

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

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In re: : Chapter 11
  
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THE WET SEAL, LLC, *et al.*, : Case No. 17-10229 (\_\_\_\_)
  
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Debtors.<sup>1</sup> : (Joint Administration Requested)
  
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**DEBTORS’ MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING  
THE DEBTORS TO PAY AND HONOR CERTAIN PREPETITION WAGES,  
BENEFITS, AND OTHER COMPENSATION OBLIGATIONS AND  
(II) AUTHORIZING BANKS TO HONOR AND PROCESS CHECKS AND  
TRANSFERS RELATED TO SUCH OBLIGATIONS**

The Wet Seal, LLC and its affiliated debtors and debtors in possession (the “Debtors”) in the above-captioned chapter 11 cases (collectively, the “Chapter 11 Cases”) hereby move the Court (the “Motion”) for entry of an order, substantially in the form attached hereto as Exhibit A, pursuant to sections 105(a), 363(b), 507(a)(4), and 507(a)(5) of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”), (i) authorizing, but not directing, the Debtors: (a) to pay their employees (collectively, the “Employees”) accrued prepetition wages and salaries (collectively, the “Employee Claims”); (b) to honor any prepetition obligations in respect of, and continue in the ordinary course of business until further notice (but not assume), certain of the Debtors’ vacation, sick time, bereavement, and holiday time policies, and workers’ compensation, severance, employee, and retiree benefit plans and programs (collectively, the “Employee Benefits”), as described below; (c) to reimburse Employees for prepetition expenses that Employees incurred on behalf of the Debtors in the ordinary course of business (the “Employee Expenses”); (d) to pay all related prepetition payroll taxes and other

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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.

deductions (the “Employee Withholdings”); and (e) to the extent that any of the foregoing programs is administered, insured, or paid through a third-party administrator or provider, to pay any prepetition claims of such administrator and provider in the ordinary course of business to ensure the uninterrupted delivery of payments or other benefits to the Employees (the “Employee Administrator Obligations” and, collectively with the Employee Claims, the Employee Benefits, the Employee Expenses and the Employee Withholdings, the “Employee Obligations”) and (ii) authorizing the Debtors’ banks and other financial institutions (collectively, the “Banks”) to honor and process related checks and electronic transfers. 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 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 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 sought herein are sections 105(a), 363(b), 507(a)(4), and 507(a)(5) of the Bankruptcy Code and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

### **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 initiated store closing sales (collectively, the “Store Closing Sales”) at each of their retail locations, thereby commencing the orderly wind down of the Debtors’ affairs and operations.

### **RELIEF REQUESTED**

5. By this Motion, the Debtors request that the Court enter an order authorizing, but not directing, the Debtors, in their sole discretion: (i) to pay Employee Claims; (ii) to honor any prepetition obligations in respect of, and continue in the ordinary course of business until further notice (but not assume), certain Employee Benefits, as described below; (iii) to reimburse Employees Expenses; (iv) to pay all related Employee Withholdings; and (v) to the extent that any Employee Benefit is administered, insured, or paid through a third-party administrator or provider, to pay any Employee Administrator Obligations.

6. The Debtors also request that the Court authorize the Banks, when requested by the Debtors, in their discretion, to honor and process any checks or electronic transfers drawn on the Debtors' bank accounts to pay any prepetition obligations described herein, whether such checks or other requests were submitted prior to or after the Petition Date, provided that sufficient funds are available to make such payments. The Debtors further request that the Banks be authorized to rely on the Debtors' designation of any particular check or electronic transfer request as approved pursuant to this Motion.

**I. EMPLOYEE CLAIMS: WAGES, SALARIES, AND BONUS PROGRAMS**

**A. Payroll and Ordinary Course Compensation**

7. The Debtors' workforce is comprised of full-time salaried employees, full-time hourly employees (collectively, the "Full-Time Employees"), and regular part-time hourly employees (collectively, the "Part-Time Employees"). As of the Petition Date, the Debtors employ approximately 366 hourly Full-Time Employees, 33 salaried Full-Time Employees, for a total of 399 Full-Time Employees, and 1,357 Part-Time Employees. Of those, 12 Employees (7 Full-Time Employees and 5 Part-Time Employees) are currently on leave. All Employees are stationed either at Debtors' headquarters in Irvine, California, or at one of Debtors' retail store locations.

8. All Employees are paid bi-weekly for the prior two weeks ending on the Saturday of any payroll week. Payroll to the Employees is funded in gross to ADP, the Debtors' third-party payroll administrator, two business days before each pay date, and ADP is responsible for distributing net pay to the Employees from its own accounts. In 2016, the average amount funded to ADP in each two-week period was approximately \$1.6 million. The Debtors' prepetition payroll date of January 27, 2017, covered the pay period from January 8, 2017, through January 21, 2017. The total amount of the January 27, 2017 payroll was

approximately \$2 million. The Debtors' next scheduled payroll date is February 10, 2017, and will cover the pay period from January 22, 2017, through February 4, 2017.

