACHTINGER LLP

5
6
7 By: /s/ Brian L. Davidoff

BRIAN L. DAVIDOFF
KEITH PATRICK BANNER
Proposed General Bankruptcy Counsel for
Debtor and Debtor in Possession

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MEMORANDUM OF POINTS AND AUTHORITIES

1
2 Debtor and Debtor in Possession B&B Liquidating, LLC, f/k/a B&B Bachrach, LLC, (the
3 “Company” or the “Debtor”), having commenced this chapter 11 bankruptcy case on February
4 16, 2018 (the “Petition Date”) hereby submits this motion (the “Motion”), on an emergency basis
5 authorizing the Debtor to continue use of its cash management system and electronic payment
6 processing in the ordinary course of business and related relief, on the terms set forth herein.

7 **I. JURISDICTION AND VENUE**

8 The Court has jurisdiction over these matters pursuant to 28 U.S.C. §§ 157 and 1334. This
9 is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The venue of the case is proper pursuant
10 to 28 U.S.C. §§ 1408 and 1409. The Debtor consents to the entry of a final judgment or order
11 with respect to the Motion if it is determined that the Court, absent consent of the parties, cannot
12 enter a final order or judgment consistent with Article III of the United States Constitution. The
13 statutory predicates for the relief requested herein are sections 105, 363, 1107 and 1108 of title 11
14 of the United States Code, 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”); and Rules 6003 and
15 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules” and each a
16 “Bankruptcy Rule”).

17 **II. SUMMARY OF BACKGROUND FACTS**

18 The Company is a specialty men's clothing merchandiser with a 140-year history in the
19 retail industry. The Company has traditionally relied on the “brick and mortar” retail model with
20 stores in malls and other marketplaces that fundamentally rely on a consistent flow of customer
21 foot traffic. Like many mall retailers in the current environment, the Company has come to learn
22 that this retail model, in many malls, is rapidly becoming obsolete.

23 A decline across the board in sales in mid-2016 precipitated the Company’s filing of a
24 voluntary chapter 11 petition on April 28, 2017, commencing case no. 2:17-bk-15292-NB
25 (“*Bachrach*”). During the course of *Bachrach*, the Company’s goals were four-fold: (a) shed the
26 poorest performing stores; (b) liquidate excess inventory; (c) free up liquidity by resolving the
27 over-advance with the Company’s then lender, Israel Discount Bank of New York (“IDB”)
28

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1 through restructure of the debt or buyout of the obligation; and (d) restructure leases regarding
2 stores that showed a potential for profitability if the lease was renegotiated.

3 The Company successfully addressed each of these issues in a brisk chapter 11
4 reorganization process, and on August 14, 2017 the Court in *Bachrach* confirmed the Debtor's
5 plan of reorganization. See *Bachrach* Docket No. 258 (including all exhibits attached thereto, the
6 "*Bachrach* Plan"). The *Bachrach* Plan went effective on August 31, 2017.

7 Though *Bachrach* involved complications with the Company's liquidator, difficult
8 negotiations with IDB, and sales that often missed their target, the Company, among other things,
9 (i) successfully liquidated and closed seven underperforming stores; (ii) renegotiated four leases
10 resulting in substantial concessions; and (iii) negotiated a significant discount of approximately
11 \$2.45 million from IDB's secured claim of approximately \$10.5 million (See *Bachrach*, Claim
12 No. 49).

13 Despite the relative success of the *Bachrach* reorganization, the decline in sales that the
14 Company had faced pre-petition continued unabated after the Company's exit from the chapter 11
15 and starved the Company of vital cash.

16 With restricted use of cash and prolonged negotiations for a new debt facility, the Debtor
17 required a financing arrangement to bridge the gap between the September 27, 2017 maturity date
18 on the IDB loan and the closing of the new financing. The Company obtained a short-term
19 arrangement from Emerald Capital Funding, LLC ("*Emerald*"), which purchased the IDB loan for
20 \$5,800,000. Emerald expected to be paid off in any subsequent refinancing. As part Emerald's
21 buyout of the IDB obligation, the Company executed a deficiency note in favor of IDB with a
22 face value of \$1,200,000.00, which can be paid off within six months at 50% of face value. On or
23 about September 19, 2017, the Emerald transaction closed.

