

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

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In re:	:	Chapter 11
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THE WET SEAL, LLC, <i>et al.</i> ,	:	Case No. 17-10229 (____)
	:	
Debtors. <sup>1</sup>	:	(Joint Administration Requested)
	:	
	X	

**DEBTORS’ MOTION FOR ENTRY OF AN ORDER  
AUTHORIZING PAYMENT OF CERTAIN PREPETITION  
SHIPPING, WAREHOUSE, DELIVERY AND CUSTOMS CHARGES**

The Wet Seal, LLC and its affiliated debtors and debtors in possession (collectively, the “Debtors”) in the above-captioned chapter 11 cases (collectively, the “Chapter 11 Cases”) hereby move the Court (this “Motion”) for entry of an order, substantially in the form attached hereto as Exhibit A, pursuant to sections 105(a) and 363(b) of title 11 of the United States Code, 11 U.S.C. §§ 101—1532 (the “Bankruptcy Code”), and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), (i) authorizing, but not directing, the Debtors to pay certain prepetition claims for shipping, freight forwarding, warehouseman, lien claimants, and customs duties, (ii) authorizing banks and financial institutions (collectively, the “Banks”) to receive, process, honor, and pay all checks and electronic funds transfers related thereto, and (iii) granting related relief. In support of this Motion, the Debtors rely on the *Declaration of Judd P. Tirnauer in Support of Chapter 11 Petitions and Requests for First Day Relief* (the “First Day Declaration”), which was filed

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<sup>1</sup> The Debtors in these chapter 11 cases and the last four digits of each Debtor’s taxpayer identification number are as follows: The Wet Seal, LLC (2741); The Wet Seal Gift Card, LLC (3286); Mador Financing, LLC (1377). The Debtors’ corporate headquarters is located at 7555 Irvine Center Drive, Irvine, California 92618.

contemporaneously with this Motion and is incorporated herein by reference. In further support of this Motion, the Debtors respectfully represent as follows:

**JURISDICTION AND VENUE**

1. The Court has jurisdiction over these Chapter 11 Cases and this Motion 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), 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 Debtors consent to 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 of these Chapter 11 Cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are sections 105(a) and 363(b) of the Bankruptcy Code, and Bankruptcy Rules 6003 and 6004.

**BACKGROUND**

**A. General Background**

3. On the date hereof (the “Petition Date”), each of the Debtors commenced a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their business and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. To date, no trustee, examiner or statutory committee has been appointed in these Chapter 11 Cases. Additional factual background relating to the Debtors’ business, capital structure and the commencement of these Chapter 11 Cases is set forth in detail in the First Day Declaration.

4. Prior to the Petition Date, the Debtors commenced going-out-of-business sales (the “Store Closing Sales”) at all of their retail locations, stopped ordering additional merchandise from vendors, and began exhausting their available inventory through their internet platform and clearance sales being conducted at their retail locations.

**B. Background Regarding Distribution Network**

5. Before commencing the Store Closing Sales, and in the ordinary course of business, the Debtors historically received—and continue to receive—merchandise sold at their retail locations into their distribution facility in Chino, California (the “Distribution Facility”), which is operated and controlled by a third party, National Distribution Centers, LLC (“NDC”). The Debtors also utilize a smaller distribution center, operated by Dependable Global Express, Inc. (“DGX”), in Long Beach, California (the “DGX Facility”) where merchandise is stored after arriving at a nearby port. Goods received into the DGX Facility are ultimately transported to the Distribution Facility for further allocation and shipment therefrom.

6. Upon arrival at the Distribution Facility, the merchandise was—and continues to be, as applicable—segregated into separate categories: (1) merchandise available for purchase on the Debtors’ ecommerce platform, www.wetseal.com (the “Website Merchandise”), and (2) merchandise shipped to, and made available for purchase from, the Debtors’ retail locations (the “Store Merchandise,” and together with the Website Merchandise, the “Merchandise”).