9. The Debtors pay ADP approximately \$35,000 per month for its administrative services. As of the Petition Date, approximately \$125,000 is owing to ADP.

10. The Debtors believe that, as of the Petition Date, approximately \$1.7 million was earned but remains unfunded with respect to Employees on account of accrued prepetition wages and salaries. The amount owed to any individual Employee on account of Employee Claims does not exceed \$12,850. Pursuant to this Motion, the Debtors seek to pay the outstanding amounts owed to Employees as of the Petition Date for accrued and unfunded wages and salaries, in an amount not to exceed \$2 million and Employee Administrator Obligations to ADP in an amount not to exceed \$125,000.

11. In addition, the Debtors contract with one additional worker, who is an independent contractor compensated outside of the Debtors' payroll system. This independent contractor receives approximately \$1,100 per week. As of the Petition Date, approximately \$1,100 (the "Independent Contractor Claim") is owing to this independent contractor.

**B. Employee Bonus Programs**

12. To ensure optimal performance by the Employees, the Debtors have implemented bonus and incentive programs (collectively, the "Employee Bonus Programs") as follows:

- i) Field Sales Bonus Program. The Debtors maintain a field bonus program (the "Field Sales Bonus Program") for all Employees that are regional directors and district directors, area managers, and for the store manager and assistant store manager in each store. To be eligible for an incentive payment under the Field Sales Bonus Program, eligible Employees must hit certain quarterly (for regional directors) or monthly (for district directors, area managers, store managers and assistant store managers) sales goals. Once a quarterly or monthly sales goal is attained,

commissions are awarded as follows: (i) \$9,375 per quarter to regional directors, (ii) between \$630 and \$3,375 per month to district directors, (iii) between \$420 and \$2,250 per month to area managers, (iv) between \$110 and \$1,200 per month to store managers, and (v) between \$30 and \$450 per month to assistant store managers. Aggregate payments on account of the Field Sales Bonus Program range from approximately \$1,000 to \$39,000 per month, averaging approximately \$18,000 per month, and, in recent years, have been primarily in respect of store managers and assistant store managers (as opposed to regional and district directors). As of the Petition Date, the Debtors are still calculating the amounts owing to Employees under the Field Sales Bonus Program for sales during the month of January 2017. However, the Debtors estimate that there will be approximately \$35,000 in accrued but unpaid amounts owing to Employees under the Field Sales Bonus Program.

- ii) Field Acting Bonus Program. The Debtors maintain a field bonus program (the "Field Acting Bonus Program") for Employees that are placed in positions of Acting regional directors, district directors, store managers and assistant store managers. To be eligible for an incentive payment under the Field Acting Bonus Program, Employees must be placed in an Acting role by their district director, regional director, or senior vice president for stores and operations. The incentive payout is prorated based on the time spent in position during the fiscal month. The Field Acting Bonus Program is paid as follows: (i) up to \$2,000 per month for acting regional directors, (ii) up to \$1,000 per month to acting district directors, (iii) up to \$500 per month to acting store managers, and (iv) up to \$150 per month to acting assistant store managers. Aggregate payments on account of the Field Acting Bonus Program range from approximately \$10,000 to \$20,000 per month, averaging approximately \$14,000 per month. As of the Petition Date, the Debtors estimate that there is approximately \$13,500 in accrued but unpaid amounts owing to Employees under the Field Acting Bonus Program.
- iii) Pop Up Shop Management Shrink Bonus Program. The Debtors maintain a field bonus program (the "Pop Up Shop Management Shrink Bonus Program") for all Employees that are store managers and assistant managers in each temporary Pop Up location. To be eligible for an incentive payment under the Pop Up Shop Management Shrink Bonus Program, eligible Employees must achieve a shrink goal in their store of 2.00%. Once inventory records are reviewed, incentives are paid out as follows (i) \$500 for store managers and (ii) \$250 for assistant store managers. As of the Petition Date, inventory results are still pending, but the Debtors estimate that there are up to \$15,250 in accrued but unpaid amounts owing to Employees under the Pop Up Shop Management Shrink Bonus Program.

13. The Debtors seek to continue the Employee Bonus Programs in the ordinary course of business during the pendency of these Chapter 11 Cases, provided that no bonus or incentive payments will be made to any insiders (as defined in section 101(31) of the Bankruptcy Code) unless separately authorized by the Court.