24 Following the closing of the Emerald transaction, the Company completed negotiations
25 with Siena Lending Group, LLC ("*Siena*") regarding a new asset-based revolving credit facility in
26 an amount not exceeding \$7,000,000.00 (the "*Siena* Loan"). Under the borrowing base
27 calculation of the Siena Loan, the Company was only able to pay Emerald \$5.3 million at closing.
28 Therefore, the Company issued a note payable to Emerald in the amount of \$500,000, secured by

1 international goods in transit. Siena and Emerald also separately entered into an intercreditor
2 agreement.

3 With the limiting of cash flow by IDB early in the process, the Company quickly began to
4 fall behind on rent and plan payments. This running deficit was only worsened by the fact that
5 the required two refinance transactions did not close until October 31, 2017, as opposed to the
6 end of September as contemplated under the *Bachrach* Plan. This delay occurred during a critical
7 time for the Company, as the Company’s overseas vendors refused to ship inventory for the
8 holiday season until closing of the refinance. Ultimately, the Company did not actually receive
9 the holiday inventory, which is normally delivered during mid-November, until mid-December,
10 which negatively affected the Company’s holiday sales.

11 This cascade of issues ultimately affected the Company’s availability under the Siena
12 loan, as Siena has indicated that Company is in default for, among other things, failure to make
13 timely payments under the *Bachrach* Plan and for post-confirmation rent. Siena applied the
14 default interest rate to the loan and further restricted the Company’s borrowing base.

15 Ultimately, the Company was left with no alternative other than an orderly liquidation.
16 The Company engaged Clear Thinking Group LLC (“CTG”) as financial adviser. Working with
17 CTG and Siena the Company sought to reach agreement with its landlords to accomplish a
18 liquidation outside of the chapter 11 process. While some landlords were amenable to this, others
19 were not. The end result is the current chapter 11 case.

20 Drawing from the extensive experience of CTG, the Company performed liquidation
21 analyses and solicited bids with various liquidators to conduct the inventory liquidation sales (the
22 “Store Closing Sales”) at the 13 locations leased by the Company (the “Closing Stores”). The
23 Store Closing Sales will span a 16-week period, with the Closing Stores closed upon completion
24 of each Store Closing Sale. Prior to the Petition Date, the Debtor retained liquidation consultants,
25 Great American Group, LLC and Tiger Capital Group, LLC (collectively, the “Liquidation
26 Consultant”) to conduct the Store Closing Sales. At the conclusion of the sale period, the Debtor
27 intends to reject all of its leases and terminate operations. The Debtor will also seek to sell its
28 intellectual property and other assets. For a further discussion on the events leading up to the

1 bankruptcy filing and the business structure of the Company, please refer to the *Omnibus*
2 *Declaration of Brian Lipman* (“Lipman Declaration”) filed concurrently herewith.

3 **III. THE DEBTOR’S CASH MANAGEMENT SYSTEM**

4 In the ordinary course of its business, the Debtor maintains a cash management system
5 (the “Cash Management System”), which includes all activities necessary and pertinent to
6 collecting and disbursing the Debtor’s cash assets. Under the Cash Management System, the
7 Company utilizes 8 separate bank accounts (the “Store Accounts”), each managing the cash and
8 check deposits of one or more retail stores.⁴ Funds contained in the Store Accounts are regularly
9 deposited into a blocked master collateral account (the “Collateral Account”) controlled by Siena
10 Lending Group LLC (“Siena”), which is linked to a revolving debt facility utilized by the Debtor
11 to provide operating capital. All credit card and other electronic transactions are deposited
12 directly into the Collateral Account, as opposed to the individual Store Accounts. Siena then
13 deposits funds available to the Debtor under the revolving loan facility agreement based on a
14 weekly borrowing base calculation into an operating account (the “Operating Account”,
15 collectively with the Store Accounts and the Collateral Account, the “Bank Accounts”), which the
16 Company draws on for operations.

17 Attached as Exhibit 1 is a list of the Bank Accounts held at the various banks (the “Banks”
18 and each, a “Bank”) that make up the Cash Management System. The Cash Management System
19 generally operates similarly to the centralized cash management systems used by other similar
20 companies of comparable size to manage the cash of numerous operating units in a cost-effective,
21 efficient manner.

22 The Debtor seeks authority to continue using the Cash Management System, including the
23 maintenance of the Bank Accounts described above and listed on Exhibit 1 during the pendency
24 of this chapter 11 case, subject to the Debtor’s right to close any such accounts in the Company’s
25 discretion and in accordance with the terms of any approved cash collateral agreement and/ or
26 post-petition financing arrangement.

