

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

In re:

UBIOME, INC.,<sup>1</sup>

Debtor.

Chapter 11

Case No. 19-\_\_\_\_ (\_\_\_\_)

**DEBTOR’S MOTION FOR ENTRY OF AN ORDER AUTHORIZING  
THE DEBTOR TO PAY CLAIMS FOR PREPETITION CUSTOMS,  
SHIPPER, WAREHOUSEMEN, AND COMMON CARRIER OBLIGATIONS**

uBiome, Inc., the debtor and debtor in possession in the above-captioned chapter 11 case (the “Debtor”) hereby moves this Court (this “Motion”) for entry of an order (the “Order”), substantially in the form annexed hereto as Exhibit A, pursuant to sections 105, 363(b), 364, 503, 1107, and 1108 of title 11 of the United States Code (the “Bankruptcy Code”), Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), authorizing (a) the Debtor to pay certain customs charges and fees to the broker who processes these customs charges, (b) the Debtor to pay certain prepetition claims incurred for shipping and/or storing goods as necessary or appropriate to obtain the release of goods in the possession of third parties and to satisfy liens regarding amounts owed to such parties, and (c) the banks and other financial institutions at which the Debtor holds accounts (collectively, the “Banks”) to receive, process, honor, and pay checks or electronic transfers used by the Debtor to pay the foregoing and to rely on the representations of the Debtor as to which checks are issued and authorized to be paid in accordance with this Motion. In support of the Motion, the Debtor relies upon and incorporate

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<sup>1</sup> 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.

by reference the *Declaration of Curtis G. Solsvig III in Support of the Debtor's Chapter 11 Petitions and Requests for First Day Relief* (the "First Day Declaration"), which was filed concurrently herewith.<sup>2</sup> 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 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 Local Rule 9013-1(f), 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 this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief requested herein are sections 105, 363, 364, 503, 1107, 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").

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<sup>2</sup> All capitalized terms used and not defined herein shall have the meanings ascribed to them in the First Day Declaration.

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.

**CUSTOMS, SHIPPER, WAREHOUSEMEN,  
AND COMMON CARRIER OBLIGATIONS**

4. In the ordinary course of business, the Debtor regularly purchases goods and merchandise from foreign countries. In receiving these goods and merchandise, the Debtor incurs a number of costs, including (i) customs charges (the "Customs Charges") from governmental authorities, (ii) broker fees (the "Broker Fees") from the Debtor's customs broker (the "Broker"), (iii) fees and expenses related to warehousing ("Warehousing Expenses"), and (iv) fees and expenses related to shipping and freight (the "Shipping Expenses" and, together with the Warehousing Expenses, the "Distribution Charges") to third-party shippers, haulers, warehousemen, common carriers, and other transporters (collectively, the "Shippers and Warehousemen"). The Debtor also incurs Shipping Expenses and Warehousing Expenses in connection with storing and transporting goods within the United States.

**A. Customs Charges**

5. In the ordinary course of its business, the Debtor receives a variety of goods, products, and related materials (collectively, the "Imported Products") from a number of foreign countries, primarily Mexico. Timely receipt of the Imported Products is critical to the Debtor's business operations. In connection with the Imported Products, the Debtor may be required to pay the Customs Charges, including, but not limited to, merchandise processing fees, detention and demurrage fees, tariffs, excise taxes, and other similar obligations. In light of this, the Debtor has engaged the Broker to facilitate the smooth importation of the Imported Products and to coordinate payment of the Customs Charges. The Broker has authority to take all actions

necessary, including making payment, to obtain the release of Imported Products for delivery to the Debtor. In this way, the Broker ensures that the Imported Products are available to the Debtor and its customers and that the Debtor's inventory supply chain is not compromised. As of the Petition Date, the Debtor estimates that approximately \$300 is currently due and owing in Customs Charges and Broker Fees.

6. The Debtor seeks authority, but not direction, to pay any and all necessary and appropriate Customs Charges and Broker Fees incurred on account of prepetition transactions. Payment of the Customs Charges is critical to ensure the uninterrupted flow of Imported Products. Absent such payment, the Debtor's supply chain may be interrupted, which would deprive the Debtor of the products and delay orders to customers.