## II. EMPLOYEE BENEFITS

### A. Paid Time Off

14. *Vacation Time.* Full-Time Employees accrue vacation time (“Vacation”) on a pro rata basis throughout the year. Vacation time for the majority of Employees is accrued based on years of service. Full-Time Employees with one to four years of service can earn up to 10 Vacation days per year. Full-Time Employees with five to nine years of service can earn up to 15 Vacation days per year. Finally, Full-Time Employees with ten or more years of service can earn up to 20 Vacation days per year. Unused Vacation days may be carried over to the following year, provided, however, that the maximum amount of days of accrued Vacation is equal to one and one half times an Employee’s annual accrual (*e.g.*, 15 days for an Employee with one year of service). Once an Employee reaches the maximum unused Vacation accrual, that Employee may not accrue any additional Vacation until the Employee uses Vacation to reduce the amount of accrued unused Vacation below the maximum. Vacation pay is calculated based on an Employee’s base hourly pay or base salary. Except where required by state law, at separation of employment, Employees do not receive payment for any unused Vacation.

15. Certain high-level Employees are entitled to a set amount of Vacation time regardless of years of service. Specifically, the Debtors’ chief executive officer and executive vice presidents receive four (4) weeks of Vacation, and all vice presidents and department directors receive two (2) or three (3) weeks of Vacation. Because all of the Debtors’ high-level

Employees are located in California, in which vacation must be “cashed out” at separation, these Employees do receive payment, at separation, for unused vacation.

16. As of the Petition Date, the Employees (including high-level Employees) had approximately \$630,000 of accrued and unused Vacation in the aggregate. The Debtors seek authorization to continue their Vacation policy and to honor, in the ordinary course of business, all unused Vacation time accrued prior to the Petition Date, but not to make cash payments on account of accrued but unused Vacation time, except at separation of employment and where required by state law.

17. *Sick Leave*. The Debtors provide paid accrued sick time (“Sick Leave”) to all Full-Time Employees and to Part-Time Employees where dictated by state law. Eligible Full-Time Employees can accrue up to six sick days per year. Unused Sick Leave may be carried over to the next year, provided that Employees may only accrue a maximum of six sick days at any point in time. Employees are not paid for unused sick days upon termination of employment or retirement, and the Debtors therefore do not make any cash payments on account of the Sick Leave policy. The Debtors seek authorization to continue the Sick Leave policy during the pendency of these Chapter 11 Cases and to honor, in the ordinary course of business, all unused Sick Leave accrued prior to the Petition Date.

**B. Severance Policy**

18. The Debtors do not maintain a formal severance pay policy for the majority of their Employees. However, in their discretion, the Debtors do, on occasion, provide severance packages to certain Employees.<sup>2</sup>

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<sup>2</sup> The Debtors provide severance to their insider Employees. The Debtors are not seeking to make any payments on account of these programs through this Motion, and will not make any payments on account of that program unless separately authorized by the Court.

**C. Employee Benefit Plans**

19. Prior to the Petition Date, the Debtors offered Full-Time Employees various standard employee benefits (the “Benefit Programs”) including, without limitation, (i) medical and prescription drug coverage, (ii) dental insurance, (iii) vision insurance, (iv) COBRA (as defined herein) coverage, (v) flexible spending accounts, (vi) life and accidental death and dismemberment insurance, (vii) temporary disability insurance, and (viii) additional medical administration costs. Such benefits are administered pursuant to plans, programs, and policies that cover the Full-Time Employees. The amounts set forth below reflect the approximate prepetition cost of such Benefit Programs, which the Debtors seek to continue in the ordinary course of their business.

20. *Medical Insurance Program.* The Debtors offer a self-insured medical and prescription drug program (the “Health Plan”) to Full-Time Employees, which is administered by United Healthcare (except that for Full-Time Employees in Hawaii, the Debtors’ medical program is administered by Hawaii Medical Service Association). The Health Plan is approximately 70% paid by the Debtors and 30% paid by the Full-Time Employees through paycheck withholdings. The Debtors also maintain a stop-loss insurance policy (the “Stop-Loss Policy”) to provide protection against catastrophic losses under their self-insured medical insurance program, which is administered by HM Insurance Group. The average monthly cost (after taking into account Employee contributions) of maintaining the Health Plan, including administrative costs and premiums in respect of the Stop-Loss Policy, has been approximately \$125,000 per month. The Debtors typically wire funds to the Health Plan administrators on a weekly basis on account of claims paid by the administrators on the Debtors’ behalf. The Debtors are unable to estimate with specificity the prepetition amounts owing in respect of the Health Plan, because the typical lag time on Employees’ submissions of medical claims is

approximately 31 days. However, based on historical data, the Debtors estimate that as of the Petition Date they owe approximately \$150,000 in respect of “incurred but not reported” claims under the Health Plan and related administrative costs (excluding amounts paid through Employee deductions), and approximately \$75,000 in respect of filed claims that have not yet been paid. The Debtors seek authorization to pay prepetition amounts in respect of the Health Plan in an amount not to exceed \$300,000 and to continue to pay postpetition costs of the Health Plan, including premiums in respect of the Stop-Loss Policy, during the pendency of these Chapter 11 Cases.

