

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

In re:

UBIOME, INC.,¹

Debtor.

Chapter 11

Case No. 19-____ (____)

**DEBTOR’S MOTION FOR ENTRY OF AN ORDER AUTHORIZING
PAYMENT OF (A) CERTAIN PREPETITION WAGES, SALARIES,
AND OTHER COMPENSATION AND (B) CERTAIN EMPLOYEE
BENEFITS AND OTHER ASSOCIATED OBLIGATIONS**

uBiome, Inc., the debtor and debtor in possession in the above-captioned chapter 11 case (the “Debtor”) hereby moves the Court (this “Motion”) for entry of an order, substantially in the form annexed hereto as Exhibit A, pursuant to sections 105(a), 363, 507, 541, 1107(a), and 1108 of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), authorizing, but not directing, the Debtor to pay (a) accrued prepetition wages, salaries, and other compensation to its workforce and (b) certain employee benefits and other associated obligations, as described below. In support of this Motion, the Debtor relies upon and incorporates by reference the *Declaration of Curtis G. Solsvig III in Support of the Debtor’s Chapter 11 Petition and Requests for First Day Relief* (the “First Day Declaration”), which was filed with the Court concurrently herewith.² In further support of this Motion, the Debtor respectfully represents as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b), and the *Amended Standing Order of Reference* from the United States District Court for

¹ The Debtor and the last four digits of its taxpayer identification number is: uBiome, Inc. (0019). The Debtor’s headquarters is located at 360 Langton Street, Suite 301, San Francisco, CA 94103.

² All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the First Day Declaration.

the District of Delaware dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b), and pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), the Debtor consents to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution. Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief requested herein are sections 105(a), 363, 507, 541, 1107(a), and 1108 of the Bankruptcy Code and Bankruptcy Rules 6003 and 6004.

BACKGROUND

2. On the date hereof (the “Petition Date”), the Debtor commenced a voluntary case under chapter 11 of the Bankruptcy Code. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtor is continuing to manage its financial affairs as debtor in possession. No trustee, examiner, or official committee of unsecured creditors has been appointed in this chapter 11 case (this “Chapter 11 Case”).

3. Information regarding the Debtor’s history and business operations, capital structure and primary secured indebtedness, and the events leading up to the commencement of this Chapter 11 Case can be found in the First Day Declaration.

THE WORKFORCE AND RELATED OBLIGATIONS

4. The Debtor’s workforce consists of approximately 34 employees (collectively, the “Employees”).³ All of the Employees are exempt from the overtime and minimum wage provisions of the Fair Labor Standards Act and applicable laws, however four of the Employees

³ Non-debtor foreign subsidiary uBiome Chile SpA, directly and indirectly through its wholly-owned subsidiaries, employs 63 people in Chile and Argentina (the “South American Employees”). The payroll for the South American Employees is funded monthly by the Debtor.

are paid on an hourly basis (collectively, the “Hourly Employees”). In addition, the Debtor supplements its business needs and workforce with approximately five independent contractors (the “Independent Contractors”).

5. In the ordinary course of business, the Debtor incurs payroll and other compensation obligations for its workforce. The Debtor also provides other benefits to Employees for the performance of services, which are described in more detail below.

6. The Employees and Independent Contractors are the lifeblood of the Debtor’s business, and their value cannot be overstated. The institutional knowledge, experience, and skills of the Employees and Independent Contractors are essential to the Debtor’s ability to continue business operations during this Chapter 11 Case. The Employees and Independent Contractors perform critical functions for the Debtor, including, among many other things, sales, clinical operations, research and development, laboratory engineering, business development, marketing, purchasing, accounting, legal, finance, management, supervisory, billing administration, and customer service. The Debtor’s failure to pay Wage Obligations (defined below), and to continue to honor, as applicable, employee benefits, would have a material adverse impact on the Debtor’s business and the Debtor’s ability to maximize value through the prosecution of this Chapter 11 Case.

A. Compensation Obligations

i) Wage Obligations

7. The Debtor incurs payroll obligations for base wages and overtime compensation owed to its Employees and Independent Contractors (the “Employee Wage Obligations”). All Employees are paid on a bi-monthly basis. The average weekly payroll for the Debtor’s

Employees is approximately \$50,000, excluding payroll taxes.⁴ Employees are typically paid by direct deposit.

8. The Debtor currently engages Paylocity to administer its payroll and the disbursement of payroll. The services of Paylocity will be imperative to the smooth functioning of the Debtor's payroll system. The Debtor pays Paylocity approximately \$4,000 per month⁵ for its services (the "Payroll Administrator Obligations" and, together with the Employee Wage Obligations, the "Wage Obligations").

9. As of the Petition Date, the Debtor estimates that Wage Obligations currently owed in the ordinary course of business do not exceed approximately \$85,000 (collectively, the "Unpaid Wage Obligations").

10. The Debtor seeks authorization, but not direction, to pay the Unpaid Wage Obligations in an amount not to exceed \$13,650 per eligible Employee or Independent Contractor, and to continue to honor the Wage Obligations on a postpetition basis in the ordinary course during the administration of this Chapter 11 Case.

ii) Withholding Obligations

11. In connection with the salaries and wages paid to Employees, for each applicable pay period, the Debtor is required by law to withhold from Employees' wages amounts related to federal, state, and local income taxes, as well as social security and Medicare taxes (collectively, the "Employee Withholding Taxes") and to remit the same to the applicable taxing authorities. The Debtor is also required to make matching payments from its own funds for, among other things, social security and Medicare taxes and to pay, based on a percentage of gross payroll,

⁴ The average weekly payroll varies significantly for Independent Contractors and, therefore, a weekly average is difficult to calculate. As of the Petition Date, the Debtor estimates that Employee Wage Obligations owed to Independent Contractors do not exceed approximately \$75,000.