**B. Shipping and Warehousing Charges**

7. The Debtor transacts with a number of third parties, including, but not limited to, the Shippers and Warehousemen, that could potentially assert liens against the Debtor and its property for amounts the Debtor owes to those third parties (the "Lien Claimants," and together with the Shippers and Warehousemen, the "Possessory Claimants"). Delays in the payment of the Distribution Charges with respect to goods that are in the possession of the Possessory Claimants as of the Petition Date could result in the assertion, under applicable law, of possessory liens upon the Debtor's property in possession of such parties.

8. The Debtor believes that payment of the Distribution Charges is necessary to ensure that the Debtor will be able to continue to perform its customer commitments and keep its distribution and supply chain intact. The Debtor's supply chain and distribution network is vital to its business because customers rely on the Debtor to provide a prompt and consistent delivery of products. Customers also return their samples for testing in a prepaid envelope that is included in the kits sold. A supply disruption would decrease revenues, delay testing results, and

erode customer goodwill. In addition, delays in payment of the Distribution Charges with respect to goods that are in the possession of the Possessory Claimants could result in the assertion, under applicable law, of possessory liens upon the Debtor's property in the possession of such parties.

9. Accordingly, to avoid undue delay and to facilitate the continued operation of the Debtor's business, the Debtor seeks immediate authority, but not direction, to pay and discharge, on a case-by-case basis and in its sole discretion, the Distribution Charges, including the claims of any and all potential Possessory Claimants. As of the Petition Date, the Debtor estimates that the outstanding prepetition amounts are approximately \$15,000 for Shipping Expenses and \$45,000 for Warehousing Expenses. All of the amounts due for Shipping Expenses and Warehousing Expenses are presently due or will come due in the first thirty days following the Petition Date.

10. Further, the Debtor proposes that, as a condition of accepting payment, a Possessory Claimant must agree to a set of conditions set forth in the "Relief Requested" section, *infra*, and the order. Each Possessory Claimant to be paid pursuant to the order shall be provided a copy of the order prior to payment, and as a condition of payment, shall agree to be bound by the terms of the Order. If any Possessory Claimant accepts payment and thereafter does not continue to provide services to the Debtor on Customary Trade Terms, then any payment of the Distribution Charges made under this Motion to such Possessory Claimant would be deemed an unauthorized postpetition transfer under section 549 of the Bankruptcy Code and, therefore, would be avoidable and recoverable by the Debtor in cash upon written request, subject to a Possessory Claimant's right to contest such treatment and request that the Debtor schedule a hearing on such matter. Upon any recovery by the Debtor, the Possessory Claimant's claim

would be reinstated as a prepetition claim in the amount so recovered, less the Debtor's reasonable costs in recovering such amounts.

**RELIEF REQUESTED**

11. By this Motion, the Debtor seeks entry of the order (a) authorizing, but not requiring, the Debtor to pay, in the ordinary course of business, (i) the Customs Charges, (ii) the Broker Fees, and (iii) the Distribution Charges, and (b) authorizing the Banks to receive, process, honor, and pay checks or electronic transfers used by the Debtor to pay the Customs Charges, Broker Fees, and Distribution Charges and to rely on the representations of the Debtor as to which checks are issued and authorized to be paid in accordance with the relief granted in connection herewith.

12. The Debtor proposes that any payments made to the Possessory Claimants pursuant to the Order be subject to the following conditions:

- a. The Debtor, in its sole discretion, shall determine which parties, if any, are entitled to payment under the Order;
- b. If a Possessory Claimant accepts payment under the Order, such party is deemed to have agreed to (i) release any liens it may have on the Debtor's goods or property; *provided, however*, that should such party fail promptly to release such lien and/or interest upon payment by the Debtor, any such lien and/or interest shall be deemed released and expunged, without necessity of further action, and an order on this Motion, together with proof of payment, shall be all that is required to evidence such release and expungement, and (ii) subject to subparagraph (d) below, continue to provide goods or services to the Debtor on Customary Trade Terms during the pendency of this Chapter 11 Case. "Customary Trade Terms" means (i) the most favorable trade terms and conditions, including credit terms, in effect between the Possessory Claimant and the Debtor during the one-year period preceding the Petition Date<sup>3</sup> or (ii) such other trade terms as the Debtor and the Possessory Claimant may mutually agree upon;

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<sup>3</sup> In the event the relationship between the party accepting payment under the Order and the Debtor does not extend to one year preceding the Petition Date, the Customary Trade Terms shall mean the terms that the party generally extends to its customers or such terms as are acceptable to the Debtor in the reasonable exercise of its business judgment.