21. *Dental Insurance Program.* The Debtors offer a self-insured dental program (the “Dental Plan”) to Full-Time Employees, which is administered by Cigna. For Employees choosing the PPO Dental Plan, the Dental Plan is approximately 17% paid by the Debtors and 83% paid by the Full-Time Employees through paycheck withholdings. For Employees choosing the HMO Dental Plan, the Dental Plan is approximately 43% paid by the Debtors and 57% paid by the Full-Time Employees through paycheck withholdings. The average monthly cost (after taking into account Employee contributions) of maintaining the Dental Plan, including administrative costs, has been approximately \$3,000 per month. The Debtors are unable to estimate with specificity the prepetition amounts owing in respect of the Dental Plan; however, because the typical lag time on Employees’ assertions of dental claims is approximately one month, the Debtors estimate that as of the Petition Date they owe approximately \$3,000 in respect of “incurred but not reported” claims under the Dental Plan and related administrative costs (excluding amounts paid through Employee deductions), and approximately \$2,000 in respect of filed but not yet paid claims. The Debtors seek authorization to pay prepetition amounts in respect of the Dental Plan in an amount not to exceed \$10,000, and

to continue to pay postpetition costs of the Dental Plan during the pendency of these Chapter 11 Cases.

22. *Vision Insurance Program.* The Debtors offer vision insurance to Full-Time Employees through VSP (the "Vision Plan"). Full-Time Employees participating in the Vision Plan pay 100% of the plan premium. The average monthly cost of maintaining the Vision Plan has been approximately \$165 per month. The Debtors seek authorization to continue to pay prepetition costs, in an amount not to exceed \$500, and postpetition costs of the Vision Plan during the pendency of these Chapter 11 Cases.

23. *Life, Disability, and Related Insurance Coverage.* The Debtors provide Full-Time Employees with company-funded short-term and long-term disability insurance, accidental death and dismemberment insurance, and basic life insurance, which are all insured by Unum. The Debtors pay 100% of the costs of these benefits. In the aggregate, the average monthly cost of maintaining these programs has been approximately \$14,000. The Debtors estimate that as of the Petition Date they owe approximately \$10,000 in respect of these benefits. The Debtors seek authorization to continue to pay prepetition costs, in an amount not to exceed \$15,000, and postpetition costs of these benefits during the pendency of these Chapter 11 Cases.

24. *COBRA.* The Debtors seek to continue to perform any obligations under Section 4980B of the Internal Revenue Code to administer Continuation Health Coverage (26 U.S.C. § 4980B) ("COBRA") in respect of former Employees and their covered dependents. Discovery Benefits, Inc. is the third-party COBRA administrator for the Debtors. The Debtors have paid approximately \$400 per month for administration of their COBRA obligations. The Debtors estimate that as of the Petition Date they owe approximately \$800 in respect of this benefit. The Debtors seek authorization to continue to pay prepetition costs, in an amount not to

exceed \$1,000, and postpetition costs of the COBRA program during the pendency of these Chapter 11 Cases.

25. *Flexible Spending Accounts.* The Debtors offer Full-Time Employees the use of flexible spending accounts for various medical claims not otherwise covered or payable by the Health Plan. The flexible spending benefits (the “Flex Benefits”) are administered by Discovery Benefits, Inc. The Debtors have paid approximately \$200 per month for administration of all Flex Benefit plans. The Debtors estimate that as of the Petition Date they owe approximately \$400 in respect of these benefits. The Debtors seek authorization to continue to pay prepetition costs, in an amount not to exceed \$1,000, and postpetition costs of the Flex Benefits during the pendency of these Chapter 11 Cases.

26. *New York State Temporary Disability Insurance.* The Debtors offer Full-Time Employees in New York State a temporary disability insurance benefit. The average cost of maintaining these programs is approximately \$4,000 per quarter. The Debtors estimate that as of the Petition Date they owe approximately \$4,000 in respect of these benefits. The Debtors seek authorization to continue to pay prepetition costs, in an amount not to exceed \$5,000, and postpetition costs of this benefit during the pendency of these Chapter 11 Cases.

27. *Hawaii State Temporary Disability Insurance.* The Debtors offer their Employees in Hawaii a temporary disability insurance benefit. The average cost of maintaining these programs is approximately \$1,000 per quarter. As of the Petition Date, there are no accrued but unpaid amounts owing to Hawaii State Temporary Disability Insurance. The Debtors seek authorization to continue to pay postpetition costs of this benefit during the pendency of these Chapter 11 Cases.