27 _____
28 ⁴ One Store Account at Bank of America, N.A., account no. xx8874 also serves as the Operating Account, as defined and discussed below.

1 **IV. ELECTRONIC PAYMENT PROCESSING**

2 Essential to the orderly flow of cash under the Cash Management System is the processing
3 of electronic forms of payment (“Electronic Payment Processing”). Indeed, electronic forms of
4 payment constitute approximately 90% of all transactions at the Debtor’s retail stores and 100%
5 of transactions through the Debtor’s e-commerce website, *bachrach.com*.

6 The Debtor’s ability to accept electronic forms of payment relies on pre-petition
7 agreements with the following electronic payment processors: (i) Worldpay US, Inc.
8 (“Worldpay”) which processes the “point of sale” credit card transactions at the Debtor’s retail
9 locations; (ii) USAePay (“USAePay”) which processes e-commerce credit card transactions; and
10 (iii) PayPal (“Paypal”, collectively with Worldpay and USAePay, the “Payment Processors”)
11 which processes online PayPal transactions.

12 Generally, the Payment Processers facilitate an electronic purchase by first verifying and
13 obtaining authorization for the purchase from the issuing bank of the card holder; then the issuing
14 bank begins the payment settlement process by forwarding the applicable funds to the Payment
15 Processor; the Payment Processor then completes the settlement process by depositing funds to
16 the Debtor’s Collateral Account, less any applicable fees. At any given point in time, multiple
17 such transactions may in process. Thus, even a relatively minor disruption to the Electronic
18 Payment Processing caused by a bankruptcy filing could have a negative effect in the Debtor’s
19 processing of customer purchases.

20 Under the Debtor’s agreements with the Payment Processors, the Debtor is required to pay
21 the Payment Processors fees for their services, certain amounts of which may have accrued but
22 remain unpaid as of the Petition Date (the “Payment Processing Fees”). The Debtor requests
23 authority to continue to pay such Payment Processing Fees, including, but not limited to, amounts
24 related to returns and exchanges, in the Debtor’s sole discretion, in order to avoid interruption of
25 these vital payment processing services. If the Debtor is unable to continue Electronic Payment
26 Processing of customer transactions, including payment of certain pre-petition obligations, the
27 Payment Processors may refuse service.
28

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1 The Debtor incurs approximately \$19,872.32 aggregate monthly fees to the Payment
2 Processors relating to customer purchases, some of which will be attributable to a pre- petition
3 period. During the twelve-month period ending in January 2018, the Debtor paid on account of
4 Electronic Payment Processing and related fees approximately \$236,170.40 but collected
5 approximately \$13,515,258.34 in sales relating to those fees. This illustrates the pre-petition
6 liability is *de minimus* compared to the enormous contribution the Payment Processing provides
7 to Debtor’s business.

8 **V. ARGUMENT**

9 **A. The Court Should Permit Maintenance of the Existing Bank Accounts and**
10 **Continuation of Electronic Payment Processing**

11 The U.S. Trustee Guidelines require a chapter 11 debtor in possession to close all existing
12 accounts immediately upon filing and open a minimum of three new bank accounts: general,
13 payroll, and tax. The U.S. Trustee Guidelines also require that new bank accounts be opened in
14 certain financial institutions designated as authorized depositories by the U.S. Trustee. *See*
15 *Guidelines and Requirements for Chapter 11 Debtors in Possession at*
16 *<https://www.justice.gov/ust-regionsr16/region-16-general-information>*. As described in the U.S.
17 Trustee Guidelines, the requirements are designed to draw a clear line of demarcation between
18 pre-petition and post-petition transactions and operations and prevent the inadvertent post-petition
19 payment of pre-petition claims. The Debtor submits, however, that a waiver of certain
20 requirements set forth in the U.S. Trustee Guidelines is warranted.

21 Allowing the Debtor to utilize its pre-petition Cash Management System and continue its
22 pre-petition Electronic Payment Processing as part of its routine transactions is entirely consistent
23 with applicable provisions of the Bankruptcy Code. In particular, section 363(c)(1) of the
24 Bankruptcy Code authorizes a debtor in possession to “use property of the estate in the ordinary
25 course of business without notice or a hearing.” 11 U.S.C. § 363(c)(1). Section 363(c)(1) is
26 intended to provide a debtor in possession with the flexibility to engage in the ordinary
27 transactions required to operate its business without undue oversight by creditors or the court.
28

1 *See, e.g., In re Roth Am., Inc.*, 975 F.2d 949, 952 (3d Cir. 1992); *see also In re Nellson*
2 *Nutraceutical Inc.*, 369 B.R. 787, 796 (Bankr. D. Del. 2007).