- c. Subject to subparagraph (d) below, if a Possessory Claimant accepts payment under the Order and thereafter does not continue to provide services to the Debtor on the Customary Trade Terms during the pendency of this Chapter 11 Case, then (i) any payment on a prepetition claim received by such party shall be deemed to be an unauthorized voidable postpetition transfer under section 549 of the Bankruptcy Code and, therefore, recoverable by the Debtor in cash upon written request and (ii) subject to subparagraph (f) below, upon recovery by the Debtor, any such prepetition claim shall be reinstated as if the payment had not been made, less the Debtor's reasonable costs in recovering such amounts;
- d. In the event of the assertion of a possessory lien against the Debtor's property that prevents the Debtor from accessing its property without payment of the prepetition claim giving rise to the lien, the Debtor may, in its absolute discretion, determine to pay the claim without regard to subparagraphs (b)(ii) and (c) above;
- e. Prior to making a payment to a party under the Order, the Debtor may, in its absolute discretion, settle all or part of the prepetition claims of such party for less than its face amount, without further notice or hearing; in any event, the Debtor may elect to only pay part of a prepetition claim under the authorization requested, leaving the remainder of the claim to be addressed pursuant to the provisions of the Bankruptcy Code; and
- f. If the Debtor seeks to recover payments under subparagraph (c) above, nothing shall preclude a party from contesting such treatment by making a written request (a "Request") to the Debtor to schedule a hearing before this Court. If such a Request is made, the hearing on the Request will be the next scheduled hearing date not less than thirty (30) days after the Debtor received the Request, of which hearing the Debtor will provide notice to the requesting party and other interested parties in accordance with the Bankruptcy Code and the orders of the Court.

### **BASIS FOR RELIEF REQUESTED**

#### **A. Payment of the Customs Charges, Broker Fees, and Distribution Charges is Appropriate Pursuant to Section 363 of the Bankruptcy Code**

13. Section 363(b) of the Bankruptcy Code provides, in relevant part, that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . . ." 11 U.S.C. § 363(b)(1). "A bankruptcy court is empowered pursuant to § 363 of the Bankruptcy Code to authorize a debtor to expend funds in the bankruptcy court's discretion outside the ordinary course of business." *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989); *see also Armstrong World Indus., Inc. v. James*

*A. Phillips, Inc. (In re James A. Phillips, Inc.)*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying on section 363 to authorize a contractor to pay the prepetition claims of some suppliers who were potential lien claimants because the payments were necessary to induce general contractors to release funds owed to the debtors); *In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15 (Bankr. M.D. Fla. 2005) (recognizing section 363 as a source of authority and allowing payment of the prepetition claims of vendors whose supplies would take four to six weeks to replace).

14. To obtain such approval under section 363(b), “the debtor must articulate some business justification, other than mere appeasement of major creditors . . . .” *Ionosphere Clubs*, 98 B.R. at 175. Where a debtor has articulated a valid business justification for a proposed transaction, courts generally apply the business judgment rule in evaluating such transaction. *See Lange v. Schropp (In re Brook Valley VII, Joint Venture)*, 496 F.3d 892, 900 (8th Cir. 2007) (“In general, courts do not second-guess business decisions made in good faith.”); *In re ALH Holdings LLC*, 675 F. Supp. 2d 462, 477 (D. Del. 2009) (“[A] court will not disturb the business decisions of loyal and informed directors ‘if they can be attributed to any rational business purpose.’”) (quoting *Sinclair Oil Corp. v. Levien*, 280 A. 2d 717, 720 (Del. 1971)). As discussed above, the Debtor has determined, after careful consideration, that the failure to pay the Customs Charges, Broker Fees, and Distribution Charges would likely have a material adverse impact on its business operations and, thus, its efforts to maximize the value of its estate for all stakeholders.

15. In addition, section 363(c) allows a debtor in possession to enter into transactions involving property of the estate in the ordinary course of business without an order of the court. *See, e.g., In re James A. Phillips Inc.*, 29 B.R. at 395 n.2 (“Insofar as transactions are actually in

the ordinary course, they are authorized automatically by § 363(c)(1) and § 1107(a), and do not require Bankruptcy Court approval.”).

16. Many of the Possessory Claimants possess goods that the Debtor needs in order for the Debtor to continue its ongoing business operations. Absent payment of the applicable Distribution Charges, the Possessory Claimants may refuse to deliver these necessary goods to the Debtor and/or may prevent the Debtor from recovering these goods. The Possessory Claimants may refuse to deliver goods in their possession to the Debtor because, under applicable state law, these Possessory Claimants may have a lien on the goods in their possession that secures the Debtor’s obligations to pay for their services. Thus, the Possessory Claimants may be unwilling to release the goods in their possession to which they may be entitled to liens, because releasing possession of the goods may convert their claims against the Debtor from secured to unsecured.