⁵ The amount the Debtor will pay to Paylocity varies based on Employee headcount.

state and federal unemployment insurance, and state disability insurance contributions (the “Employer Payroll Tax Obligations,” and together with Employee Withholding Taxes, the “Payroll Tax Obligations”).

12. Additionally, for each applicable pay period, the Debtor routinely deducts certain amounts directly from Employees’ paychecks, including, without limitation, garnishments, child support and service charges, and similar deductions (collectively, the “Deductions”).

13. The Debtor estimates that it withholds, on average, between \$115,000 and \$120,000 per month in Payroll Tax Obligations and Deductions (collectively, the “Withholding Obligations”). As of the Petition Date, the Debtor does not believe that any Withholding Obligations are currently outstanding (“Unremitted Withholdings Obligations”).

14. The Debtor seeks authority, but not direction, to remit Unremitted Withholdings Obligations postpetition in the ordinary course of business and to continue collecting the Withholding Obligations. The Debtor believes that Unremitted Withholdings Obligations that remain in the Debtor’s possession constitute moneys held in trust and, therefore, are not property of the Debtor’s estate. Out of an abundance of caution, however, the Debtor seeks authority to remit Unremitted Withholdings Obligations and continue collecting the Withholding Obligations in the ordinary course of business during the administration of this Chapter 11 Case.

iii) Equity Incentive Plan

15. The Debtor maintains an equity compensation plan (the “Equity Incentive Plan”). The Equity Incentive Plan is structured to incentivize award recipients to deliver superior corporate performance to the Debtor at no cost to the Debtor’s creditors. These non-cash awards align Employee and board member interests with the interests of the Debtor’s financial stakeholders by linking compensation to the Debtor’s corporate performance. The Debtor is not

seeking authority from the Court to continue the Equity Incentive Plan at this time and any such relief will be requested under a separate motion.

B. Paid Time Off

16. The Debtor offers certain Employees paid time off (“PTO”) in the form of compensation for vacation, personal days, and sick time (collectively, “PTO Programs”).⁶ Hourly Employees accrue PTO at a rate of 0.076231 per hour. Hourly Employees may roll-over any accrued but unused PTO from one year to the next, however at no time may accrued PTO exceed 1.5 times such Hourly Employee’s annual entitlement. In accordance with applicable law, Hourly Employees who are terminated from their employment (for any reason) are entitled to payment for all accrued but unused PTO as of the date of termination of employment. Non-Hourly Employees, however, do not accrue PTO, but are instead entitled to take paid time off in an unlimited amount in consultation with their managers. Because non-Hourly Employees do not accrue PTO, they are not entitled to payment upon termination of their employment. The PTO Programs are typical and customary, and continuing to offer them is necessary for the Debtor to retain Employees during this Chapter 11 Case.

17. Because PTO is accrued and used by Employees on a continuous basis, it is difficult to precisely quantify the cost of accrued PTO as of the Petition Date. However, the Debtor estimates that as of the Petition Date the value of accrued and unpaid PTO does not exceed approximately \$10,000 (“Unpaid PTO Obligations”). This amount, however, is not a current cash pay obligation as Hourly Employees are only entitled to be paid for accrued but unused PTO upon termination. To the best of its knowledge, the Debtor does not believe that

⁶ Certain Employees not eligible for PTO may be eligible for sick time based on applicable law. To the extent an Employee is eligible for sick time based on applicable law, the Debtor is requesting authority, but not direction, to pay accrued sick time as of the Petition Date and to continue to pay sick time, as part of the PTO Program, in accordance with applicable law, throughout the administration of this Chapter 11 Case.

any Unpaid PTO Obligations are currently due and owing as of the Petition Date. Out of an abundance of caution, however, the Debtor requests authority, but not direction, to pay any Unpaid PTO Obligations as of the Petition Date solely in accordance with applicable law.

18. The Debtor requests that it be authorized, but not directed, to pay any Unpaid PTO Obligations currently due and owing and to continue to honor the PTO Programs (including with regard to any PTO that accrued prepetition, even if Employees use such prepetition PTO throughout the administration of this Chapter 11 Case in accordance with the Debtor's prepetition policy) in the ordinary course during the administration of this Chapter 11 Case.

C. Reimbursable Expense Obligations

19. Prior to the Petition Date, in the ordinary course of business, the Debtor reimbursed Employees (the "Reimbursement Program") for approved, legitimate expenses incurred on behalf of the Debtor in the scope of the Employee's employment ("Reimbursable Expense Obligations"). Reimbursable Expense Obligations typically include expenses for, among other things, travel, cell phones, and certain other business-related, out-of-pocket expenses. All such expenses are incurred with the applicable Employee's understanding that he or she will be reimbursed by the Debtor in accordance with the Debtor's reimbursement policy. In all cases, reimbursement is contingent on the Debtor's determination that the charges are for legitimate, reasonable, reimbursable business expenses.

