

**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 INTERIM AND FINAL ORDERS
(A) AUTHORIZING, BUT NOT DIRECTING, THE DEBTOR TO
PAY CERTAIN PREPETITION TAXES AND OBLIGATIONS
AND (B) GRANTING RELATED RELIEF**

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 interim order (the “Interim Order”) and a final order (the “Final Order”), substantially in the form attached hereto as Exhibit A and Exhibit B, respectively, pursuant to sections 105(a), 363, 507(a)(8), and 541 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”), (a) authorizing, but not directing, the Debtor to pay certain taxes and certain other related obligations, (b) authorizing all banks and other financial institutions to receive, process, honor, and pay checks presented for payment and electronic payment requests relating to the foregoing, and (c) granting related relief. 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 concurrently herewith.² In further support of this Motion, the Debtor respectfully represents as follows:

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.

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 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 in this District 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(a)(8), and 541 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. Additional 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 TAX OBLIGATIONS

4. In the ordinary course of business, the Debtor: (a) incurs certain tax liabilities, including sales, use, income, trust fund, transfer, franchise, real property, and personal property taxes, as well as certain local taxes on gross receipts, business license fees, and other taxes and similar obligations (collectively, the “Taxes”)³ necessary to operate its business and (b) remits such Taxes to applicable taxing and other regulatory authorities (collectively, the “Authorities”).

5. The Debtor pays the Taxes monthly, quarterly or annually to the respective Authorities, in each case as required by applicable laws and regulations. The Debtor is currently reviewing the taxability of its products and services and is performing an audit to determine whether there are any outstanding tax liabilities of which it is unaware. However, as of the Petition Date, the Debtor believes that it is substantially current in the payment of assessed and undisputed Taxes. Certain Taxes attributable to the prepetition period, however, have accrued and will not come due until after the Petition Date. Additionally, certain Authorities may not have been paid or may have been sent checks for Taxes that may or may not have been presented or cleared as of the Petition Date.

6. The Taxes incurred by the Debtor fall into the following general categories:

Sales and Use Taxes: Until recently, the Debtor collected certain sales, local gross receipt, and other similar taxes (the “Sales Taxes”) from its customers. Sales Taxes were collected at the time of sale and periodically remitted to the Authorities.⁴ The Debtor no longer collects Sales Taxes. The Debtor also incurs use taxes (the “Use Taxes”) in connection with the purchase of tangible personal property or services from vendors that lack a nexus to states in which the Debtor operates. Given the lack of nexus, these vendors are not required to charge or remit Sales Taxes. Despite this, the laws of a

³ The Debtor does not seek authority to collect and pay any employee withholding taxes under this Motion, but rather requests such authority as part of 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*, filed concurrently herewith.

⁴ The Debtor formerly collected sales tax in California, Arkansas, Kentucky, and New York. Sales Taxes have been remitted to California only.

number of different states may require the Debtor (when purchasing such property or services) to self-assess and pay the Use Taxes. The timing and payment of Use Taxes varies from jurisdiction to jurisdiction—generally, the Debtor pays Use Taxes in arrears on a quarterly basis. The Debtor is currently performing a review of its Use Taxes payments. In the most recent quarter, the Debtor remitted approximately \$4,900 (net of refunds) in Sales Taxes and Use Taxes to the Taxing Authorities. The Debtor estimates that, as of the Petition Date, Sales Taxes and Use Taxes do not exceed approximately \$4,000.

State and Local Income Taxes and Franchise Taxes: The Debtor is also subject to state and local income taxes (collectively, “Income Taxes”), franchise taxes (“Franchise Taxes”), and similar taxes in certain jurisdictions. Franchise Taxes are generally assessed by state and local Authorities against entities doing business within a particular jurisdiction and can be based on a flat fee, net operating income, gross receipts, or capital employed. Some states will refuse to qualify a debtor to do business in a state if Franchise Taxes have not been paid. Generally, the Debtor pays Franchise Taxes on an annual basis, in arrears, but some jurisdictions require estimated Franchise Taxes to be remitted on a quarterly basis if the estimated Franchise Taxes exceed a certain threshold. Other jurisdictions assess both Franchise Taxes and Income Taxes, while others assess either Franchise Taxes or Income Taxes depending on which results in the higher tax. The Debtor remitted approximately \$23,000 to the Authorities for Franchise and Income Taxes in the last fiscal year. The Debtor estimates that, as of the Petition Date, currently owed Franchise and Income Taxes do not exceed approximately \$4,000.