17. The Debtor’s inability to pay the Customs Charges, Broker Fees, and Distribution Charges would cause a detrimental delay in the Debtor’s operations and, in the event of a sufficiently substantial supply disruption, could cause a total shutdown of the Debtor’s operations. Because the Debtor’s business depends upon the timely delivery of products, avoiding such a scenario is vital to the Debtor’s continuing business operations and the success of this Chapter 11 Case. The Debtor submits that the amounts of the Customs Charges, Broker Fees, and Distribution Charges are small relative to the value that would be lost if the Debtor experienced a substantial disruption in its operations, which would likely occur absent payment of these charges and fees.

18. In addition, because the Possessory Claimants may have secured claims against the Debtor’s estate, payment of the Possessory Claims is unlikely to provide the Possessory

Claimants with any greater priority than they would otherwise have if the relief requested herein were not granted. Accordingly, the Debtor's other creditors will suffer no impairment by payment of the Distribution Charges and will benefit by the Court's empowering the Debtor to negotiate payment of the Distribution Charges to facilitate a smooth transition into bankruptcy.

19. The Debtor's payment of the Customs Charges, Broker Fees, and Distribution Charges to obtain needed merchandise and ensure delivery of goods belonging to the Debtor is an action within the ordinary course of the Debtor's business. As such, the Debtor submits that Court approval of the Debtor's payments is not necessary because of the authority granted to them by section 363(c) of the Bankruptcy Code. Nonetheless, out of an abundance of caution and to provide assurances to all interested parties, the Debtor requests that the Court grant the relief requested herein and enter an order authorizing, but not directing, it to pay the Distribution Charges in the ordinary course of the Debtor's business.

**C. Payment of the Distribution Charges is in Furtherance of the Debtor's Fiduciary Duties Under Sections 1107(a) and 1108 of the Bankruptcy Code.**

20. The Debtor, operating its businesses as a debtor in possession under Bankruptcy Code 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's going-concern value." *Id.*

21. Courts have noted that there are instances in which debtor in possession can fulfill its fiduciary duties "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.*

22. Payment of the Distribution Charges meets each element of the *CoServ* court’s standard. First, as described above, the Possessory Claimants have possession of certain critical goods, products, and related materials, which the Debtor needs to continue operations. Second, the cost of replacing such goods, products, and materials in the Possessory Claimants’ would be significantly more than the prepetition claim that the Debtor would have to pay. Additionally, any disruption in the Debtor’s distribution network would significantly disrupt the Debtor’s business. Accordingly, the harm and economic disadvantage that would stem from the failure to pay any of the Distribution Charges is grossly disproportionate to the amount of the prepetition claims that would have to be paid. And, finally, with respect to each of the Distribution Charges, the Debtor has determined that, to avoid significant disruption of the Debtor’s business operations, no practical or legal alternative to payment of the Distribution Charges exists. Therefore, the Debtor can only meet its fiduciary duties as debtor in possession under sections 1107(a) and 1108 of the Bankruptcy Code through payment of the Distribution Charges.

**D. Granting this Motion Will Provide No More Than That Which is Entitled Under the Bankruptcy Code**

23. The Customs Charges would likely be paid in full under any chapter 11 plan pursuant to section 507(a)(8) of the Bankruptcy Code, which provides priority status to the

claims of a governmental unit based on a customs duty arising out of the importation of certain merchandise. Payment of the Customs Charges as proposed in this Motion thus merely accelerates the distribution that the applicable agencies would receive in any event upon confirmation of a plan. Therefore, granting the Motion with respect to the Customs Charges would have no substantial effect on the relative distribution of the estate's assets.

**E. The Court May Also Authorize Payment of the Distribution Charges Pursuant to Section 105(a) of the Bankruptcy Code and the “Necessity of Payment” Doctrine**

24. 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).

25. 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.”).

26. 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.

27. As stated above, the payment of the Customs Charges, Broker Fees, and Distribution Charges is essential to the uninterrupted operation of the Debtor’s business. In turn, the maintenance of the Debtor’s business during this Chapter 11 Case is crucial to the Debtor’s ability to maximize value for the benefit of all stakeholders. Accordingly, the Court should exercise its equitable powers to grant the relief requested herein.

