

**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,
PURSUANT TO SECTIONS 105(a), 363, 1107(a), AND 1108 OF THE BANKRUPTCY
CODE (I) AUTHORIZING THE DEBTOR TO PAY CERTAIN PRE-PETITION
CLAIMS OF CRITICAL VENDORS AND (II) AUTHORIZING AND DIRECTING
FINANCIAL INSTITUTIONS TO HONOR AND PROCESS CHECKS
AND TRANSFERS RELATED TO SUCH CLAIMS**

uBiome, Inc., the debtor and debtor in possession in the above-captioned chapter 11 case (the “Debtor”), hereby moves the Court (this “Motion”) for the entry of interim and final orders, substantially in the form attached hereto as Exhibit A (the “Interim Order”) and Exhibit B (the “Final Order,” and together with the Interim Order, the “Proposed Orders”), respectively, pursuant to sections 105(a), 363(b), 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”): (i) authorizing, but not directing, the Debtor, in its sole discretion, to pay, in the ordinary course of business, the pre-petition claims of certain critical vendors (collectively, the “Critical Vendors,” whose claims shall be identified herein collectively as the “Critical Vendor Claims”) in an aggregate amount not to exceed \$181,000, with up to \$121,000 payable pursuant to the Interim Order; and (ii) authorizing the Debtor’s banks and other financial institutions (collectively, the “Banks”) to honor and process check and electronic transfer requests related to the foregoing. In support of this Motion, the Debtor relies upon and incorporates by reference the *Declaration of Curtis G. Solsvig III in Support of Chapter 11 Petition and Requests 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.

First Day Relief (the “First Day Declaration”), filed contemporaneously herewith. In further support of this Motion, the Debtor respectfully states as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 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)(2), 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 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 sought herein are sections 105(a), 363(b), 1107(a), and 1108 of the Bankruptcy Code, and Bankruptcy Rules 6003 and 6004.

BACKGROUND

A. General 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.

B. The Critical Vendors

4. In the ordinary course of business, the Debtor relies on various vendors to supply various goods and services that are crucial to the Debtor's ongoing operations, and are vital to maximizing the going concern value of the Debtor through this Chapter 11 Case. Among other things, these vendors supply the Debtor with certain lab materials, supplies, and other lab equipment and services. The Debtor uses advanced processing techniques in its lab which is accredited by the College of American Pathologists (CAP) and certified through Clinical Laboratory Improvement Amendments (CLIA). Certain vendors supply the lab with reagents and proprietary sequencing kits that are vital to DNA-sequencing process. Other vendors supply the lab's robots with customized parts and tools necessary to appropriately handle the samples according to the CAP and CLIA certifications. The Debtor's kits also include customized and specific items to enable customers to self-provide and send in samples. In addition, the Debtor relies on billing service providers for specialized healthcare revenue and claim management services to process insurance-related activity arising from legacy operations. Lastly, certain vendors are integral to the internal communications infrastructure of the Debtor with its employees and non-debtor affiliates who are spread globally.

5. Any interference with the Debtor's relationship with the Critical Vendors would have an immediate and damaging effect on the Debtor's operations, and jeopardize the Debtor's ability to service its customers during this critical juncture of this proceeding. Such an operational interruption has the potential to upend the sale process. The Debtor has examined

the extent to which payment of Critical Vendor Claims is necessary to avoid irreparable harm to its estate and to ensure that the Debtor has access to essential services and goods on a postpetition basis. Specifically, the Debtor has reviewed its accounts payable and has undertaken a process to identify those vendors who are truly essential to the Debtor's operations. Prior to the Petition Date, the Debtor consulted with appropriate members of its management team, with the assistance of the Debtor's professionals, to identify those vendors that are essential to the Debtor's operations and the ongoing sale process using the following criteria: (i) whether the vendor in question is a "sole source" provider of goods critical to the Debtor's business operations; (ii) whether certain customer engagements require the Debtor to obtain the goods or services from a particular vendor or prevent them from obtaining them from alternative sources; (iii) if a vendor is not a sole source provider, whether the Debtor can engage alternative providers to adequately meet the needs of the Debtor's clients and fulfill the Debtor's mandates on a timely, cost-effective, and consistent basis; (iv) whether the Debtor has favorable pricing and other terms with the vendors that would be lost if the Debtor was to switch to a new vendor; (v) whether the vendor is foreign or otherwise not likely to recognize or acknowledge the Debtor's chapter 11 proceeding or submit to the Court's jurisdiction; and (vi) whether a vendor meeting the standards of the foregoing (i) through (v) is likely to refuse to continue providing goods or services postpetition if its prepetition claims are not paid.