Real and Personal Property Taxes: Various state and local governments in jurisdictions where the Debtor’s operations are located have the authority to levy property taxes against the Debtor’s leased and owned real and personal property (the “Property Taxes”). The Debtor typically pays Property Taxes annually or bi-annually depending on how the relevant tax is assessed. The Debtor estimates that, as of the Petition Date, it is current on all Property Taxes.

Regulatory and Licensing Fees. Various Authorities require that the Debtor pay regulatory and licensing fees (collectively, the “Regulatory and Licensing Fees”). In connection with the Debtor’s primary business, the Debtor’s laboratory facilities require numerous federal, state, and local licenses (the “Laboratory Licenses”). The Laboratory Licenses impose associated inspection requirements, and certain fees are also due and owing based on sales or on headcount, depending upon the relevant licensing requirement. The Debtor believes that, as of the Petition Date, no amounts are due and owing on account of Regulatory and Licensing Fees.

Business License Fees, Annual Report Taxes, and Other Taxes and Fees. Some local governments require the Debtor to obtain a business license and pay fees associated with such license (the “Business License Fees”). The requirements for a company to obtain a business license and the manner in which the fees are computed vary according to the laws of the applicable jurisdiction. Various Authorities also require the Debtor to pay annual report taxes (the “Annual Report Taxes”) in order to be in good standing for

purposes of conducting business within the state. The Debtor estimates that, as of the Petition Date, Business License Fees and Annual Report Taxes do not exceed approximately \$5,000.

7. Many Authorities impose personal liability on directors and/or responsible officers of entities responsible for collecting or paying certain taxes or fees to the extent that such taxes or fees are not remitted, as set forth below. Although the Debtor believes that all taxes and fees for which the Debtor's directors and/or responsible officers may be personally liable are described herein, it is possible that other prepetition obligations similar in nature (and in threat of personal liability) may be uncovered by the Debtor subsequent to the filing of this Motion. To the extent that such prepetition obligations exist, the Debtor will consider such obligations "Taxes" as that term is defined and used herein and request the authority to pay such Taxes as they may arise in the ordinary course of its business.

RELIEF REQUESTED

8. By this Motion, the Debtor requests entry of the Interim Order and the Final Order: (a) authorizing, but not directing, the Debtor to pay Taxes that have accrued, but were not yet due and owing or were not paid, as of the Petition Date in the aggregate approximate amount of up to \$15,000, (b) authorizing all banks and financial institutions (collectively, the "Banks") to receive, process, honor, and pay checks presented for payment and electronic payment requests relating to the foregoing, and (c) granting related relief. For the avoidance of doubt, the Taxes which the Debtor seeks authority to pay are comprised entirely of current tax obligations, and are not in respect of "catch up" payments.

BASIS FOR RELIEF

A. The Court Should Authorize, But Not Direct, the Debtor to Pay, in its Sole Discretion, the Taxes

9. The Debtor submits that the relief requested herein is consistent with sections 363(b)(1) and 105(a) of the Bankruptcy Code. First, section 363(b)(1) of the Bankruptcy Code provides that, after notice and a hearing, the trustee “may use, sell, or lease, other than in the ordinary course of business, property of the estate[.]” 11 U.S.C. § 363(b)(1). Section 105(a) of the Bankruptcy Code empowers a 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). Bankruptcy courts have invoked the equitable power of section 105 of the Bankruptcy Code to authorize the postpetition payment of prepetition claims where such payment is necessary to preserve the value of a debtor’s estate. *See, e.g., Tropical Sportswear Int’l Corp.*, 320 B.R. 15, 20 (Bankr. M.D. Fla. 2005) (“Bankruptcy courts recognize that section 363 is a source for authority to make critical vendor payments, and section 105 is used to fill in the blanks.”). Courts have likewise acknowledged that “[u]nder [section] 105, the court can permit pre-plan payment of a prepetition obligation when essential to the continued operation of the debtor.” *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (citing *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 177 (Bankr. S.D.N.Y. 1989)); *see also In re Just for Feet, Inc.*, 242 B.R. 821, 825 (D. Del. 1999) (citing *In re Penn Central Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972)) (holding that the court is authorized under section 105(a) of the Bankruptcy Code to allow immediate payment of prepetition claims found to be critical to the debtor’s continued operation).