3 As the United States Court of Appeals for the Ninth Circuit recognized:

4 The touchstone of “ordinariness” is ... the interested parties’
5 reasonable expectations of what transactions the debtor in
6 possession is likely to enter consistent with these expectations,
7 creditors have no right to notice and hearing

7 *Burlington N. R.R. Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853 F.2d 700, 705
8 (9th Cir. 1988) (citation omitted).

9 The Debtor submits that the continued administration and maintenance of the Cash
10 Management System and Electronic Payment Processing is not only within the ordinary course of
11 business, but indeed expected and relied upon by the Debtor and its customers and are customary
12 for the industry in which the Debtor operates. Such practices fall squarely within the purview of
13 section 363(c)(1) of the Bankruptcy Code.

14 Despite this clear application section 363(c)(1), the Debtor nevertheless brings this
15 Motion out of an abundance of caution, to the extent any aspect of the Cash Management System
16 and Electronic Payment Processing could be considered as outside the ordinary course of business
17 for purposes of section 363(c)(1).

18 In addition to section 363(c)(1) of the Bankruptcy Code, statutory support for the
19 requested relief also exists pursuant to Bankruptcy Code sections 105(a) and 363(b)(1) and the
20 “necessity of payment” doctrine. Section 105(a) provides in part:

21 The court may issue any order, process, or judgment that is
22 necessary or appropriate to carry out the provisions of this title.

23 11 U.S.C. §105(a). Section 105(a) grants bankruptcy courts broad authority and discretion to
24 enforce the provisions of the Bankruptcy Code by relying on either specific statutory or equitable
25 common law principles. The basic purpose of section 105 is to enable the court to do whatever is
26 appropriate and necessary to aid in its jurisdiction, in anything arising in or relating to a
27 bankruptcy case.” 2 COLLIER ON BANKRUPTCY, ¶ 105.01 (Alan N. Resnick & Henry J. Sommer
28 eds., 16th ed.). Essentially, section 105(a) codifies the bankruptcy court’s inherent equitable

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1 powers. *See In re Am. Hardwoods, Inc.*, 885 F.2d 621, 625 (9th Cir. 1989) (section 105 endows
2 the court with general equitable powers, where not inconsistent with more specific law); *Eskanos*
3 *& Adler, P.C. v. Roman (In re Roman)*, 283 B.R. 1, 13 (9th Cir. BAP 2002) (“[s]ection 105
4 provides a bankruptcy court with broad equitable powers”); *Mgmt. Tech. Corp. v. Pardo*, 56 B.R.
5 337, 339 (Bankr. D.N.J. 1985) (noting that the court’s equitable power is derived from section
6 105). In addition, Bankruptcy Code section 363(b)(1) authorizes a debtor in possession to use
7 property of the estate other than in the ordinary course of business after notice and a hearing,
8 giving bankruptcy courts broad flexibility to permit the debtor to expend funds outside the
9 ordinary course of business. If the debtor articulates the business justification for using property
10 outside of the ordinary course of business, bankruptcy courts may permit its expenditure under
11 section 363(b)(1).

12 Where there is a valid business justification for using property outside of the ordinary
13 course of business, the law presumes that, “in making a business decision the directors of a
14 corporation acted on an informed basis, in good faith[,] and in the honest belief that the action
15 was taken in the best interests of the company.” *Official Comm. Of Subordinated Bondholders v.*
16 *Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (internal
17 quotation marks omitted) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)).

18 Additional authority for the relief requested is found pursuant to Bankruptcy Rule 6003,
19 pursuant to which the Court may grant a motion for the use, sale, or lease of property of the
20 Debtor’s estate if it is necessary to avoid immediate and irreparable harm. *See 2007 Advisory*
21 *Committee Note to Rule 6003*. Relief under Bankruptcy Rule 6003 may be granted to prevent
22 serious prejudice to the Debtor’s ability to continue normal operations while in chapter 11. *In re*
23 *Humbolt Creamery, LLC*, 2009 WL 2820552 (2009). Further, the harm must be shown to be
24 actual and imminent, not speculative. *See, e.g. Direx Israel, Ltd v. Breakthrough Media Group*,
25 952 F.2d 802, 812 (4th Cir. 1991).