20. It is difficult for the Debtor to determine the exact amount of Reimbursable Expense Obligations outstanding as of the Petition Date because, among other things, Employees may have expenses that they have yet to submit to the Debtor for reimbursement. Over the past six months, the Debtor has paid, on average, approximately \$11,000 per week on account of Reimbursable Expense Obligations. However, as a result of a smaller workforce, new expense policies, and the current business activity, the Debtor anticipates significantly lower

Reimbursable Expense Obligations going forward. The Debtor processes payment of these Reimbursable Expense Obligations on a rolling basis. As of the Petition Date, the Debtor estimates that the total amount of unpaid prepetition Reimbursable Expense Obligations does not exceed approximately \$7,000 (“Unpaid Reimbursable Expense Obligations”).

21. Additionally, certain Employees have historically used a corporate credit card (the “Corporate Card”) for business expenses, including, among other expenses, company IT costs, office supplies, travel, and employee lunches. Historically, on average the Debtor has paid approximately \$335,000 per month on account of the Corporate Card. However, as a result of a smaller workforce, new expense policies, and the current business activity, the Debtor anticipates significantly lower Corporate Card expenses going forward. As of the Petition Date, the Debtor estimates that the total amount of unpaid prepetition Corporate Card expenses does not exceed approximately \$65,000 (“Unpaid Corporate Card Expense Obligations”).

22. Accordingly, to avoid harming Employees who incurred Reimbursable Expense Obligations, and to ensure that no individual Employee incurs liability on account of the Corporate Card, the Debtor requests authority, but not direction, to pay all Unpaid Reimbursable Expense Obligations and Unpaid Corporate Card Expense Obligations and authority to continue the Reimbursement Program, including, but not limited to the Corporate Card, in the ordinary course during the administration of this Chapter 11 Case.

D. Employee Benefit Programs

23. In the ordinary course of business, the Debtor offers certain full-time Employees medical benefits, including medical, dental, and vision benefits (collectively, the “Health Plans”). All obligations with respect to the Health Plans are hereinafter referred to as the “Employee Benefits Obligations.”

24. The Debtor offers four medical plan options offered to their full-time employees: (i) two Preferred Provider Organization plans administered by Anthem Blue Cross (“Anthem”) and (ii) two Health Maintenance Organization plans administered by Anthem or Kaiser. In addition, the Debtor offers two dental plans and a vision plan.

25. The Health Plans are funded through contributions by the participating Employee and by the Debtor. The Debtor believes that it is necessary and appropriate to continue to honor its obligations under the Health Plans. The cost of the Health Plans is generally shared between the Debtor and the eligible employees, with Employees contributing approximately 10% of the Health Plans’ costs through payroll deductions. The Health Plans cost the Debtor approximately \$29,000 per month for administrative and self-insurance costs (collectively, the “Administrative Costs”). As of the Petition Date, the Debtor estimates that it does not owe any amounts for Administrative Costs, however, to the extent that any such costs come due the Debtor requests authority to pay them in the ordinary course of business. As of the Petition Date, the Debtor estimates that its liability under the Health Plans does not exceed approximately \$2,000 (the “Health Plan Costs” and, together with the Administrative Costs, the “Unpaid Employee Benefit Obligations”).

26. The Debtor requests authority, but not direction, to pay all Unpaid Employee Benefit Obligations and to continue to offer the Health Plans and honor its obligations thereunder in the ordinary course during the administration of this Chapter 11 Case.

E. Life Insurance and Disability Insurance

27. The Debtor provides (a) basic term life, short-term disability, and long-term disability insurance coverage to all full-time Employees and (b) access to, among other things, variable life, employee accident insurance, and a flexible spending account (collectively, the “Employee Insurance Program”). The Debtor incurs estimated costs in the amount of \$68 per

month with respect to the Employee Insurance Program. As of the Petition Date, the Debtor estimates that it does not owe any amounts under the Employee Insurance Program, however, to the extent any costs thereunder come due, the Debtor requests the authority to pay such costs in the ordinary course of business (if any, the “Unpaid Employee Insurance Coverage”).

28. The Debtor seeks authority, but not direction, to pay the Unpaid Employee Insurance Coverage and to continue to provide the Employee Insurance Program in the ordinary course of business during the administration of this Chapter 11 Case.

F. Workers’ Compensation Claims

29. The Debtor is also required by the law of the states in which it does business to provide workers’ compensation coverage for its employees. The Debtor maintains a workers’ compensation policy through Chubb Indemnity Insurance Company (the “Workers’ Compensation Insurance Policy”)⁷ that provides the required level of coverage in each state in which the Debtor operates (the “Workers’ Compensation Program”).

30. The Workers’ Compensation Insurance Policy does not require a deductible and insures the Debtor’s employees up to \$1,000,000 per incident. Accordingly, the Debtor retains risk with respect to workers’ compensation claims above the \$1,000,000 per incident limit (the “Workers’ Compensation Claims”). As of the Petition Date, the Debtor estimates that nothing is owed in Workers’ Compensation Claims (if any, the “Unpaid Workers’ Compensation Claims”).

31. The Debtor seeks authority, but not direction, to pay any Unpaid Workers’ Compensation Claims (regardless of when such obligations arose) and to continue to honor the

⁷ Authority to continue the Workers’ Compensation Policy is sought in the *Debtor’s Motion for Entry of an Order Authorizing (A) Continuation of, and Payment of Prepetition Obligations Incurred in the Ordinary Course of Business in Connection With, Various Insurance Policies, Including Payment of Policy Premiums and Broker Fees, and (B) Banks to Honor and Process Checks and Electronic Transfer Requests Related Thereto*, filed contemporaneously herewith.

Workers' Compensation Program in the ordinary course of business during the administration of this Chapter 11 Case.