6. The Debtor estimates that, as of the Petition Date, the aggregate amount of the Critical Vendor Claims is approximately \$181,000, of which approximately \$121,000 will be due and owing within thirty (30) days after the Petition Date.

D. The Critical Vendor Program

7. In return for receiving payments on the Critical Vendor Claims, the Debtor will use commercially reasonable efforts to require the applicable Critical Vendor to provide

favorable trade terms in line with historical practices for the post-petition delivery of services or otherwise continue to supply the Debtor with essential services for the duration of this Chapter 11 Case. The Debtor therefore requests authority, but not direction, to condition the payment of Critical Vendor Claims upon an agreement to continue supplying services or goods to the Debtor in accordance with trade terms that are at least as favorable to the Debtor as those practices and programs (including credit limits, pricing, timing of payments, availability, and other terms) in place prior to the Petition Date (the “Customary Trade Terms”).

8. The Debtor also reserves the right to negotiate trade terms with any Critical Vendor, as a condition to payment, that vary from the Customary Trade Terms (the “Negotiated Trade Terms”) to the extent the Debtor determines, in its reasonable business judgment, that such terms are necessary to procure essential services or are otherwise in the best interests of the Debtor’s estate.

9. The Debtor may elect to condition the payment of Critical Vendor Claims upon such party’s written agreement to continue supplying services or goods on Customary Trade Terms or Negotiated Trade Terms for the duration of this Chapter 11 Case by entering into trade agreements (each, a “Trade Agreement”). Such Trade Agreements, once agreed to and accepted, shall be legally binding contractual arrangements governing the commercial trade relationship between the parties as provided therein.

10. The Debtor also seeks authority, but not direction, to pay the claim of a Critical Vendor that threatens to withhold services or goods unless its pre-petition claim is paid if the Debtor concludes, in its reasonable business judgment, that such payment is necessary for the preservation of the Debtor’s estate. Additionally, the Debtor requests that, if a Critical Vendor accepts payment pursuant to the Proposed Orders after agreeing to provide goods or services on

Customary Trade Terms or Negotiated Trade Terms, and thereafter does not continue to provide services or goods on such terms (regardless of whether a Trade Agreement has been executed), (i) any payment on account of a Critical Vendor Claim may be deemed, in the Debtor's reasonable business judgment, to be an improper post-petition transfer and, therefore, recoverable by the Debtor in cash upon written request, and (ii) upon recovery of the payment by the Debtor, the Critical Vendor Claim shall be reinstated as if the payment had not been made. If there exists an outstanding post-petition balance due from the Debtor to such Critical Vendor, the Debtor may elect to recharacterize and apply any payment made pursuant to the relief requested by this Motion to such outstanding post-petition balance, and such Critical Vendor will be required to repay the Debtor such paid amounts that exceed the post-petition obligations then outstanding without the right of any setoffs, claims, provisions for payment of any claims, or otherwise.

11. The Debtor also proposes that, where applicable, all payments of Critical Vendor Claims shall be applied first to the Critical Vendor's claims for goods received by the Debtor within 20 days prior to the Petition Date. These claims are entitled, in many instances, to priority or administrative expense status pursuant to section 503(b)(9) of the Bankruptcy Code and, accordingly, such payments will only affect the timing of the distribution, but not the amount, of the payment to such Critical Vendors.

RELIEF REQUESTED

12. By this Motion, the Debtor seeks entry of the Proposed Orders:

(i) authorizing, but not directing, the Debtor, in its discretion, to pay Critical Vendor Claims in amounts not to exceed, in the aggregate, the \$121,000 cap provided for in the Interim Order (the "Interim Claims Cap") and, in the aggregate and inclusive of the Interim Claims Cap, the \$181,000

cap provided for in the Final Order; (ii) authorizing the Banks to honor and process check and electronic transfer requests related thereto; and (iii) granting related relief.