7. The Debtors utilize a number of third-party shippers, freight forwarders, and similar critical transportation vendors (such parties, the “Shippers”) to ship purchased Website Merchandise to customers. The Debtors similarly use the Shippers to deliver Store Merchandise to their retail locations after such merchandise is properly allocated to meet

customer demand. Depending on the location of the Debtors' stores vis-à-vis the Distribution Facility, the Debtors use both ground and air freight forwarders. The Shippers are owed approximately \$615,000 on account of amounts that come due on or before twenty-one days after the Petition Date, absent the immediate payment of which such Shippers will refuse to make ongoing deliveries to the Distribution Center and, ultimately, to the Debtors' stores.

8. Merchandise that is received from overseas is shipped to applicable ports in the United States, cleared for customs, and finally moved onto trucks which transport the Merchandise to the Distribution Facility and, eventually, to the Debtors' stores. The Debtors are required to pay customs duty charges, which charges the Debtors pay directly without the use of an outside broker. The Merchandise can be stopped in transit if customs duties are not paid in the ordinary course. As of the Petition Date, the Debtors believe there is approximately \$25,000 owed in customs duty charges, which must be satisfied before Merchandise located at the DGX Facility, which has already cleared customs, is released and forwarded to the Distribution Facility.

9. As the Store Closing Sales run their course, the Debtors intend to, among other things: (i) dispose of their ecommerce inventory and, ultimately, consolidate inventory in a manner that maximizes value and minimizes the accrual of administrative expenses; (ii) continue to receive Merchandise into the Distribution Facility to the extent it remains in the possession of freight forwarders or DGX as of the Petition Date; and (iii) allocate Store Merchandise and ship it to the Debtors' retail locations, under the guidance of their retained liquidators, in a manner that will maximize the success of the Store Closing Sales. Each of these initiatives will require the continued cooperation of, and assistance from, the Shippers, NDC, DGX, customs agencies, and related parties (collectively, the "Transporters").

**RELIEF REQUESTED**

10. By this Motion, the Debtors request entry of an order, pursuant to sections 105(a) and 363(b) of the Bankruptcy Code and Bankruptcy Rules 6003 and 6004, (i) authorizing, but not directing, the Debtors to pay certain prepetition claims of the Transporters (collectively, the “Transporter Claims”), (ii) authorizing the Banks to receive, process, honor, and pay all checks and electronic funds transfers related thereto, and (iii) granting related relief.

11. The success of the Debtors’ wind-down strategy depends on the daily process of importing and shipping its Merchandise to stock the Debtors’ stores during the Store Closing Sales. To ensure the steady movement of products, the Debtors rely on Transporters for the processing and shipping of the Merchandise to and from the Distribution Facility. If the Debtors fail to pay any of the foregoing entities for charges incurred in connection with the transportation of the Merchandise, the Debtors’ ability to move, receive, and ultimately sell Merchandise in a seamless manner will be significantly undermined, thereby limiting the duration and scope of the Store Closing Sales. Moreover, various statutes, tariffs, and agreements may permit the Transporters to assert possessory liens against Merchandise in their possession, which would further diminish the Debtors’ go-forward ability to liquidate their inventory, and, in some cases, no alternative vendor is available or willing to provide the requisite services.

12. As of the Petition Date, the Debtors estimate that approximately \$650,000 is owed on account of Transporter Claims, which came due on or before twenty-one days after the Petition Date. These amounts include both invoices that the Debtors have received, as well as amounts that the Debtors have not yet received, but are believed to have been incurred as of the Petition Date based on historical practice. Payment of the foregoing Transporter Claims will avoid disruption in the Store Closing Sales, prevent the possibility of possessory liens being

asserted against the Merchandise, allow certain Merchandise to be released from customs, and enable the Debtors to realize the full potential value of the Merchandise during the Store Closing Sales.

13. Moreover, although the Debtors believe that the above aggregate amount of Transporter Claims is accurate, to the extent that additional amounts are found to be outstanding (most likely due to delayed invoicing or the timing of certain shipments), the Debtors must be able to pay such amounts to gain access to the Merchandise, as any disruption in the Debtors' movement of Merchandise could significantly undermine the Debtors' wind-down efforts.