26 Similar relief has become a relatively common practice in business chapter 11 cases,
27 including in *Bachrach* [Docket No. 56] and the following unreported cases in the Central District
28 of California: *In re Shiekh Shoes, LLC*, 2:17-bk-24626-VZ (Bankr. C.D. Cal. 2017) [Docket No.

1 71], *In re Cornerstone Apparel, Inc.*, 2:17-bk-17292-VZ (Bankr. C.D. Cal. 2017) [Docket No.
2 43], *In re Channel Technologies Group, LLC*, 9:16-bk-11912-PC (Bankr. C.D. Cal. 2016)
3 [Docket No. 58]; *In re Freedom Communications, Inc.*, 8:15-bk-15311-MW (Bankr. C.D. Cal.
4 2015) [Docket No. 41]; *In re American Suzuki Motor Corp.*, 8:12-bk-22808-SC (Bankr. C.D. Cal.
5 Nov. 7, 2012) [Docket No. 74]; *In re Gordian Medical, Inc.*, 8:12-bk-12339-MW (Bankr. C.D.
6 Cal. 2012) [Docket No. 49]; *In re Victor Valley Community Hospital*, 6:10-39537-CB (Bankr.
7 C.D. Cal. 2010) [Docket No. 32]; *In re Z Galleries*, 2:09-18400-VZ (Bankr. C.D. Cal. 2009)
8 [Docket No. 46]; *In re Empire Land, LLC*, 6:08-14592-MJ (Bankr. C.D. Cal. 2008) [Docket No.
9 86]; *In re People’s Choice Home Loans, Inc.*, 8:07-10765-RK (Bankr. C.D. Cal. 2007) [Docket
10 No. 179].

11 Here, the Debtor has shown a valid business justification for continued use of the Cash
12 Management System and Electronic Payment Processing. Retail sales occur on a daily basis and
13 online sales can occur at any time of day, with credit cards and other electronic forms of payment
14 potentially taking up to three business days to post. Any disruption in the fluidity of this system
15 will cause immediate and irreparable harm to the Debtor, as pending payments could be cancelled
16 by Payment Processors or delayed until new bank accounts can opened—which could take days,
17 if not weeks to complete. Forcing the Debtor to close all accounts and/or denying the Debtor’s
18 ability to pay the Payment Processors would clog the Debtor’s fluid movement of cash and
19 detrimentally impact the Debtor’s orderly liquidation in this chapter 11 case.

20 Furthermore, the Collateral Account—as a blocked account tied to the Debtor’s revolving
21 credit facility—is an essential component of the Debtor’s business, as articulated above and in the
22 concurrently filed motion to approve the post-petition finance/cash collateral arrangement with
23 Siena. Creating a new Collateral Account, would require negotiations with Siena that would
24 cause further delay. Also, the Bank Accounts, inclusive of the Collateral Account, are located at
25 depository institutions that are approved the United States Trustee-Region 16 to administer
26 debtor-in-possession accounts.

27 ///

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1 **B. Payment of Outstanding Routine Expenses and Fees Relating to the**
2 **Operation of the Cash Management System and Electronic Payment**
3 **Processing Should Be Authorized**

4 With regard to the Cash Management System, the Debtor has and will continue to incur
5 fees and other charges (collectively, all such fees and charges, the “Cash Management Fees”) in
6 connection with (a) Bank services; (b) checks deposited with the Banks which have been
7 dishonored or returned for insufficient funds in the applicable amount; and (c) any reimbursement
8 or other payment obligations, such as overdrafts, arising under agreements with the Banks
9 relating to the accounts, including, without limitation, any pre-petition cash management
10 agreements or treasury services agreements. In addition, as discussed above, the Debtor regularly
11 incurs Payment Processing Fees for the processing of electronic payments, certain amounts of
12 which may have accrued but remain unpaid as of the Petition Date.

13 The Debtor seeks authority, pursuant to sections 105(a) and 363(b) of the Bankruptcy
14 Code, in its sole discretion, to pay the Cash Management Fees and the Payment Processing Fees
15 as part of its liquidation, including such fees that may have accrued pre-petition. The payment of
16 the Cash Management Fees and Payment Processing Fees will minimize disruption to the
17 Debtor’s liquidation, and is therefore in the best interests of the estate.

18 **C. The Banks Should Be Prohibited From Freezing the Existing Bank Accounts**

19 Subject to section 553 of the Bankruptcy Code, the Banks should be prohibited from
20 offsetting, affecting, freezing, or otherwise impeding the Debtor’s use of any funds deposited in
21 the existing accounts of, or by reason of, the filing of the bankruptcy, or as a result of any claim
22 (as defined in section 101(5) of the Bankruptcy Code) of any such bank against the Debtor that
23 arose before the Petition Date, absent further order of the Court.