28. *Additional Medical Administration Costs.* The Debtors are required to pay certain fees related to the Affordable Care Act. As of the Petition Date, the Debtors owe \$11,422 in respect to Transitional Reinsurance fees and an estimated \$2,500 in respect to Patient-Centered Outreach Research Institute (PCORI) fees. The Debtors seek authorization to continue to pay prepetition costs, in an amount not to exceed \$14,000, and postpetition costs of this benefit during the pendency of these Chapter 11 Cases.

29. *Honoring of Prepetition Benefits.* As of the Petition Date, certain of the Benefit Programs described above remained unpaid or not yet provided because certain obligations of the Debtors under the applicable plan, program or policy accrued either in whole or in part prior to the commencement of these Chapter 11 Cases, but will not be required to be paid or provided in the ordinary course of the Debtors' business until a later date. The Debtors seek authority to pay or provide as they become due all amounts in respect of the Benefit Programs described above that have already accrued, subject to the caps set forth herein.

30. *Continuation of Benefit Programs Postpetition.* The Debtors also request confirmation of their right to continue to perform their obligations with respect to these Benefit Programs for the duration of their Cases. These programs are an important component of the total compensation offered to the Employees, and are essential to the Debtors' efforts to maintain Employee morale and minimize attrition among those whose retention is important for the Debtors' success. The Debtors believe that the expenses associated with such programs are reasonable and necessary in light of the potential attrition, loss of morale, and loss of productivity that would occur if such programs were discontinued.

**D. Workers' Compensation Plan**

31. Under the laws of various states, the Debtors are required to maintain workers' compensation insurance to provide their Employees with coverage for injury claims

arising from or related to their employment with the Debtors. The Debtors maintain a self-insured workers' compensation benefits program through Zurich North America (the "WC Program"). The WC Program provides benefits to all Employees for claims arising from or related to their employment with the Debtors. As of the Petition Date, the Debtors believe they are current with all administrative expenses in connection with the WC Program. For the claims administration process in these Chapter 11 Cases to operate as efficiently as possible, and to ensure that the Debtors comply with state law, it is necessary that the Debtors obtain authority to continue to maintain the WC Program in the ordinary course of business, and to pay any prepetition amounts related thereto, including, without limitation, any payments for workers' compensation claims, Employee Administrator Obligations to Zurich North America, and other amounts required in connection with the program as such amounts become due in the ordinary course during the pendency of these Chapter 11 Cases.

**E. Retirement Savings Program**

32. The Debtors maintain a 401(k) plan (the "Retirement Plan"), administered by Fidelity Investments, through which qualified and participating Employees may defer a portion of their salary to help meet their financial goals and accumulate savings for their future. The Retirement Plan is funded by Employee and employer contributions. The Debtors provide an immediately vesting match of 100% on each Employee's first 3% of deferred compensation and 50% on such Employee's next 2% of deferred compensation. In 2016, the Debtors' incurred expense for matching contributions was approximately \$338,674. As of the Petition Date, there are no accrued but unfunded matching contributions with respect to the Retirement Plan.

33. The Debtors believe that maintaining the Retirement Plan is important to maintaining Employee morale. Accordingly, the Debtors request authority, but not the direction, to continue to administer the Retirement Plan in the ordinary course of business.

34. The Debtors pay Fidelity Investments approximately \$6,000 per quarter to manage the day-to-day and strategic decisions associated with the Retirement Plan. As of the Petition Date, there are no amounts owing to Fidelity. Accordingly, the Debtors are not seeking authority to make any prepetition payments.

35. The Debtors pay approximately \$11,000 each year for the audit of the Retirement Plan. An audit for the last plan year was recently performed in October 2016. As of the Petition Date, there are no accrued but unpaid amounts owing to the auditor, KMJ Corbin & Co. Accordingly, the Debtors are not seeking authority to make any related prepetition payments.

### **III. EMPLOYEE EXPENSES**

36. Prior to the Petition Date, the Debtors directly or indirectly reimbursed their Employees for certain expenses incurred in the scope of their employment on behalf of the Debtors. The Employee Expenses are incurred in the ordinary course of the Debtors' business operations and include, without limitation, expenses for meals, travel, automobile mileage, and other business-related expenses.

37. The Debtors maintain multiple kinds of Employee credit card programs. First, the Debtors maintain one (1) corporate purchasing card ("Corporate Purchasing Card") through American Express with a \$320,000 credit limit. Officers and executives of the Debtors use or approve use of this card for certain approved business expenses.