BASIS FOR RELIEF

A. The Court Should Authorize the Debtor to Pay the Critical Vendor Claims Pursuant to Sections 105(a) and 363 of the Bankruptcy Code

13. The Court may authorize the Debtor to pay the Critical Vendor Claims, in its sole discretion, pursuant to section 363 of the Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides that a debtor “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). Under this section, a court may authorize a debtor to pay certain pre-petition claims where a debtor demonstrates a sound business justification for such relief. *See In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (finding that a sound business justification existed to justify payment of certain claims); *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) (authorizing, pursuant to section 363, contractor to pay pre-petition claims of some suppliers who were potential lien claimants, because payments were necessary for general contractors to release funds owed to debtors).

14. Additionally, 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 post-petition payment of pre-petition claims of certain vendors, 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 pre-petition 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 *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 pre-petition claims of vendors found to be critical to the debtor’s continued operation).

15. In a long line of well-established cases, federal courts consistently have permitted post-petition payment of pre-petition 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 pre-petition claims beyond railroad reorganization cases).

16. 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 pre-petition 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 pre-petition 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 pre-petition 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 Bankruptcy Code sections that relate to payment of pre-petition claims. In one case, the court indicated its agreement with “the principle that a bankruptcy court may exercise its equity powers under section 105(a) to authorize payment of pre-petition 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).

17. The Debtor believes that the services and goods provided by the Critical Vendors are necessary to prevent any unexpected or inopportune interruptions to the Debtor’s operations during this Chapter 11 Case and throughout the sale process. The Critical Vendors are the most efficient and, in many cases, the only source from which the Debtor can procure critical services or goods within a timeframe that would permit the Debtor to avoid unanticipated interruptions, delays or shutdowns in its operations. As such, the failure to honor its pre-petition obligations to the Critical Vendors could have a significant adverse effect on the Debtor’s continued operation and its ability to maximize the value of its estate through a going concern sale. Moreover, the continued availability of trade credit in amounts and on terms consistent with the Debtor’s pre-petition trade terms is critical. The retention or reinstatement of Customary Trade Terms will enable the Debtor to maximize the value of its business, for the benefit of all stakeholders.

18. Accordingly, the preservation and protection of the Debtor's business through ongoing relationships with the Critical Vendors provides a sufficient business justification for payment of the Critical Vendor Claims, even if such payments were deemed to be outside the ordinary course of business. *See Ionosphere Clubs*, 98 B.R. at 17. The Debtor, therefore, seeks authorization under sections 105(a) and 363(b) of the Bankruptcy Code to pay the Critical Vendor Claims.

B. The Court Should Authorize Payment of the Critical Vendor Claims as a Valid Exercise of the Debtor's Fiduciary Duties Under Sections 1107(a) and 1108 of the Bankruptcy Code.

19. Authority for the relief requested herein 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, is a 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.*

20. 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 pre-petition claim." *Id.* The *CoServ* court specifically noted that preplan satisfaction of pre-petition claims would be a valid exercise of a debtor's fiduciary duty when the payment "is the only means to effect a substantial enhancement of the estate," and also when the payment was to "sole suppliers of a given product." *Id.* at 497-98. The court provided a three-pronged test for determining whether a preplan payment on account of a pre-petition 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 pre-petition 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.

21. Here, the Debtor's request for authority to pay the Critical Vendor Claims, as set forth herein, meets each element of the *CoServ* court's standard. As described above, the Debtor believes that, unless the Debtor has the authority to pay the Critical Vendor Claims, the Critical Vendors may refuse, or be unable, to provide services or goods to the Debtor on a post-petition basis, thereby creating the significant risk that the Debtor will experience an unexpected or inopportune interruption to its operations. Any such interruption would diminish estate value and frustrate the Debtor's sale efforts. The harm and economic disadvantage that would stem from the failure of the Critical Vendors to provide the required goods and services necessary to manufacture and deliver the Debtor's products is wholly disproportionate to the amount of the Critical Vendor Claims.

22. Finally, the Debtor has examined other options short of seeking authority to pay the Critical Vendor Claims and has determined that, in order to avoid an unexpected or inopportune interruption to its business operations, there exists no practical alternative. Therefore, the Debtor can only meet its fiduciary duties as debtors in possession under sections 1107(a) and 1108 of the Bankruptcy Code if authorized to pay the Critical Vendor Claims, in its discretion, as provided herein and in the Proposed Orders.