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

28. In connection with the Customs Charges, Broker Fees, and Distribution Charges, the Debtor respectfully requests that the Court (a) authorize all applicable Banks to receive, process, honor, and pay all checks and transfers issued by the Debtor in accordance with the Order, without regard to whether any checks or transfers were issued before or after the Petition Date; (b) provide that all Banks may rely on the representations of the Debtor with respect to whether any check or transfer issued or made by the Debtor before the Petition Date should be honored pursuant to the Order (such banks and other financial institutions having no liability to any party for relying on such representations by the Debtor provided for herein); and (c) authorize the Debtor to issue replacement checks or transfers to the extent any checks or transfers that are issued and authorized to be paid in accordance with the Order are dishonored or rejected by the Banks.

**G. Immediate Relief is Justified**

29. 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).

30. 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 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).

31. As described herein and in the First Day Declaration, the Debtor will suffer immediate and irreparable harm without Court authorization for the relief requested herein.

32. Accordingly, Bankruptcy Rule 6003 has been satisfied and the relief requested herein should be granted.

**REQUEST FOR WAIVER OF STAY**

33. 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**

34. Nothing contained herein is intended or should be construed as an admission of the validity of 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 rights to contest all Distribution Charges, and any invoice or claim of any Possessory Claimant under applicable non-bankruptcy law. Likewise, if the Court grants the relief sought herein, any payment made pursuant to the Order is not intended to be and should not be construed as an admission as to the validity of any claim or a waiver of the Debtor’s rights to dispute such claim subsequently.

**NOTICE**

35. The Debtor has provided 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)

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*Proposed Counsel to the Debtor and Debtor in Possession*

**EXHIBIT A**

**PROPOSED ORDER**

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

In re:

UBIOME, INC.,<sup>1</sup>

Debtor.

Chapter 11

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PREPETITION CUSTOMS, SHIPPER, WAREHOUSEMEN,  
AND COMMON CARRIER OBLIGATIONS**

Upon the *Debtor's Motion for Entry of Order Authorizing the Debtor to Pay Claims for Prepetition Customers, Shipper, Warehousemen, and Common Carrier Obligations* (the "Motion")<sup>2</sup> filed by the above-captioned debtor and debtor-in-possession (the "Debtor"); 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; and this Court having found that venue of this 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 found that due and sufficient notice of the Motion has been given under the particular circumstances and that no other or further notice of the Motion need be given; and this Court having determined that it may enter a final order consistent with Article III of the United States Constitution; and upon consideration of the First Day Declaration; and a hearing having been held to consider the relief requested in the Motion; and upon the record of the hearing and all of the proceedings had before this Court; and this Court having found and determined that the relief sought in the Motion is in the best interests of the Debtor, its estate, its creditors and all

<sup>1</sup> 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.

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

other parties in interest; and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; 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 pay all prepetition payments on account of Customs Charges, Broker Fees, and Distribution Charges in the ordinary course of business consistent with the parties' customary practices in effect prior to the Petition Date.
3. Subject to paragraph 4 hereof, the Debtor is authorized, but not directed, in its sole discretion and business judgment, to pay the prepetition amounts owed on account of (a) the Customs Charges and the Broker Fees, in an amount not to exceed \$300, and (b) the Distribution Charges, in an amount not to exceed \$60,000, in each case, without prejudice to its ability to seek additional relief on an emergency basis; *provided, however*, that any such payment shall not be deemed (a) an admission by the Debtor of the extent, validity, perfection, or possible avoidance of any related liens, claims or payments or (b) a waiver of the Debtor's rights regarding the extent, validity, perfection, or avoidance of any related liens, claims, or payments. The Debtor's right to challenge the extent, validity, perfection, or avoidance of such liens, claims, or payments is hereby expressly reserved.
4. The Debtor is authorized, in its sole discretion, to pay the Possessory Claimants on the following terms and conditions:
  - a. The Debtor, in its sole discretion, shall determine which parties, if any, are entitled to payment under this Order;
  - b. If a Possessory Claimant accepts payment under this Order, such party is deemed to have agreed to (i) release any liens it may have on the Debtor's goods or property; *provided, however*, that should such party fail promptly to release such

lien and/or interest upon payment by the Debtor, any such lien and/or interest shall be deemed released and expunged, without necessity of further action, and this Order, together with proof of payment, shall be all that is required to evidence such release and expungement, and (ii) subject to subparagraph (d) below, continue to provide goods or services to the Debtor on Customary Trade Terms during the pendency of this Chapter 11 Case. "Customary Trade Terms" means (i) the most favorable trade terms and conditions, including credit terms, in effect between the Possessory Claimant and the Debtor during the one-year period preceding the Petition Date<sup>3</sup> or (ii) such other trade terms as the Debtor and the Possessory Claimant may mutually agree upon;