G. Savings and Retirement Plans

32. The Debtor maintains a 401(k) plan for the Employees (the "401(k) Plan"), which is administered by Empower Retirement. Generally, the 401(k) Plan provides pre-tax salary deductions on eligible compensation, which amounts are deducted automatically from each participating Employee's paycheck and deposited in such Employee's 401(k) Plan account. The Debtor matches these Employee contributions to the 401(k) Plan dollar-for-dollar on the first 2% of salary contributed and half of the next 4% of salary contributed. The Debtor believes that all Employees currently participate in the 401(k) Plan, with an approximate weekly withholding amount from Employee paychecks of \$10,000 (exclusive of the Debtor's match amount), plus an administrative fee of \$5,000 per quarter. The Debtor estimates that it matches approximately \$3,000 of Employee contributions on a weekly basis. As of the Petition Date, the Debtor holds in trust approximately \$41,500 of Employee 401(k) Plan contributions, which includes the Debtor's contribution match (the "Unremitted 401(k) Contributions").⁸

33. The Debtor requests that it be authorized, but not directed, to remit the Unremitted 401(k) Contributions and to continue to operate the 401(k) Plan in the ordinary course of business.

H. Commuter Benefits

34. Prior to the Petition Date, in the ordinary course of business, the Debtor reimburses Employees (the "Commuter Benefits Program") up to \$200 per month for certain legitimate travel expenditures due to the high cost of living surrounding its San Francisco

⁸ However, the Debtor is also expecting a refund of approximately \$88,000 (net refund of \$46,500) for overpayments from past periods.

corporate headquarters. The Commuter Benefits Program typically includes reimbursements for expenses based on mileage driven or for the use of public transit. Approximately 20 Employees are included in the Commuter Benefits Program. The Debtor incurs estimated costs in the amount of \$4,000 per month on account of the Commuter Benefits Program. As of the Petition Date, the Debtor estimates that its liability under the Commuter Benefits Program does not exceed approximately \$4,000 (the “Unpaid Commuter Benefits”).

35. The Debtor seeks authority, but not direction, to pay the Unpaid Commuter Benefits and to continue to provide the Commuter Benefits Program in the ordinary course of business during the administration of this Chapter 11 Case.

RELIEF REQUESTED

36. By this Motion, the Debtor seeks entry of an order authorizing, but not directing, the Debtor, in its discretion, to (a) pay and/or remit, as applicable, (i) the Unpaid Wage Obligations, (ii) the Unremitted Withholdings Obligations, (iii) the Unpaid PTO Obligations, (iv) the Unpaid Reimbursable Expense Obligations, (v) the Unpaid Corporate Card Expense Obligations, (vi) the Unpaid Employee Benefits Obligations, (vii) the Unpaid Employee Insurance Coverage, (viii) any Unpaid Workers’ Compensation Claims, (ix) the Unremitted 401(k) Contributions, and (x) the Unpaid Commuter Benefits (together with all costs and fees incident to the foregoing, collectively, the “Employee Obligations”) and (b) continue to honor and/or collect, as applicable, (i) the Wage Obligations, (ii) the Withholding Obligations, (iii) the PTO Programs, (iv) the Reimbursement Program, (v) the Health Plans, (vi) the Employee Insurance Program, (vii) the Workers’ Compensation Program, (viii) the Unpaid Workers’ Compensation Claims, (ix) the 401(k) Plan, and (x) the Commuter Benefits Program (collectively, the “Employee Plans and Programs”).

37. To enable the Debtor to carry out the relief requested, the Debtor also requests that the Court authorize all applicable banks and financial institutions (collectively, the “Banks”) to receive, process, honor, and pay all checks presented for payment and all electronic payment requests made by the Debtor relating to the Employee Obligations and the Employee Plans and Programs, whether such checks were presented or electronic-payment requests were submitted prior to or after the Petition Date.

BASIS FOR RELIEF

38. The Debtor’s ability to successfully operate is contingent on a reliable and loyal workforce. The Employees are vital to preserving the Debtor’s customer relationships, maintaining brand value, and contributing to the growth of the Debtor’s business. Without the continued service and dedication of the Employees, it will be difficult, if not impossible, to operate the Debtor’s business without an unexpected and inopportune interruption, and to maximize the value of the Debtor’s estate. Thus, it is essential to assure the Employees and Independent Contractors that the Debtor will honor the Employee Obligations and continue and maintain the Employee Plans and Programs in the ordinary course of business throughout this Chapter 11 Case. A failure to promptly do so will create concern and discontent among the Employees and could lead to resignations or the decision to not complete work for the Debtor or accept future hiring proposals. Loss of even a few key personnel would immediately and irreparably harm the Debtor’s ability to maintain operations to the detriment of all interested parties. Therefore, pursuant to sections 105(a), 363, 507, 541, 1107(a), and 1108 of the Bankruptcy Code, the Debtor seeks authority to pay the Employee Obligations, and to maintain and continue the Employee Plans and Programs, in its discretion, and in the ordinary course of business, in the exercise of its business judgment. This relief is necessary to retain the

workforce, the loss of which would disable the Debtor's business operations during this critical stage of the Debtor's sale process.

A. A Portion of the Employee Obligations is entitled to Priority Treatment

39. Section 507(a)(4)(A) of the Bankruptcy Code grants priority status to up to \$13,650 for each employee's claims for "wages, salaries, or commission, including vacation, severance, and sick leave pay" earned within 180 days before the Petition Date. 11 U.S.C. § 507(a)(4)(A). Similarly, section 507(a)(5) of the Bankruptcy Code grants priority to contributions to employee benefit plans, up to an aggregate amount of \$13,650 multiplied by the number of employees covered, less any amounts paid to such employees under section 507(a)(4) of the Bankruptcy Code. 11 U.S.C. § 507(a)(5).