24 **D. The Court Should Grant the Debtor Authority to Use Existing Business**
25 **Forms and Checks to the Limited Extent Requested Below**

26 To minimize expense to its estate, the Debtor also requests authority to (i) continue to use
27 all correspondence and business forms (including, but not limited to letterhead, purchase orders,
28 invoices, etc.); and (ii) continue using their existing check stock without reference to the “debtor

1 in possession” status (all such correspondence, check stock, books and records and other business
2 forms collectively referred to herein as “Business Forms”). Many of the Debtor’s business forms
3 are electronically generated or, if printed, can be electronically altered. The Debtor seeks the
4 authority of this Court to utilize its Business Forms without the “debtor in possession”
5 designation during the course of its liquidation, as the obtaining of new Business Forms would
6 incur unnecessary additional expenses in the liquidation process and minimizing such expenses is
7 in the interest of all creditors and the estate.

8 Bankruptcy courts routinely grant authority to continue using existing business
9 instruments in chapter 11 cases. *See, e.g., In re Johnson*, 106 B.R. 623, 624 (Bankr. D. Neb.
10 1989) (debtor not required to obtain new checks imprinted with “Debtor in Possession” legend).
11 The reason that such authority is routinely granted is fundamental—there is simply no reason to
12 force a business enterprise to incur the disruption and expense of stamping or otherwise placing
13 the “debtor in possession” designation on all of its business forms, or to hamper administration of
14 a chapter 11 case to the further economic detriment of creditors while the new forms are being
15 generated. Accordingly, the Court should authorize the Debtor’s continued use of existing
16 business forms as requested herein.

17 **E. The Order Should Be Effective Immediately**

18 Bankruptcy Rule 6003 provides that the relief requested in this Motion may be granted if
19 the “relief is necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003. The
20 Debtor submits that for the reasons already set forth herein, the relief requested in this Motion is
21 necessary to avoid immediate and irreparable harm to the Debtor.

22 The Debtor further seeks a waiver of any stay of the effectiveness of the order approving
23 this Motion. Pursuant to Bankruptcy Rule 6004(h): “[a]n order authorizing the use, sale, or lease
24 of property other than cash collateral is stayed until the expiration of fourteen (14) days after
25 entry of the order, unless the court orders otherwise.” As set forth above, the relief requested
26 herein is essential to prevent irreparable damage to the Debtor’s operations and its efforts to
27 pursue an orderly liquidation of the Company in this chapter 11 case. Thus, the relief sought in
28 this Motion is appropriate under these circumstances.

1 **VI. CONCLUSION**

2 Based upon the foregoing, the Debtor respectfully requests that the Court enter an order,
3 on an emergency basis: (1) authorizing the maintenance of the Bank Accounts, including the
4 authority to pay routine Cash Management Fees owed to financial institutions; (2) authorizing
5 continued use of the existing Cash Management System, Bank Accounts, checks, and related
6 business forms; (3) prohibiting the Banks from offsetting, affecting, freezing, or otherwise
7 impeding the Debtor’s use of any funds deposited in the existing accounts; (4) authorizing the
8 maintenance, administration and continuation of the Debtor’s Electronic Payment Processing,
9 including the authority to pay Payment Processing Fees certain of which were incurred pre-
10 petition; and (5) such other and further relief as the Court deems just and proper.

11
12 DATED: February 19, 2018

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13
14
15 By: /s/ Brian L. Davidoff

BRIAN L. DAVIDOFF
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EXHIBIT 1

Exhibit 1 -- Bank Accounts

Store Accounts

Store #	Bank	Routing #	Bank Account#
8	Bank of America	72000805	xx8874
76			
82			
12	Bank of America	540890107	xx6696
64			
31	Chase	520101023	xx8250
16	CHASE	505301026	xx7468
37			
18	CHASE	511101029	xx5163
20			
79			
21	SUNTRUST	064000046	xx8529
25	ASSOCIATED	75900575	xx7712
89	CAPITAL ONE	255071981	xx0705

Other Accounts

Store #	Bank	Routing #	Bank Account#
Collateral account	Bank of America	122000661	xx7455
Sales Tax Account	Bank of America	61000052	xx8028
Operating account**	Bank of America	72000805	xx8874

**operating account also operates as the store account for Store Nos. 8, 76, & 82.