10. In a long line of well-established cases, federal courts consistently have permitted postpetition payment of prepetition obligations where necessary to preserve or enhance the value of a debtor’s estate for the benefit of all creditors. *See, e.g., Miltenberger v. Logansport, C. & S.*

W. Ry. Co., 106 U.S. 286, 312 (1882) (payment of pre-receivership claim permitted to prevent “stoppage of [crucial] business relations”); *In re Lehigh & New Eng. Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (holding that “if payment of a claim which arose prior to [the commencement of the bankruptcy case] is essential to the continued operation of the . . . [business] during [the bankruptcy case], payment may be authorized even if it is made out of [the] corpus”); *Dudley v. Mealey*, 147 F.2d 268, 271 (2d Cir. 1945) (extending doctrine for payment of prepetition claims beyond railroad reorganization cases).

11. This legal principle—known as the “doctrine of necessity”—functions in chapter 11 cases as a mechanism by which a bankruptcy court can exercise its equitable power to allow payment of critical prepetition claims not explicitly authorized by the Bankruptcy Code. *See Just for Feet*, 242 B.R. at 826 (finding that “to invoke the necessity of payment doctrine, a debtor must show that payment of the prepetition claims is critical to the debtor’s [continued operation].”); *In re Columbia Gas Sys., Inc.*, 136 B.R. 930, 939 (Bankr. D. Del. 1992) (recognizing that “[i]f payment of a prepetition claim is essential to the continued operation of [the debtor], payment may be authorized”); *In re Boston & Me. Corp.*, 634 F.2d 1359, 1382 (1st Cir. 1980) (recognizing the existence of a judicial power to authorize trustees to pay claims for goods and services that are indispensably necessary to the debtors’ continued operation). The doctrine is frequently invoked early in a bankruptcy case, particularly in connection with those sections of the Bankruptcy Code that relate to payment of prepetition claims. In one case, the court indicated its accord with “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 . . . payment of creditors in full or at least proportionately.’” *In re Structurelite Plastics Corp.*, 86 B.R. 922, 931 (Bankr. S. D. Ohio 1988).

12. The Debtor submits that the timely payment of Taxes is critical to the Debtor's ability to preserve the value of its business while it pursues a value-maximizing transaction. Failure to pay these obligations could damage the Debtor's relationship with the Authorities and cause them to take precipitous action, including conducting audits, filing liens, seeking to impose liability against the Debtor and its officers and directors and, if applicable, seeking to lift the automatic stay, all of which could disrupt the Debtor's chapter 11 efforts and impose significant costs on the Debtor's estate. Payment of the Taxes will avoid these potentially burdensome and costly governmental actions, as well as the incurrence of potential penalties and interest if such Taxes are not timely paid. Thus, granting the relief requested herein will maximize the value of the Debtor's estate and benefit its creditors.

13. Second, authority for satisfying the Taxes may also be found in sections 1107(a) and 1108 of the Bankruptcy Code. The Debtor, operating its business as a debtor in possession under sections 1107(a) and 1108, are fiduciaries "holding the bankruptcy estate and operating the business for the benefit of its creditors and (if the value justifies) equity owners." *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor in possession is the duty "to protect and preserve the estate, including an operating business' going-concern value." *Id.*

14. Courts have noted that there are instances in which a debtor in possession can fulfill its fiduciary duty "only . . . by the preplan satisfaction of a prepetition claim." *Id.* The *CoServ* court specifically noted that preplan satisfaction of prepetition claims would be a valid exercise of a debtor's fiduciary duty when the payment "is the only means to effect a substantial enhancement of the estate," *id.*, and also when the payment was to "sole suppliers of a given

product.” *Id.* at 498. The court provided a three-pronged test for determining whether a preplan payment on account of a prepetition claim was a valid exercise of a debtor’s fiduciary duty:

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

Id.