40. Indeed, "[w]age priority has been a feature of the bankruptcy law since 1898." *In re Garden Ridge Corp.*, No. 04-10324 (KJC), 2006 WL 521914, at *2 (Bankr. D. Del. Mar. 2, 2006) (citing 4 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 507.05[1] (15th ed. 2005)). Its purpose is to "alleviate hardship on workers . . . who may have no other source of income" and "to encourage employees to stand by an employer in financial difficulty." *Id.* (citing 4 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 507.05[1] (15th ed. 2005)). This priority extends to certain other "benefits that are considered akin to compensation, such as vacation, severance and sick leave pay." *Id.*

41. A portion of the Employee Obligations relating to the period prior to the Petition Date constitutes priority claims under sections 507(a)(4) and (5) of the Bankruptcy Code. Amounts that are paid on account of priority claims for the majority of the Employee Obligations would not otherwise be available for distribution to unsecured creditors. Therefore, the Debtor's unsecured creditors will not be prejudiced by permitting priority obligations to be satisfied in the ordinary course of business at the outset of this Chapter 11 Case rather than at the conclusion of

the case. Indeed, the Debtor submits that payment of Employee Obligations at this time enhances value for the benefit of the Debtor and all interested parties by retaining the workforce during the ongoing sale process.

B. The Debtor Should be Authorized to Pay the Employee Obligations Under Sections 1107(a) and 1108 of the Bankruptcy Code

42. The Debtor, operating its business as debtor in possession under sections 1107(a) and 1108 of the Bankruptcy Code, is a fiduciary “holding the bankruptcy estate and operating the business for the benefit of its creditors and (if the value justifies) equity owners.” *In re CoServ, LLC*, 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.*

43. 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 is a valid exercise of a debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate.” *Id.* The court provided a three-pronged test for determining whether a preplan payment on account of a prepetition claim is 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.

44. Payment of the Employee Obligations as set forth herein meets each element of the standard set forth in *CoServ*. The Debtor relies on the skill and expertise of its Employees.

Many Employees possess unique knowledge regarding specific aspects of the Debtor's operations, including pivotal medical and scientific backgrounds, which would be virtually irreplaceable should such Employees be lost through a failure to pay the Debtor's obligations thereto. In addition, any failure by the Debtor to pay the Employee Obligations as set forth herein would negatively impact the morale of the workforce at a critical time for the Debtor and its business when the workforce is most needed. The workforce is also critical to the Debtor's ability to maintain its operations consistent with past practices, which would be impossible without the continued efforts of the workforce. The damage to the value of the Debtor's business and, hence, the costs to creditors as a whole, would be immediate and irreparable if the Employee Obligations were not met. In short, the potential harm and economic disadvantage that would stem from the failure to pay the Employee Obligations greatly outweigh the amount of any prepetition claims that the Debtor is seeking authorization to pay.

45. After careful consideration in consultation with its advisors, the Debtor has determined in its business judgment that to avoid significant disruption to its business operations there exists no practical or legal alternative to the payment of the Employee Obligations.

C. Payment of the Employee Obligations is Warranted Pursuant to Section 363 of the Bankruptcy Code

46. Section 363(b)(1) of the Bankruptcy Code provides that a debtor may "after notice and a hearing, use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). A debtor's decision to use, sell, or lease assets outside the ordinary course of business must be based upon the sound business judgment of that debtor. *See Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. LTV Co. (In re Chateaugay Corp.)*, 973 F.2d 141, 143 (2d Cir. 1992) (holding that a court determining an application pursuant to section 363(b) must find from the evidence a good business reason to

grant such application); *see also In re Ionosphere Clubs, Inc.*, 100 B.R. 670, 675 (Bankr. S.D.N.Y. 1989) (standard for determining a section 363(b) motion is whether the debtor has a “good business reason” for the requested relief). “Where the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.” *Comm. of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986). Consistent with a debtor’s fiduciary duties, where there is a sound business purpose for the payment of prepetition obligations, and where the debtor is able to “articulate some business justification, other than the mere appeasement of major creditors,” courts have authorized debtors to make such payments under section 363(b) of the Bankruptcy Code. *See, e.g., In re Ionosphere Clubs*, 98 B.R. at 175 (accepting debtor’s argument that payment of employee wage claims was “critical . . . in order to preserve and protect its business and ultimately reorganize, retain its currently working employees and maintain positive employee morale,” and finding that the debtor had “clearly demonstrated sound business reasons to justify such payments”).

47. The Debtor pays the Employee Obligations in the ordinary course of business, as permitted by section 363(c) of the Bankruptcy Code. However, to the extent that the Court finds that approval is necessary, and in an abundance of caution, the Debtor requests that the Court grant the relief requested herein and enter an order authorizing it to pay the Employee Obligations, consistent with its compensation, PTO, and other benefit policies and plans, and to permit, but not require, the Debtor, in its discretion, to maintain and continue the Employee Plans and Programs for its Employees as those practices, programs, policies, and plans were in

effect as of the Petition Date, as such may be modified, terminated, amended, or supplemented from time to time.