23. Accordingly, for all of the foregoing reasons, the Debtor submits that cause exists for granting the relief requested herein.

AUTHORIZATION FOR BANKS

24. The Debtor also requests that the Court authorize the Banks, when requested by the Debtor, in its discretion, to honor and process checks or electronic fund transfers drawn on the Debtor's bank accounts to pay pre-petition obligations described herein, whether such checks or other requests were submitted prior to, or after, the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments. The Debtor further requests that all of the Banks be authorized to rely on the Debtor's designation of any particular check or electronic payment request as approved pursuant to this Motion.

SATISFACTION OF BANKRUPTCY RULE 6003(b)

25. Pursuant to Bankruptcy Rule 6003(b), any motion seeking to use property of the estate pursuant to section 363 of the Bankruptcy Code or to satisfy pre-petition claims within 21 days of the Petition Date requires the Debtor to demonstrate that such relief "is necessary to avoid immediate and irreparable harm." The failure of any Critical Vendor to continue to perform in the ordinary course would delay or prevent delivery of goods to the Debtor's customers. This would have immediate and detrimental consequences to the Debtor's business and would jeopardize the Debtor's efforts to preserve and maximize the value of its estate, to the detriment of all of the Debtor's stakeholder. At this critical juncture of this proceeding, the Debtor cannot afford any material disruptions of its business operations or present anything less than a "business as usual" appearance to the public. Moreover, it is the Debtor's business judgment that continuation of its positive relationship with the Critical Vendors is essential to avoid any disruption to its operations and increases the likelihood of successfully prosecuting this Chapter 11 Case and consummating a going concern sale. Thus, if

the relief requested herein is not granted, the Debtor's failure to satisfy the Critical Vendor Claims would cause the Debtor's estate immediate and irreparable harm.

26. For these reasons and those set forth above, the Debtor respectfully submits that Bankruptcy Rule 6003(b) has been satisfied and the relief requested herein is necessary to avoid immediate and irreparable harm to the Debtor and its estate.

WAIVER OF STAY UNDER BANKRUPTCY RULE 6004(h)

27. Pursuant to Bankruptcy Rule 6004(h), "[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 set forth throughout this Motion, the Debtor submits that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h), as any delay in satisfying the Critical Vendor Claims would jeopardize the Debtor's business operations and its efforts in connection with this Chapter 11 Case, to the detriment of its estate and creditors.

RESERVATION OF RIGHTS

28. Nothing in the Proposed Orders or this Motion: (i) 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 in this Chapter 11 Case; (ii) 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; or (iii) shall be construed as a promise to pay a claim.

NOTICE

29. 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 thirty (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.

CONCLUSION

WHEREFORE, the Debtor respectfully requests entry of the Proposed Orders, granting the relief requested herein and such other and further relief as is 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)

Andrew L. Magaziner (No. 5426)

Joseph M. Mulvihill (No. 6061)

Jordan E. Sazant (No. 6515)

Rodney Square, 1000 North King Street

Wilmington, Delaware 19801

Telephone: (302) 571-6600

Facsimile: (302) 571-1253

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-____ (____)

Docket Ref. No. _____

**INTERIM ORDER, PURSUANT TO SECTIONS 105(a), 363, 1107(a) AND 1108 OF THE
BANKRUPTCY CODE: (I) AUTHORIZING THE DEBTOR TO PAY CERTAIN PRE-
PETITION CLAIMS OF CRITICAL VENDORS; AND (II) AUTHORIZING AND
DIRECTING FINANCIAL INSTITUTIONS TO HONOR AND PROCESS CHECKS
AND TRANSFERS RELATED TO SUCH CLAIMS**

Upon consideration of the *Debtor’s Motion for Entry of Interim and Final Orders, Pursuant to Sections 105(a), 363, 1107(a), and 1108 of the Bankruptcy Code: (I) Authorizing the Debtor to pay Certain Pre-Petition Claims of Critical Vendors and (II) Authorizing and Directing Financial Institutions to Honor and Process Checks and Transfers Related to Such Claims* (the “Motion”)² 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. §§ 1334(b) and 157, 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 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 found 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 determined that it may enter a final order consistent with Article III of the United States Constitution; and this Court having found and determined that the

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 not otherwise defined herein are to be given the meanings ascribed to them in the Motion.