14. As such, the Debtors request authority, but not direction, to pay Transporter Claims as and when the Debtors determine that payment is necessary or appropriate to prevent immediate and irreparable harm to the estates in an amount not to exceed \$650,000.

15. The Debtors request that all applicable Banks be authorized to receive, process, honor, and pay all checks presented for payment and to honor all electronic payment requests made by the Debtors related to the prepetition obligations described herein, whether such checks were presented or electronic requests were submitted prior to or after the Petition Date. The Debtors further request that all such Banks be authorized to rely on the Debtors' designation of any particular check or electronic payment request as approved pursuant to this Motion.

### **BASIS FOR RELIEF**

#### **A. Payment of the Prepetition Claims Described Herein is Warranted Under Section 363(b) of the Bankruptcy Code**

16. The Court may authorize the Debtors to pay shipping and warehouse charges under section 363(b) of the Bankruptcy Code, which provides 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). Under section 363(b), a court may authorize a debtor to pay certain prepetition claims. *See In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (authorizing payment of prepetition wages pursuant to section 363(b) of the Bankruptcy Code); *In re UAL Corp.*, Case No. 02-48191, 2002 WL 34344254, at \*1 (Bankr. N.D. Ill. Dec. 9, 2002) (authorizing payment of prepetition claims under section 363 of the Bankruptcy Code as an out-of-ordinary-course transaction). To do so, “the debtor must articulate some business justification, other than mere appeasement of major creditors.” *In re Ionosphere Clubs, Inc.*, 98 B.R. at 175. As discussed more fully herein, the Debtors’ request to pay the Transporter Claims meets this standard because, given the nature of the Debtors’ industry and the ongoing Store Closing Sales, the failure to satisfy such claims could have a material adverse effect on the Debtors’ ability to generate the maximum return for their Merchandise under difficult circumstances.

**B. Payment of the Prepetition Claims is Warranted Under the “Doctrine of Necessity”**

17. It is in the best interests of the Debtors’ estates that the Transporter Claims be paid, and the Court has the authority under the Bankruptcy Code to permit the Debtors to satisfy such obligations. The Court’s authority to approve the satisfaction of prepetition obligations derives from both the Bankruptcy Code and the common law “doctrine of necessity.”

18. Courts have repeatedly recognized “the existence of the judicial power to authorize a debtor . . . to pay pre-petition claims where such payment is essential to the continued operation of the debtor.” *In re Ionosphere Clubs, Inc.*, 98 B.R. at 176; *see also In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191-92 (Bankr. D. Del. 1994) (finding that a debtor is entitled to pay certain prepetition creditors upon a showing that the payment is “essential to the continued operation of the business”) (citations omitted). The United States Supreme Court first articulated

the equitable common law principle commonly referred to as the “doctrine of necessity” over 125 years ago in *Miltenberger v. Logansport Railway Company*, 106 U.S. 286, 311 (1882). “The Supreme Court, the Third Circuit and the District of Delaware all recognize the court's power to authorize payment of pre-petition claims when such payment is necessary for the debtor’s survival during chapter 11.” *In re Just for Feet, Inc.*, 242 B.R. 821, 825 (D. Del. 1999).

19. Under the doctrine of necessity, a bankruptcy court may exercise its equitable power to authorize a debtor to pay critical prepetition claims, even though such payment is not explicitly authorized under the Bankruptcy Code. *See In re Columbia Gas Sys., Inc.*, 136 B.R. 930, 939 (Bankr. D. Del. 1992) (citing *In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (recognizing that “[i]f payment of a prepetition claim ‘is essential to the continued operation of [the debtor], payment may be authorized’”).

20. The Court’s exercise of its authority under the “doctrine of necessity” is appropriate to carry out specific statutory provisions of chapter 11, specifically sections 1107(a), 1108 and 363(b)(1) of the Bankruptcy Code, which collectively authorize a debtor-in-possession to maintain and operate the debtor's business and use estate property outside of the ordinary course of business, even if the debtor ultimately seeks to sell or liquidate its business. Indeed, a debtor-in-possession operating a business under section 1108 of the Bankruptcy Code has a duty to protect and preserve the value of its business, and prepetition claims may be paid if necessary to perform the debtor's duty. *See In re Just for Feet, Inc.*, 242 B.R. at 825 (authorizing, under the doctrine of necessity, payment of prepetition claims of critical vendors because such claims were “essential to the continued operation of the debtor.”).