38. Second, the Debtors maintain the following credit cards that carry a combined credit limit of \$130,000:

- i) One (1) CEO credit card ("CEO Card") issued by American Express.
- ii) Three (3) credit cards used by field managers ("Field Employee Cards").  
The Field Cards are used at the discretion of the cardholder, who pays the

balance owed directly to American Express. The cardholder then submits such charges to the Debtors for approval and reimbursement through the Debtors' regular reimbursement procedures.

- iii) One (1) BTA travel card ("Travel Card") used to book travel through the Egencia travel program.

39. Absent authority to pay the Employee Expenses incurred prepetition, the Employees could be obligated to pay such amounts out of their personal funds. The Debtors therefore seek authority to pay all outstanding Employee Expenses in an amount not to exceed \$50,000, and to continue the foregoing policy with respect to all remaining Employees holding a Corporate Purchasing Card, CEO Card, Field Employee Card, or Travel Card during the pendency of these Chapter 11 Cases.

#### **IV. EMPLOYEE WITHHOLDINGS**

40. The Debtors routinely deduct certain amounts from Employees' compensation that represent earnings that judicial or government authorities or the Employees have designated for deduction, including, for example, various federal, state and local income, Federal Insurance Contribution Act ("FICA") and other taxes, support payments and tax levies, savings programs contributions, benefit plans insurance programs and other similar programs, and forward those amounts to various third-party recipients.

41. In addition, the Debtors are responsible for remitting, for their own account, various taxes and fees associated with payroll pursuant to the FICA and federal and state laws regarding unemployment and disability taxes ("Payroll Taxes"). The Debtors believe, as of the Petition Date, they are current on Payroll Taxes. The Debtors seek authority to deduct Employee Withholdings in the ordinary course of business and remit Employee Withholdings to the appropriate third parties, including, without limitation, amounts determined to be related to the period prior to the Petition Date.

**V. DIRECTION TO BANKS**

42. Finally, the Debtors seek an order authorizing the Banks to receive, process, honor, and pay all of the Debtors' prepetition checks and fund transfers on account of any Employee Obligations, and prohibiting the Banks from placing any holds on, or attempting to reverse, any automatic transfers to any account of an Employee or other party for Employee Obligations. The Debtors also seek an order authorizing them to issue new postpetition checks or effect new postpetition fund transfers on account of the Employee Obligations to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

**VI. SUMMARY**

43. The Debtors seek authority to continue to honor and implement the Employee-related policies and practices as described above and to pay Employee Prepetition Obligations subject to the limits set forth below:

<b>Category<sup>3</sup></b>	<b>Amount</b>
Employee Claims <sup>4</sup>	\$2,125,000
Independent Contractor Claim	\$1,100
Employee Bonus Programs	\$63,750
Vacation (only at separation and where required by state law)	\$630,000
Health Plan	\$300,000
Dental Plan	\$10,000
Vision Plan	\$500
Life, Disability and Related Coverage	\$15,000
COBRA	\$1,000
Flexible Spending Accounts	\$1,000
New York State TDI	\$5,000

<sup>3</sup> Each category includes amounts for related Employee Administrator Obligations.

<sup>4</sup> No Employee will be paid more than \$12,850 in the aggregate with respect to Employee Claims.

Hawaii State TDI	\$0
Additional Medical Administration Costs	\$14,000
Retirement Plan	\$0
Employee Expenses	\$50,000

**BASIS FOR RELIEF**

**I. THE COURT SHOULD AUTHORIZE, BUT NOT DIRECT, THE DEBTORS, IN THEIR DISCRETION, TO PAY OR OTHERWISE HONOR THE EMPLOYEE OBLIGATIONS.**

44. The Debtors seek the relief requested herein because any delay in paying or otherwise honoring any of the Employee Obligations could severely disrupt the Debtors' relationship with, and irreparably impair the morale of, the Employees at a time when their continued dedication, confidence, cooperation, and services are most critical to the Debtors and the success of the Store Closing Sales and related wind-down initiatives. The Debtors face the risk that their ability to effectively operate their business and wind down their operations in an efficient manner may be severely jeopardized if the Debtors are not immediately granted authority to pay the Employee Obligations. Granting the relief requested in this Motion on the grounds set forth below will allow the Debtors to continue to operate with minimal disruption and enable them to maximize the value of their estates for the benefit of all stakeholders.

45. Pursuant to section 507(a)(4) of the Bankruptcy Code, each Employee may be granted a priority claim for:

allowed unsecured claims, but only to the extent of \$12,850 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for –

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

- (B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services, for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor...