15. Payment of the Taxes meets each element of the *CoServ* court’s standard. Any unexpected or inopportune interruption of the Debtor’s operations during the course of this Chapter 11 Case could greatly diminish estate value and frustrate the Debtor’s chapter 11 efforts to maximize value for all interested parties. Therefore, to ensure that the Debtor has the flexibility to meet its fiduciary duties as a debtor in possession under sections 1107(a) and 1108 of the Bankruptcy Code, the Debtor submits that it must be permitted to make payment of the Taxes as the Debtor determines necessary to maximize the value of its estate.

16. Third, to the extent that the Taxes are entitled to priority status under section 507(a)(8) of the Bankruptcy Code or to assert a lien against the Debtor’s assets, they must be paid in full under any chapter 11 plan before any of the Debtor’s general unsecured obligations may be satisfied. As such, to the extent that they are entitled to priority, the Debtor submits that payment of the Taxes does not prejudice general unsecured creditors.

17. Fourth, the Authorities might assert that certain of the Taxes are so-called “trust fund” taxes that the Debtor is required to collect from third parties and hold in trust for the benefit of the Authorities. To the extent that the Debtor collects the Taxes on behalf of the Authorities, such Taxes may not constitute property of the Debtor’s bankruptcy estate. *See Begier v. Internal Revenue Service*, 496 U.S. 53, 57–60 (1990); *City of Ferrell v. Sharon Steel*

Corp., 41 F.3d 92, 97 (3d Cir. 1994); *DeChiaro v. N.Y. State Tax Comm'n*, 760 F.2d 432, 433 (2d Cir. 1985) (finding sales taxes are “trust fund” taxes); *Al Copeland Enters., Inc. v. Texas*, 991 F.2d 233 (5th Cir. 1993) (holding debtor’s prepetition collection of sales taxes and interest thereon were held subject to trust and were not property of the estates); *In re Shank*, 792 F.2d 829, 830 (9th Cir. 1986) (noting sales taxes required by state law to be collected by sellers from their customers are “trust fund” taxes); *In re Tap, Inc.*, 52 B.R. 271, 272 (Bankr. D. Mass. 1985) (withholding taxes are “trust fund” taxes). To the extent that the Taxes are “trust fund” taxes and the funds representing such Taxes can be adequately identified and traced, the Debtor would have no equitable interest in such funds and they would not be property of its estate. *See* 11 U.S.C. § 541(d); *In re Am. Int’l Airways, Inc.*, 70 B.R. 102, 103 (Bankr. E.D. Pa. 1987). Accordingly, the Debtor submits that the Court should authorize it to pay any of the Taxes that constitute trust fund taxes, and the Debtor submits that payment of such Taxes would not prejudice the rights of any of its other creditors or other parties in interest.

18. Fifth, some states hold corporate officers personally liable for unpaid taxes in certain circumstances. *See, e.g.*, John F. Olsen, et al., *Director & Officer Liability: Indemnification and Insurance* § 3:21 (2003) (“[S]ome states hold corporate officers personally liable for any sales tax and penalty owed and not paid by the corporation regardless of cause[.]”). To the extent that any such “trust fund” taxes remain unpaid by the Debtor, its directors and officers could be subject to lawsuits or criminal prosecution during the pendency of the Chapter 11 Case. Such potential lawsuits would prove extremely disruptive for the Debtor, for the named officers and directors whose attention to the chapter 11 process is required, and for the Court, as the Court might be asked to entertain various requests for injunctions with respect to the potential state court actions against such individuals. Even the possibility of any such lawsuit or

criminal prosecution would distract the Debtor and its directors and officers and its efforts in these bankruptcy proceedings. Furthermore, the Authorities may audit the Debtor if the Taxes are not timely paid. Payment of the Taxes will therefore avoid a loss of focus on the part of the Debtor's directors, officers and other employees resulting from the risk of personal liability and/or audits.

19. For the foregoing reasons, the Debtor believes that granting the relief requested herein is appropriate and in the best interests of its estate and creditors.