21. The Debtors submit that paying the Transporter Claims, not to exceed \$650,000, is critical to their efforts to maximize the value of their estates for the benefit of their



creditors through the Store Closing Sales and related wind down efforts. Absent such payment, the Debtors will be unable to move Merchandise within the distribution network, making it impossible to reach the consumer and thereby hamstringing the potential success of the Store Closing Sales.

22. The Debtors considered all reasonable alternatives prior to the Petition Date that would have otherwise reduced, or perhaps eliminated, the need to satisfy Transporter Claims on a postpetition basis, but given the nature of the services provided by the Transporters, and a dearth of available or willing replacements to distribute the Merchandise to the Debtors' stores postpetition and provide related services, the Debtors determined that the claims held by the Transporters must be paid ensure that an operable, efficient, and effective distribution scheme remains in place during the pendency of the Store Closing Sales. Moreover, the Debtors determined that they will suffer immediate and irreparable harm if they do not obtain authority to satisfy the Transporter claims immediately following the Petition Date since, absent such relief, the Debtors will not receive inventory to their stores on a timely basis, will be unable to comply with the termination date applicable to the Store Closing Sales, and will be forced to incur additional administrative expenses in the form of March rent if there is any significant delay in obtaining the Shippers' consent to perform in a timely manner. Simply stated, if the Store Closing Sales are to succeed, and the Debtors are to efficiently administer their estates, the Debtors must be able to maintain their Merchandise-transport network in which the payment of the Transporters, and most notably, the Shippers, comprises a vital link.

23. Based on the foregoing, the Debtors submit that the relief requested is necessary and appropriate, is in the best interests of their estates and creditors, and should be granted.

**C. Cause Exists to Authorize the Banks to Honor Checks and Electronic Fund Transfers**

24. The Debtors have sufficient funds to honor the Transporter Claims in the ordinary course of business using available cash, expected cash flows from ongoing business operations, and the proceeds from their postpetition financing. The Debtors believe that there is minimal risk that checks or wire transfer requests that the Court has not authorized will be inadvertently made. Thus, the Debtors request that the Court authorize all applicable financial institutions to receive, process, honor and pay any and all checks or wire transfer requests in respect of the relief requested herein.

**IMMEDIATE RELIEF IS JUSTIFIED**

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

**WAIVER OF ANY APPLICABLE STAY**

26. The Debtors also request 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 Debtors seek in this Motion is necessary for the Debtors to operate their business without interruption and to preserve value for their estates. Accordingly, the Debtors respectfully request 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.

**NOTICE**

27. Notice of this Motion has been given to (i) the U. S. Trustee; (ii) counsel to Crystal Financial, LLC; (iii) counsel to Mador Funding, LLC; (iv) holders of the thirty (30) largest unsecured claims on a consolidated basis against the Debtors; (v) the Banks; and (vi) any party that has requested notice pursuant to Bankruptcy Rule 2002. As this Motion is seeking “first day” relief, within two business days of the hearing on this Motion, the Debtors will serve copies of this Motion and any order entered respecting this Motion as required by Rule 9013-1(m). The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

**CONCLUSION**

WHEREFORE, the Debtors respectfully request entry an order, substantially in the form attached hereto as Exhibit A (i) granting the relief requested herein, and (ii) granting such other relief as is just and proper.