11 U.S.C. § 507(a)(4).

46. Likewise, under section 507(a)(5) of the Bankruptcy Code, Employees may ultimately be granted a priority claim for:

allowed unsecured claims for contributions to an employee benefit plan –

- (A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
- (B) for each such plan, to the extent of –
  - (i) the number of employees covered by each such plan multiplied by \$12,850; less
  - (ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

11 U.S.C. § 507(a)(5).

47. The Debtors believe that a substantial portion, if not all, of the relief requested herein is within the statutory caps of sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code. The Debtors, therefore, would be required to pay these claims in full to confirm any chapter 11 plan. *See* 11 U.S.C. § 1129(a)(9)(B) (requiring payment of certain allowed unsecured claims for wages, salaries, and commissions, and certain allowed unsecured claims for contributions to an employee benefit plan). Thus, granting the relief requested herein

would only affect the timing, and not the amount, of the payment of such amounts to the extent that they constitute priority claims.

48. Even if a particular claim is not entitled to priority, payment is nonetheless justified under section 105(a) of the Bankruptcy Code and the well-established “doctrine of necessity.” The Court’s power to utilize the doctrine of necessity in chapter 11 cases derives from the Court’s inherent equity powers and its statutory authority 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). The United States Supreme Court first articulated the doctrine of necessity over a century ago in *Miltenberger v. Logansport Railway Company*, 106 U.S. 286 (1882), in affirming the authorization by the lower court of the use of receivership funds to pay pre-receivership debts owed to employees, vendors, and suppliers, among others, when such payments were necessary to preserve the receivership property and the integrity of the business in receivership. *See id.* at 309–14. The modern application of the doctrine of necessity is largely unchanged from the Court’s reasoning in *Miltenberger*. *See In re Lehigh & New Eng. Ry.*, 657 F.2d 570, 581–82 (3d Cir. 1981) (“[I]n order to justify payment under the ‘necessity of payment’ rule, a real and immediate threat must exist that failure to pay will place the [debtor’s] continued operation . . . in serious, jeopardy.”).

49. The doctrine of necessity permits the Court to authorize payment of certain prepetition claims prior to the completion of the reorganization process where the payment of such claims is necessary to the reorganization. *See In re Just for Feet, Inc.*, 242 B.R. 821, 826 (D. Del. 1999) (stating that where the debtor “cannot survive” absent payment of certain prepetition claims, the doctrine of necessity should be invoked to permit payment); *see also In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (“[T]he court can permit pre-plan

payment of a pre-petition 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) (“[T]o justify payment of a pre-petition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the Chapter 11 process.”).

50. The Employees perform a variety of critical functions for the Debtors, and their knowledge, skills, and service are essential to the success of the Store Closing Sales. Without the continued service and dedication of the Employees, it will be difficult, if not impossible, to efficiently and effectively complete the going-out-of-business sales and maximize the value of the Debtors’ assets. Moreover, absent the requested relief, the Employees would suffer great hardship and, in many instances, financial difficulties, because these monies and benefits are needed to enable them to meet their personal obligations. This would have a highly negative impact on workforce morale and likely would result in unmanageable performance issues or turnover, thereby, resulting in immediate and irreparable harm to the Debtors and their estates. The Debtors, therefore, believe it is necessary to pay and/or honor the prepetition Employee Obligations to maintain employee morale and a focused workforce during this critical time, which will allow the Debtors to avoid any inopportune interruptions to their efforts to maximize the value of their estates for the benefit of all stakeholders.

## **II. THE COURT SHOULD AUTHORIZE THE BANKS TO HONOR AND PROCESS THE DEBTORS’ PAYMENTS ON ACCOUNT OF THE EMPLOYEE OBLIGATIONS.**

51. The Debtors represent that they have sufficient funds to pay the amounts described herein in the ordinary course of business by virtue of expected cash flows from ongoing business operations, and anticipated access to cash collateral. As a result of the commencement of these Chapter 11 Cases and in the absence of an order of the Court providing otherwise, the Debtors’ checks and electronic fund transfers in respect of the Employee

Obligations may be dishonored or rejected by financial institutions. Under the Debtors' cash management system, the Debtors can readily identify checks or transfers as relating directly to payment of Employee Obligations. Accordingly, the Debtors believe that prepetition checks and transfers other than those for Employee Obligations will not be honored inadvertently. The Debtors submit that any Bank should be authorized to rely on the representations of the Debtors with respect to whether any check drawn or transfer request issued by the Debtors prior to the Petition Date should be honored pursuant to this Motion.

52. For the reasons set forth above, the Debtors submit that the relief requested herein is in the best interests of the Debtors, their estates, and their creditors, and, therefore, should be granted.