- c. Subject to subparagraph (d) below, if a Possessory Claimant accepts payment under this Order and thereafter does not continue to provide goods or services to the Debtor on the Customary Trade Terms during the pendency of this Chapter 11 Case, then any payment such Possessory Claimant receives may be deemed a voidable postpetition transfer pursuant to section 549(a) of the Bankruptcy Code and the Debtor may take any and all appropriate steps to cause the Possessory Claimant to repay any payments it received to the extent that the aggregate amount of such payments exceeds the postpetition obligations then outstanding;
- d. In the event of the assertion of a possessory lien against the Debtor's property that prevents the Debtor from accessing its property without payment of the prepetition claim giving rise to the lien, the Debtor may, in its absolute discretion, determine to pay the claim without regard to subparagraphs (b)(ii) and (c) above;
- e. Prior to making a payment to a party under this Order, the Debtor may, in its absolute discretion, settle all or part of the prepetition claims of such party for less than their face amount, without further notice or hearing; in any event, the Debtor may elect to only pay part of a prepetition claim under the authorization requested, leaving the remainder of the claim to be addressed pursuant to the provisions of the Bankruptcy Code; and
- f. If the Debtor seeks to recover payments under subparagraph (c) above, nothing shall preclude a party from contesting such treatment by making a written request (a "Request") to the Debtor to schedule a hearing before this Court. If such a Request is made, the hearing on the Request will be the next scheduled hearing date not less than thirty (30) days after the Debtor received the Request, of which hearing the Debtor will provide notice to the requesting party and other interested parties in accordance with the Bankruptcy Code and the orders of this Court.

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<sup>3</sup> In the event the relationship between the party accepting payment under the Order and the Debtor does not extend to one year preceding the Petition Date, the Customary Trade Terms shall mean the terms that the party generally extends to its customers or such terms as are acceptable to the Debtor in the reasonable exercise of its business judgment.

5. Upon the payment of any amounts pursuant to this Order, any property of the Debtor held by or within the control of a Shipper or Warehouseman, as applicable, shall be released and delivered to its destination as directed by one or more of the Debtor consistent with its customary practices in the ordinary course of business.

6. Each Bank is authorized to honor checks presented for payment and all fund transfer requests made 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.

7. 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 respect of payments made in accordance with this Order that are dishonored or rejected.

8. Nothing herein shall change the nature or priority of the underlying claims held by Possessory Claimants.

9. Notwithstanding the relief granted herein and any actions taken hereunder, nothing contained herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any person or entity.

10. The Debtor's satisfaction of any liens pursuant to this order shall not be deemed to be an admission that such liens are valid liens and the Debtor retains the right to contest the extent, validity, or perfection of such liens or to seek the avoidance of such liens.

11. Nothing contained in this Order shall be deemed to constitute an assumption or adoption of any executory contract or prepetition or postpetition agreement between the Debtor and the holder of an Outstanding Order, Possessory Claim, or claim relating to a Distribution Charge, or require the Debtor to make any of the payments authorized herein.

12. The authorization granted hereby to pay the Customs Charges, Broker Fees, and Distribution Charges shall not create any obligation on the part of the Debtor or its officers, directors, attorneys, or agents to pay the Customs Charges, Broker Fees, or Distribution Charges, and none of the foregoing persons shall have any liability on account of any decision by the Debtor not to pay a Customs Charge, Broker Fees, or Distribution Charge, and nothing contained in this Order shall be deemed to increase, reclassify, elevate to an administrative expense status, or otherwise affect the Customs Charges, Broker Fees, or Distribution Charges to the extent they are not paid.

13. Nothing in this Order shall be deemed either a grant of administrative priority expense status to, or authority to pay, any amounts that are disputed by the Debtor.

14. Nothing contained in this Order shall be construed as a waiver by the Debtor of its rights to contest the rights of any Possessory Claimant or any obligation arising in connection with the Customs Charges, the Broker Fees, or the Distribution Charges under applicable law.

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

16. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied because the relief requested in the Motion, as granted hereby, is necessary to avoid 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

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United States Bankruptcy Judge