D. Payment of Certain Withholding Obligations is Appropriate Under Section 541 of the Bankruptcy Code

48. The Debtor also seeks authority to pay the Withholding Obligations. These amounts principally represent the Employees' earnings that governments, the Employees, and the judicial authorities have designated for deduction from the Employees' paychecks. Indeed, certain Withholding Obligations are not property of the Debtor's estate because the Debtor has withheld such amounts from Employees' paychecks on another party's behalf. *See* 11 U.S.C. § 541; *see also City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95 (3d Cir. 1994) (observing the "well-settled principle that debtors do 'not own an equitable interest in property . . . [they] hold[] in trust for another,' and that therefore funds held in trust are not 'property of the estate.'") (quoting *Begier v. IRS*, 496 U.S. 53, 59 (1990)).

49. Further, federal and state laws require the Debtor to withhold certain tax payments from Employees' paychecks and to pay such amounts to the appropriate taxing authority. *See* 26 U.S.C. §§ 6672 and 7501(a); *see also Sharon Steel Corp.*, 41 F.3d at 95–97 (finding that state law requiring a corporate debtor to withhold city income tax from its employees' wages created a trust relationship between debtor and the city for payment of withheld income taxes); *In re DuCharmes & Co.*, 852 F.2d 194, 196 (6th Cir. 1988) (noting that individual officers of a company may be held personally liable for failure to pay trust fund taxes). A failure to pay these amounts could subject the Debtor and its officers and directors to liability. *See, e.g., John F. Olson, et al., Director & Officer Liability: Indemnification and Insurance* § 3:21 (2003). To avoid the potential of such liability, and because the Withholding

Obligations are not property of the Debtor's estate, the Debtor requests that the Court authorize it to remit these amounts to the appropriate parties in the ordinary course of business.

E. Payment of the Employee Obligations is Warranted Pursuant to Section 105(a) of the Bankruptcy Code and Under the Doctrine of Necessity

50. Courts have also authorized payment of prepetition claims in appropriate circumstances pursuant to section 105(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code, which codifies the inherent equitable powers of the bankruptcy court, empowers the bankruptcy court 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). Under section 105(a), courts may permit pre-plan payments of prepetition obligations when such payments are essential to the continued operation of the debtor's business and, in particular, where nonpayment of a prepetition obligation would trigger a withholding of goods or services essential to the debtor's business reorganization plan. *See, e.g., In re Ionosphere Clubs*, 98 B.R. at 177 (finding that section 105 empowers bankruptcy courts to authorize payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor).

51. Numerous courts have used their section 105(a) powers under the “doctrine of necessity” to authorize payment of prepetition obligations where, as here, such payment is an essential element of the preservation of the debtor in possession's potential for rehabilitation. *See In re CoServ, L.L.C.*, 273 B.R. at 497 (reasoning that because the debtor in possession has fiduciary duties it must meet, it is logical that the bankruptcy court may “use Section 105(a) of the [Bankruptcy] Code to authorize satisfaction of the prepetition claim in aid of preservation or enhancement of the estate”); *In re Synteen Techs., Inc.*, No. 00-02203-W, 2000 WL 33709667, at *2 (Bankr. D.S.C. Apr. 14, 2000) (noting that courts have permission to “allow payment of a prepetition claim when essential to the continued operation of the debtor” (citation omitted)); *In*

re Just For Feet, Inc., 242 B.R. 821, 824 (D. Del. 1999) (“courts have used their equitable power under section 105(a) . . . to authorize the payment of pre-petition claims when such payment is deemed necessary to the survival of a debtor in a chapter 11 reorganization”); *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (“Under [section 105] the court can permit pre-plan payment of a prepetition 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) (approving payment of prepetition unsecured claims of tool makers as “necessary to avert a serious threat to the Chapter 11 process”); *In re Quality Interiors, Inc.*, 127 B.R. 391, 396 (Bankr. N.D. Ohio 1991) (“[P]ayment by a debtor-in-possession of pre-petition claims outside of a confirmed plan of reorganization is generally prohibited by the Bankruptcy Code,” but “[a] general practice has developed . . . where bankruptcy courts permit the payment of certain pre-petition claims, pursuant to 11 U.S.C. § 105, where the debtor will be unable to reorganize without such payment.”).

52. The “doctrine of necessity” is frequently invoked early in reorganization cases, during the so-called “breathing spell,” when preservation of the estate is most critical and often extremely difficult. See 2 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 105.02[4][a] (16th ed. 2018) (discussing cases in which courts have relied upon the “doctrine of necessity” or the “necessity of payment” rule to pay prepetition claims immediately). For example, in *In re Structurlite Plastics Corp.*, the court embraced “the principle that a bankruptcy court may exercise its equity powers under section 105(a) to authorize payment of prepetition claims where such payment is necessary to ‘permit the greatest likelihood of survival of the debtor’” 86 B.R. 922, 931 (Bankr. S.D. Ohio 1988) (quoting *In re Chateaugay Corp.*, 80 B.R. 279, 287 (S.D.N.Y. 1987)). The court explained that “a *per se* rule proscribing the payment

of prepetition indebtedness may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code.” *Id.* at 932. Flexibility of payment is particularly critical when the prepetition creditor provides vital goods or services to the debtor.

53. Here, the majority of the Employees rely on their compensation, benefits, and reimbursement of expenses to satisfy their daily living expenses and maintain their health and well-being. Consequently, these Employees will be exposed to significant financial hardships if the Debtor is not permitted to honor the Employee Obligations. If the Debtor is unable to satisfy such obligations, Employee morale and loyalty will suffer at a time when Employee support is critical. Further, if the Court does not authorize the Debtor to honor its various obligations under the Employee Benefits Plans, the Employees’ health coverage could be threatened, potentially burdening individual Employees with the costs of health care. At a minimum, the loss of health care coverage, or uncertainty regarding coverage, would result in considerable anxiety for the Employees at a time when the Debtor needs its Employees to perform their jobs at peak efficiency. For all of the foregoing reasons, a sound business purpose exists to pay the Employee Obligations.