Dated: February 2, 2017  
Wilmington, Delaware

/s/ Andrew L. Magaziner

Robert S. Brady (No. 2847)

Michael R. Nestor (No. 3526)

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*Proposed Counsel to the Debtors and  
Debtors in Possession*

**Exhibit A**

**Proposed Order**

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

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In re:	:	Chapter 11
THE WET SEAL, LLC, <i>et al.</i> ,	:	
Debtors. <sup>1</sup>	:	Case No. 17-10229 (____)
	:	(Jointly Administered)
	:	Ref. Docket No. ____
	:	
	X	

**ORDER AUTHORIZING PAYMENT OF CERTAIN PREPETITION  
SHIPPING, DELIVERY AND CUSTOMS CHARGES**

Upon the motion (the “Motion”)<sup>2</sup> of the Debtors for entry of an order, pursuant to sections 105(a) and 363(b) of the Bankruptcy Code and Bankruptcy Rules 6003 and 6004 (i) authorizing, but not directing, the Debtors to pay the Transporter Claims , (ii) authorizing the Banks to receive, process, honor, and pay all checks and electronic funds transfers related thereto, and (iii) granting related relief; and it appearing that this Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 1334 and 157, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated February 29, 2012; and it appearing that the Motion is a core matter pursuant to 28 U.S.C. § 157(b)(2) and that this Court may enter a final order consistent with Article III of the United States Constitution; and it appearing that venue of these Chapter 11 Cases and of the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that due and adequate notice of the Motion has been given under the circumstances, and that no other or further notice need be given; and it appearing that the relief requested in the Motion is in the best interests of the Debtors’ estates,

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<sup>1</sup> The Debtors in these chapter 11 cases and the last four digits of each Debtor’s taxpayer identification number are as follows: The Wet Seal, LLC (2741); The Wet Seal Gift Card, LLC (3286); Mador Financing, LLC (1377). The Debtors’ corporate headquarters is located at 7555 Irvine Center Drive, Irvine, California 92618.

<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion or in the First Day Declaration, as applicable.

their creditors, and other parties in interest; and after due deliberation, and good and sufficient cause appearing therefor, it is hereby

**ORDERED DECREED THAT:**

1. The Motion is GRANTED, as set forth herein.
2. The Debtors are authorized, but not directed, to pay the Transporter Claims in the ordinary course of the Debtors' business up to an aggregate amount of \$650,000 relating to undisputed prepetition claims that the Debtors, in their business judgment, determine are necessary and appropriate.
3. The Banks are authorized, at the Debtors' request, to receive, honor, process, and pay any and all checks and electronic transfers related to the Transporter Claims, whether presented before or after the Petition Date, provided that there are sufficient good funds standing to the Debtors' credit in the applicable accounts to cover such payments.
4. The Debtors shall be and hereby are authorized to issue in their sole discretion new postpetition checks or effect new postpetition fund transfers to pay the Transporter Claims to replace any prepetition check or fund transfer requests that may be dishonored or rejected.
5. Nothing in the Motion or this Order shall impair the Debtors' or any other party's ability to contest, without prejudice, in each party's sole discretion, the validity and amounts of the Transporter Claims.
6. Nothing in the Motion or this Order provides or shall be deemed to provide that any lien (contractual, common law, statutory, or otherwise) securing a claim that is paid pursuant to this Order constitutes a valid enforceable lien, and the Debtors reserve all rights to contest the extent, validity, perfection, or possible avoidance of any such liens, and to recoup

for the Debtors' estates any amounts paid on account of the Transporter Claims to the extent the validity or perfection of such liens are later successfully contested or such liens are later avoided.

7. Nothing herein shall be deemed to constitute the postpetition assumption of any executory contract between the Debtors and any holder of a Transporter.

8. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

9. Bankruptcy Rule 6003(b) has been satisfied because the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtors. The requirements of Bankruptcy Rule 6004(a) are waived.

10. Notwithstanding any provision in the Bankruptcy Rules to the contrary: (i) this Order shall be effective immediately and enforceable upon its entry; (ii) the Debtors are not subject to any stay in the implementation, enforcement, or realization of the relief granted in this order; and (iii) the Debtors are authorized and empowered, and may in their discretion and without further delay, take any action necessary or appropriate to implement this Order.

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

Dated: February \_\_\_\_, 2017  
Wilmington, Delaware

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UNITED STATES BANKRUPTCY JUDGE