B. Cause Exists to Authorize the Banks to Honor Checks and Electronic Transfer Requests

20. To facilitate the implementation of the above-requested relief, the Debtor further requests that the Court authorize and direct all Banks to receive, process, honor, and pay any and all checks drawn on, or electronic transfer requests from, its accounts, whether such checks or requests are presented or submitted prior to or after the Petition Date, to the extent such checks or requests are expressly identified by the Debtor as related directly to the payment of the Taxes.

SATISFACTION OF BANKRUPTCY RULE 6003

21. Bankruptcy Rule 6003 provides that to the extent "relief is necessary to avoid immediate and irreparable harm," the Court may approve a motion to "pay all or part of a claim that arose before the filing of the petition" prior to twenty-one days after the Petition Date. Fed. R. Bankr. P. 6003. As described above and in the First Day Declaration, the payment of the Taxes is necessary to prevent the immediate and irreparable damage to the Debtor's operations and going-concern value that would result from, among other things, the Debtor's (i) failure to maintain good standing within the jurisdictions in which it conducts its business, (ii) inability to operate its business without interference from the Authorities, or (iii) directors' and responsible officers' exposure to personal liability for unpaid Taxes. Accordingly, the Debtor submits that

the relief requested herein is necessary to avoid immediate and irreparable harm and, therefore, Bankruptcy Rule 6003 is satisfied.

WAIVER OF BANKRUPTCY RULES 6004(h)

22. The Debtor also requests that the Court waive the stay imposed by Bankruptcy Rule 6004(h), which provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 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

23. 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. The Debtor expressly reserves its right to contest any and all claims or causes of action against any Authority.

NOTICE

24. 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 Authorities; (e) the Internal Revenue Service; (f) the Banks; and (h) 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)

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Proposed Counsel to the Debtor and Debtor in Possession

EXHIBIT A

PROPOSED INTERIM 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. _____

**INTERIM ORDER (A) AUTHORIZING, BUT NOT DIRECTING,
THE DEBTOR TO PAY CERTAIN PREPETITION TAXES
AND OBLIGATIONS AND (B) GRANTING RELATED RELIEF**

Upon the *Debtor's Motion for Entry of Interim and Final Orders (A) Authorizing, but not Directing, the Debtor to Pay Certain Prepetition Taxes and Obligations and (B) Granting Related Relief* (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; the 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 Capitalized terms used in this Order but not otherwise defined herein shall have the meanings ascribed to such
(cont'd)

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 on an interim basis until such time as this Court conducts a final hearing on this matter (the “Final Hearing”).

2. The Final Hearing shall take place on _____, 2019 at __:__ .m. (prevailing Eastern Time). Any objections or responses to the Motion shall be filed on or before 4:00 p.m. (prevailing Eastern Time) _____, 2019 and served on (i) proposed counsel for the Debtor, Young Conaway Stargatt and Taylor, LLP, 1000 N. King Street, Wilmington, Delaware 19801 (Attn: Joseph M. Mulvihill (email: jmulvihill@ycst.com)); (ii) the United States Trustee, 844 King Street, Suite 2207, Wilmington, Delaware, 19801, Attn: Jane M. Leamy, Esq. (Jane.M.Leamy@usdoj.gov); (iii) counsel for the DIP Financing Parties, (A) Morrison & Foerster LLP, 200 Clarendon St., Boston, MA 02116 (Attn: Alex Rheaume) (arheaume@mof.com), and (B) Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166-0193 (Attn: Jason Goldstein) (jgoldstein@gibsondunn.com); and (d) counsel to any statutory committee appointed in this Chapter 11 Case.

3. The Debtor is authorized, but not directed, to pay all prepetition Taxes that have accrued, but were not yet due and owing or were not paid in full, as of the Petition Date, including those Taxes subsequently determined upon audit to be owed for periods prior to the Petition Date; *provided, however*, that the amount of the payments relating to prepetition Taxes shall not exceed \$15,000 absent further order of this Court.

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terms in the Motion.

4. Nothing in this Order shall be construed as authorizing the Debtor to pay any amounts on account of past-due taxes.

5. The Banks are authorized, when requested by the Debtor, in the Debtor's discretion, to receive, honor, process and pay any and all checks drawn on, or electronic transfer requests from, the Debtor's bank accounts to pay prepetition obligations authorized to be paid hereunder, whether such checks or requests were presented or submitted prior to or after the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments.