relief sought in the Motion is in the best interests of the Debtor, its estate, its creditors and all 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 on an interim basis.
2. The Debtor is authorized, but not directed, to honor, pay, or otherwise satisfy amounts on account of the Critical Vendor Claims; *provided, however*, that such payments shall not exceed \$121,000 prior to entry of the Final Order approving the Motion unless otherwise ordered by this Court.
3. The Debtor is authorized, but not directed, to condition the payment of Critical Vendor Claims upon such Critical Vendor's agreement (a "Trade Agreement") to continue supplying services or goods to the Debtor in accordance with trade terms at least as favorable to the Debtor as those practices and programs (including credit limits, pricing, timing of payments, availability, and other terms) in place prior to the Petition Date (the "Customary Trade Terms"), or, in the alternative, to negotiate trade terms with any Critical Vendor, as a condition to payment of any Critical Vendor Claim, that vary from the Customary Trade Terms (the "Negotiated Trade Terms") to the extent the Debtor determines, in its reasonable business judgment, that such terms are necessary to procure essential services or are otherwise in the best interests of the Debtor's estate. A Trade Agreement, once agreed to and accepted by a Critical Vendor, shall be legally binding contractual arrangements governing the commercial trade relationship between the parties as provided therein.
4. If a Critical Vendor accepts payment pursuant to this Interim Order after agreeing to provide services on Customary Trade Terms or Negotiated Trade Terms, and

thereafter does not continue to provide services on such terms (regardless of whether a Trade Agreement has been executed), then (i) any payment on account of a Critical Vendor Claim may be deemed, in the Debtor's reasonable business judgment, to be an improper post-petition transfer and, therefore, recoverable by the Debtor in cash upon written request, and (ii) upon recovery of the payment by the Debtor, the Critical Vendor Claim shall be reinstated as if the payment had not been made. If there exists an outstanding post-petition balance due from the Debtor to a Critical Vendor, the Debtor may elect to recharacterize and apply any payment made pursuant to this Interim Order to such outstanding post-petition balance, and the Debtor may then take any and all appropriate steps to cause such Critical Vendor to repay payments made to it on account of its pre-petition claim to the extent that such payments exceed the post-petition amounts then owing to such Critical Vendor.

5. The Banks are authorized, at the direction of the Debtor, to honor and process all pre-petition and post-petition checks and fund transfers on account of the Critical Vendor Claims that had not been honored and paid as of the Petition Date, provided that the Debtor has sufficient standing in its credit with such Bank. Each Bank is authorized, but not directed, to 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 Interim Order, and the Banks shall not have any liability to any party for relying on such representations by the Debtor as provided for herein, and shall not be liable to any party on account of (i) following the Debtor's representations, instructions, or presentations as to any order of this Court (without any duty of further inquiry), (ii) honoring of any pre-petition checks, drafts, wires, or automated clearing house transfer in a good-faith belief or upon a representation by the Debtor that this Court has authorized such pre-petition check, draft, wire, or automated

clearing house transfer, or (iii) an innocent mistake made despite implementation of reasonable handling procedures.

6. A final hearing on the relief sought in the Motion shall be conducted on _____, 2019 at _____ (ET) (the "Final Hearing"). Any party-in-interest objecting to the relief sought at the Final Hearing or the Proposed Final Order shall file and serve a written objection, which objection shall be served upon (i) proposed counsel for the Debtor, Young Conway 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@mfo.com), and (B) Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166-0193 (Attn: Mary Beth Maloney) (mmaloney@gibsondunn.com); and (d) counsel to any statutory committee appointed in this Chapter 11 Case, in each case so as to be received no later than _____, 2019 at 4:00 p.m. (ET). If no objections to the entry of the Proposed Final Order are timely filed, this Court may enter the Proposed Final Order without further notice or a hearing.

7. Nothing in this Interim Order: (i) 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; (ii) 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; or (iii) shall be construed as a promise to pay a claim.