54. Taken together, the nature of the Employee Obligations, the substantial harm to the Debtor’s business that would be caused if those obligations were not honored, the related potential for loss of value in the Debtor’s estate, and the fact that a significant portion of the obligations in question relates to priority wage claims, the Debtor submits that payments related to the Employee Obligations are authorized pursuant to the doctrine of necessity.

55. Accordingly, for all of the foregoing reasons, the relief requested herein will benefit the Debtor’s estate and creditors by allowing the Debtor’s business operations to continue without interruption and should therefore be approved.

F. The Court Should Authorize Applicable Banks to Honor Checks and Electronic Fund Transfers in Accordance with the Motion

56. In connection with the foregoing, the Debtor respectfully requests that the Court authorize all applicable Banks to receive, process, honor, and pay all checks presented for payment and all electronic payment requests made by the Debtor relating to the Employee Obligations and the Employee Plans and Programs, whether such checks were presented or electronic-payment requests were submitted prior to or after the Petition Date.

SATISFACTION OF BANKRUPTCY RULE 6003

57. Pursuant to Bankruptcy Rule 6003, the Court may grant relief within 21 days after the filing of the petition regarding a motion to “use, sell, lease, or otherwise incur an obligation regarding property of the estate” only if such relief is necessary to avoid immediate and irreparable harm. Fed. R. Bankr. P. 6003(b). Immediate and irreparable harm exists where the absence of relief would impair a debtor’s ability to reorganize or threaten the debtor’s future as a going concern. *See In re Ames Dep’t Stores, Inc.*, 115 B.R. 34, 36, n.2 (Bankr. S.D.N.Y. 1990) (discussing the elements of “immediate and irreparable harm” in relation to Bankruptcy Rule 4001).

58. Moreover, Bankruptcy Rule 6003 authorizes the Court to grant the relief requested herein to avoid harm to the Debtor’s customers and other third parties. Unlike Bankruptcy Rule 4001, Bankruptcy Rule 6003 does not condition relief on imminent or threatened harm to the estate alone. Rather, Bankruptcy Rule 6003 speaks of “immediate and irreparable harm” generally. *Cf.* Fed. R. Bankr. P. 4001(b)(2), (c)(2) (referring to “irreparable harm to the estate”). Indeed, the “irreparable harm” standard is analogous to the traditional standards governing the issuance of preliminary injunctions. *See* 9 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 4001.07[b][3] (16th ed. 2018) (discussing source of

“irreparable harm” standard under Rule 4001(c)(2)). Courts will routinely consider third-party interests when granting such relief. *See, e.g., Capital Ventures Int’l v. Argentina*, 443 F.3d 214, 223 n.7 (2d Cir. 2006); *see also Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 761 (7th Cir. 2001).

59. As described herein and in the First Day Declaration, the Debtor will suffer immediate and irreparable harm without Court authority to pay the Employee Obligations and other related relief requested herein. Accordingly, the Debtor submits that Bankruptcy Rule 6003 has been satisfied and the relief requested herein should be granted.

REQUEST FOR WAIVER OF STAY

60. 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 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). As described above, the relief that the Debtor seeks in this Motion is necessary for the Debtor to operate its business without interruption and to preserve value for its estate. Accordingly, the Debtor respectfully requests that the Court waive the fourteen-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

DEBTOR’S RESERVATION OF RIGHTS

61. Nothing contained herein is intended or should be construed as an admission of the validity of, or a promise to pay with respect to, any claim against the Debtor, a waiver of the Debtor’s rights to dispute any claim, or an approval, assumption, or rejection of any agreement, contract, or lease under section 365 of the Bankruptcy Code.

NOTICE

62. The Debtor will provide notice of this Motion to: (a) the Office of the United States Trustee for the District of Delaware; (b) holders of the 30 largest unsecured claims against the Debtor; (c) counsel to the DIP Financing Parties; (d) the Banks; and (e) all parties that have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002. Notice of this Motion and any order entered hereon will be served in accordance with Local Rule 9013-1(m). In light of the nature of the relief requested herein, the Debtor submits that no other or further notice is necessary.

WHEREFORE, the Debtor respectfully requests that the Court grant the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: Wilmington, Delaware
September 4, 2019

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Andrew L. Magaziner

Michael R. Nestor (No. 3526)

Joseph M. Barry (No. 4221)

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Proposed Counsel to the Debtor and Debtor in Possession

EXHIBIT A

PROPOSED ORDER

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

In re:

UBIOME, INC.,¹

Debtor.

Chapter 11

Case No. 19-____ (____)

Ref. Docket No. _____

**ORDER AUTHORIZING PAYMENT OF (A) CERTAIN PREPETITION WAGES,
SALARIES, AND OTHER COMPENSATION AND (B) CERTAIN EMPLOYEE
BENEFITS AND OTHER ASSOCIATED OBLIGATIONS**

Upon the *Debtor's Motion for Entry of an Order Authorizing Payment of (A) Certain Prepetition Wages, Salaries, and Other Compensation and (B) Certain Employee Benefits and Other Associated Obligations* (the "Motion")² filed by the above-captioned debtor and debtor in possession (the "Debtor"); and this Court having reviewed the Motion; and this Court having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b), and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012; this Court having found that venue of this Chapter 11 Case and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and this Court having determined that it may enter a final order consistent with Article III of the United States Constitution; and it appearing that notice of the Motion has been given as set forth in the Motion and that such notice is adequate and no other or further notice need be given; and this Court having considered the First Day Declaration; and this Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein;

¹ The Debtor and the last four digits of its taxpayer identification number is: uBiome, Inc. (0019). The Debtor's headquarters is located at 360 Langton Street, Suite 301, San Francisco, CA 94103.