6. The Banks may rely on the Debtor's representations with respect to whether any check or other transfer drawn or issued by the Debtor prior to the Petition Date should be honored pursuant to this Order, and any such Bank shall not have any liability to any party for relying on such representations.

7. Nothing in this Order (a) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code, or an admission as to the validity of any claim against the Debtor and its estate, (b) shall impair, prejudice, waive or otherwise affect the rights of the Debtor and its estate with respect to the validity, priority or amount of any claim against the Debtor and its estate, shall impair, prejudice, waive or otherwise affect the rights of the Debtor and its estate with respect to any and all claims or causes of action against any Authority, or (d) shall be construed as a promise to pay a claim.

8. Notwithstanding the relief granted herein or any actions taken hereunder, nothing contained in this Order shall create any rights in favor of, or enhance the status of any claim held by, any Authority.

9. The Debtor is authorized to take any and all actions necessary to effectuate the relief granted herein.

10. The requirements of Bankruptcy Rule 6003(b) are satisfied because the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtor and its estate.

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

12. This Court shall retain exclusive jurisdiction with respect to all matters relating to the interpretation or implementation of this Order.

Dated: _____, 2019
Wilmington, Delaware

United States Bankruptcy Judge

EXHIBIT B

PROPOSED FINAL 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 Nos. _____ & _____

**FINAL ORDER (A) AUTHORIZING, BUT NOT DIRECTING,
THE DEBTOR TO PAY CERTAIN PREPETITION TAXES
AND OBLIGATIONS AND (B) GRANTING RELATED RELIEF**

Upon the *Debtor's Motion for Entry of Interim and Final Orders (A) Authorizing, but not Directing, the Debtor to Pay Certain Prepetition Taxes and Obligations and (B) Granting Related Relief* (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 previously entered the *Interim Order (A) Authorizing, but not Directing, the Debtor to Pay Certain Prepetition Taxes*

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 Capitalized terms used in this Order but not otherwise defined herein shall have the meanings ascribed to such
(cont'd)

and Obligations and (B) Granting Related Relief [Docket No. ___]; and this Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein; 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 on a final basis.
2. The Debtor is authorized, but not directed, to pay all prepetition Taxes that have accrued, but were not yet due and owing or were not paid in full, as of the Petition Date, including those Taxes subsequently determined upon audit to be owed for periods prior to the Petition Date; *provided, however*, that the amount of the payments relating to prepetition Taxes shall not exceed \$15,000 absent further order of this Court.
3. Nothing in this Order shall be construed as authorizing the Debtor to pay any amounts on account of past-due taxes.
4. The Banks are authorized, when requested by the Debtor, in the Debtor's discretion, to receive, honor, process and pay any and all checks drawn on, or electronic transfer requests from, the Debtor's bank accounts to pay prepetition obligations authorized to be paid hereunder, whether such checks or requests were presented or submitted prior to or after the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments.
5. The Banks may rely on the Debtor's representations with respect to whether any check or other transfer drawn or issued by the Debtor prior to the Petition Date should be

(cont'd from previous page)
terms in the Motion.

honored pursuant to this Order, and any such Bank shall not have any liability to any party for relying on such representations.

6. Nothing in this Order (a) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code, or an admission as to the validity of any claim against the Debtor and its estate, (b) shall impair, prejudice, waive or otherwise affect the rights of the Debtor and its estate with respect to the validity, priority or amount of any claim against the Debtor and its estate, shall impair, prejudice, waive or otherwise affect the rights of the Debtor and its estate with respect to any and all claims or causes of action against any Authority, or (d) shall be construed as a promise to pay a claim.

7. Notwithstanding the relief granted herein or any actions taken hereunder, nothing contained in this Order shall create any rights in favor of, or enhance the status of any claim held by, any Authority.

8. The Debtor is authorized to take any and all actions necessary to effectuate the relief granted herein.

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

10. This Court shall retain exclusive jurisdiction with respect to all matters relating to the interpretation or implementation of this Order.

Dated: _____, 2019
Wilmington, Delaware

United States Bankruptcy Judge