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

9. The requirements of Bankruptcy Rule 6003(b) are satisfied.

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

11. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Interim 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, PURSUANT TO SECTIONS 105(a), 363, 1107(a) AND 1108 OF THE
BANKRUPTCY CODE: (I) AUTHORIZING THE DEBTOR TO PAY CERTAIN PRE-
PETITION CLAIMS OF CRITICAL; AND (II) AUTHORIZING AND DIRECTING
FINANCIAL INSTITUTIONS TO HONOR AND PROCESS CHECKS AND
TRANSFERS RELATED TO SUCH CLAIMS**

Upon consideration of the *Debtor’s Motion for Entry of Interim and Final Orders, Pursuant to Sections 105(a), 363, 1107(a), and 1108 of the Bankruptcy Code: (I) Authorizing the Debtor to pay Certain Pre-Petition Claims of Critical Vendors and (II) Authorizing and Directing Financial Institutions to Honor and Process Checks and Transfers Related to Such Claims* (the “Motion”)² 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. §§ 1334(b) and 157, 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 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 determined that it may enter a final order consistent with

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

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

Article III of the United States Constitution; 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 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 this Court having entered that certain *Interim Order, Pursuant to Sections 105(a), 363, 1107(a) and 1108 of the Bankruptcy Code: (I) Authorizing the Debtor to Pay Certain Pre-Petition Claims of Critical Vendors; and (II) Authorizing and Directing Financial Institutions to Honor and Process Checks and Transfers Related to Such Claims* [D.I. ___] (the “Interim Order”); and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis as set forth herein.
2. The Debtor is authorized, but not directed, to honor, pay, or otherwise satisfy amounts on account of Critical Vendor Claims; *provided, however*, that such payments shall not exceed \$181,000 on an aggregate basis, inclusive of any payments made pursuant to the Interim Order, unless otherwise ordered by this Court.
3. The Debtor is authorized, but not directed, to condition the payment of Critical Vendor Claims upon such Critical Vendor’s agreement (a “Trade Agreement”) to continue supplying services or goods to the Debtor in accordance with trade terms at least as favorable to the Debtor as those practices and programs (including credit limits, pricing, timing of payments, availability, and other terms) in place prior to the Petition Date (the “Customary Trade Terms”), or, in the alternative, to negotiate trade terms with any Critical Vendor, as a condition to payment of any Critical Vendor Claim, that vary from the Customary Trade Terms (the “Negotiated Trade Terms”) to the extent the Debtor determines, in its reasonable business

judgment, that such terms are necessary to procure essential services or are otherwise in the best interests of the Debtor's estate. A Trade Agreement, once agreed to and accepted by a Critical Vendor, shall be legally binding contractual arrangements governing the commercial trade relationship between the parties as provided therein.

4. If a Critical Vendor accepts payment pursuant to this Final Order after agreeing to provide services on Customary Trade Terms or Negotiated Trade Terms, and thereafter does not continue to provide services on such terms (regardless of whether a Trade Agreement has been executed), then (i) any payment on account of a Critical Vendor Claim may be deemed, in the Debtor's reasonable business judgment, to be an improper post-petition transfer and, therefore, recoverable by the Debtor in cash upon written request, and (ii) upon recovery of the payment by the Debtor, the Critical Vendor Claim shall be reinstated as if the payment had not been made. If there exists an outstanding post-petition balance due from the Debtor to a Critical Vendor, the Debtor may elect to recharacterize and apply any payment made pursuant to this Final Order to such outstanding post-petition balance, and the Debtor may then take any and all appropriate steps to cause such Critical Vendor to repay payments made to it on account of its pre-petition claim to the extent that such payments exceed the post-petition amounts then owing to such Critical Vendor.

5. The Banks are authorized, at the direction of the Debtor, to honor and process all pre-petition and post-petition checks and fund transfers on account of the Critical Vendor Claims that had not been honored and paid as of the Petition Date, provided that the Debtor has sufficient standing in its credit with such Bank. Each Bank is authorized, but not directed, to 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 Final Order, and the Banks shall not have any liability to any party for relying on such representations by the Debtor as provided for herein, and shall not be liable to any party on account of (i) following the Debtor's representations, instructions, or presentations as to any order of this Court (without any duty of further inquiry), (ii) honoring of any pre-petition checks, drafts, wires, or automated clearing house transfer in a good-faith belief or upon a representation by the Debtor that this Court has authorized such pre-petition check, draft, wire, or automated clearing house transfer, or (iii) an innocent mistake made despite implementation of reasonable handling procedures.

6. Nothing in this Final Order: (i) 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; (ii) 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; or (iii) shall be construed as a promise to pay a claim.

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

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

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

Dated: _____, 2019
Wilmington, Delaware

United States Bankruptcy Judge