² All capitalized terms used and not defined herein shall have the meanings ascribed to them in the Motion.

and this Court having determined that the relief sought in the Motion is in the best interests of the Debtor and its estate; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.
2. The Debtor is authorized, but not directed, to continue to honor the Wage Obligations, in accordance with the Debtor's prepetition practices, in the ordinary course during the administration of this Chapter 11 Case, and to pay the Unpaid Wage Obligations in an amount not to exceed \$85,000, absent further order of this Court; *provided, however*, that, subject to the requirements of 11 U.S.C. section 507(a)(4) of the Bankruptcy Code, without prejudice to the Debtor's right to seek additional payments, the Debtor shall not make any payments in excess of \$13,650 on account of prepetition Wage Obligations to any one Employee, absent further order of this Court.
3. The Debtor is authorized, but not directed, to continue to collect the Withholding Obligations, in accordance with the Debtor's stated policies and prepetition practices, in the ordinary course during the administration of this Chapter 11 Case, and to remit the Unremitted Withholdings Obligations, if any.
4. The Debtor is authorized, but not directed, to continue the Debtor's PTO Programs, including payout of accrued PTO to Hourly Employees upon termination, in accordance with the Debtor's prepetition practices, in the ordinary course during the administration of this Chapter 11 Case, and to pay the Unpaid PTO Obligations in an amount not to exceed \$10,000, absent further order of this Court; *provided, however*, that payments to any terminated Hourly Employee on account of PTO shall not exceed (i) \$13,650, *minus* (ii) any amount the terminated Hourly Employee received pursuant to paragraph 2 of this Order;

provided, further, however, that Unpaid PTO Obligations will only be paid to the extent required by applicable law.

5. The Debtor is authorized, but not directed, to continue to honor the Reimbursement Program, including, but not limited to, the Corporate Card, in accordance with the Debtor's prepetition practices, in the ordinary course during the administration of this Chapter 11 Case, and to pay the Unpaid Reimbursable Expense Obligations in an amount not to exceed \$7,000, absent further order of this Court, and to pay the Unpaid Corporate Card Expense Obligations in an amount not to exceed \$65,000, absent further order of this Court; *provided, however*, that satisfaction of the Unpaid Reimbursable Expense Obligations shall only be allowed to the extent Employees have paid for such expenses directly from their own funds or are otherwise personally liable for such expenses.

6. The Debtor is authorized, but not directed, to honor the Health Plans, in accordance with the Debtor's prepetition practices, in the ordinary course during the administration of this Chapter 11 Case and in accordance with the Debtor's prepetition policies and programs, and to pay the Unpaid Employee Benefits Obligations in an amount not to exceed \$5,000, absent further order of the Court.

7. The Debtor is authorized, but not directed, to honor the Employee Insurance Program, in accordance with the Debtor's prepetition practices, in the ordinary course during the administration of this Chapter 11 Case, and to pay the Unpaid Employee Insurance Coverage, if any.

8. The Debtor is authorized, but not directed, to honor the Workers' Compensation Program, in accordance with the Debtor's prepetition practices, in the ordinary course during the

administration of this Chapter 11 Case, and to pay any Unpaid Workers' Compensation Claims in the ordinary course of business.

9. The Debtor is authorized, but not directed, to continue the 401(k) Plan in accordance with the Debtor's prepetition practices, in the ordinary course during the administration of this Chapter 11 Case, and to pay the Unremitted 401(k) Contributions in an amount not to exceed \$41,500.

10. The Debtor is authorized, but not directed, to continue the Commuter Benefits Program in accordance with the Debtor's prepetition practices, in the ordinary course during the administration of this Chapter 11 Case, and to pay Unpaid Commuter Benefits in an amount not to exceed \$4,000.

11. Nothing in the Motion or this Order, nor as a result of any payment made pursuant to this Order, shall be deemed or construed as an admission as to the validity or priority of, or a promise to pay with respect to, any claim against the Debtor, an approval or assumption of any agreement, contract or lease pursuant to section 365 of the Bankruptcy Code, or a waiver of the right of the Debtor, or shall impair the ability of the Debtor, or any other party in interest, to the extent applicable, to contest the validity and amount of any payment made pursuant to this Order.

12. Each Bank is authorized to receive, process, honor, and pay all checks and transfers issued or requested by the Debtor, to the extent that sufficient funds are on deposit in the applicable accounts, in accordance with this Order and any other order of this Court.

13. The Debtor is authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests in connection with any of the Employee Obligations described herein that are dishonored or rejected.

14. Nothing in the Motion or this Order shall be construed to authorize any payments governed by section 503(c)(3) of the Bankruptcy Code (including section 503(c)(1)) or any severance payments to insiders in excess of the limits set forth in section 503(c)(2) of the Bankruptcy Code.

15. The Debtor shall not make any payments in excess of the amounts set forth in section 507(a)(4) and 507(a)(5) of the Bankruptcy Code, absent further order of this Court.

16. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied because the relief requested in the Motion, as granted hereby, avoids immediate and irreparable harm to the Debtor and its estate.

17. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

18. The Debtor is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

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

Dated: _____, 2019
Wilmington, Delaware

United States Bankruptcy Judge