**IMMEDIATE RELIEF IS JUSTIFIED**

53. 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 believe that, among other things, the success of their chapter 11 efforts will require the continued focus and dedication of the Employees, as any deterioration in Employee morale or significant loss in workforce will have an adverse impact on the Debtors' ability to continue to operate their business during the Store Closing Sales and the subsequent wind down. Thus, if the relief requested herein is not granted, the failure to satisfy the Employee Obligations would cause the Debtors' estates immediate and irreparable harm by detracting from, and potentially derailing, the Debtors' chapter 11 efforts. For this reason and those set forth above, the Debtors respectfully submit that Bankruptcy Rule 6003(b) has been satisfied and the relief requested herein is necessary to avoid immediate and irreparable harm to the Debtors and their estates.

**WAIVER OF ANY APPLICABLE STAY**

54. 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 set forth throughout this Motion, any delay in paying the Employee Obligations would be detrimental to the Debtors, their estates, and their creditors. Indeed, the Debtors’ ability to operate their business with as little disruption as possible requires, in large part, an able and willing workforce, which the Debtors currently have in the Employees. 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.

**RESERVATION OF RIGHTS**

55. Nothing in this Motion or any actions taken by the Debtors pursuant to relief granted in any order granting the relief requested herein (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or (ii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtors and their estates with respect to the validity, priority, or amount of any claim against the Debtors and their estates.

**NOTICE**

56. 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)

of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware. 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)

Jaime Luton Chapman (No. 4936)

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*Proposed Counsel to the Debtors and  
Debtors in Possession*

**EXHIBIT A**

**Proposed Order**

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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

**ORDER (I) AUTHORIZING THE DEBTORS TO PAY AND HONOR CERTAIN  
PREPETITION WAGES, BENEFITS, AND OTHER COMPENSATION  
OBLIGATIONS AND (II) AUTHORIZING BANKS TO HONOR AND  
PROCESS CHECKS AND TRANSFERS RELATED TO SUCH OBLIGATIONS**

Upon consideration of the motion (the “Motion”)<sup>2</sup> of the Debtors for the entry of an order, pursuant to sections 105(a), 363(b), 507(a)(4), and 507(a)(5) of the Bankruptcy Code, (i) authorizing, but not directing, the Debtors, in accordance with their stated policies and in their discretion, to pay, honor, or otherwise satisfy certain of the Employee Obligations, including amounts and obligations related to the period prior to the Petition Date, and (ii) authorizing Banks to honor and process related checks and electronic transfers; and upon consideration of the Motion and all pleadings related thereto, including the First Day Declaration; and due and proper notice of the Motion having been given; and it appearing that no other or further notice of the Motion is required; and it appearing that this Court has jurisdiction to consider the Motion in accordance with 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order* from the United States District Court for the District of Delaware, dated February 29, 2012; and it appearing that this is

<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). Debtors’ corporate headquarters is located at 7555 Irvine Center Drive, Irvine, California 92618.

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

a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue of this proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the relief requested in the Motion and provided for herein is in the best interest of the Debtors, their estates, and their creditors; and after due deliberation and sufficient cause appearing therefor, it is hereby

**ORDERED THAT:**

1. The Motion is GRANTED as set forth herein.
2. Upon entry of this Order, the Debtors are authorized, but not directed, to pay and/or honor (including to any third parties that provide or aid in the monitoring, processing or administration of the Employee Obligations), in their sole discretion, the Employee Obligations as and when such obligations are due, in amounts not to exceed the limits set forth in the Motion; *provided, however*, notwithstanding any other provision of this Order, no payments to any Employee shall exceed the amounts set forth in sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code unless such amounts above the \$12,850 statutory cap provided for under section 507(a)(4) of the Bankruptcy Code (the “Statutory Cap”) are a result of cash payment for unpaid Vacation that is required under applicable state law.
3. The Debtors are authorized, but not directed, in their sole discretion, in amounts not to exceed the limits set forth in the Motion to honor and continue the Employee Benefits that were in effect as of the Petition Date; *provided, however*, that such relief shall not constitute or be deemed an assumption or an authorization to assume any of such Employee Benefit under section 365(a) of the Bankruptcy Code.

4. Prepetition amounts authorized to be paid by this Order are limited as follows:

<b>Category<sup>3</sup></b>	<b>Amount</b>
Employee Claims	\$2,125,000
Independent Contractor Claim	\$1,100
Employee Bonus Programs	\$63,750
Vacation (only at separation and where required by state law)	\$630,000
Health Plan	\$300,000
Dental Plan	\$10,000
Vision Plan	\$500
Life, Disability and Related Coverage	\$15,000
COBRA	\$1,000
Flexible Spending Accounts	\$1,000
New York State TDI	\$5,000
Hawaii State TDI	\$0
Additional Medical Administration Costs	\$14,000
Retirement Plan	\$0
Employee Expenses	\$50,000

5. In addition to the foregoing, the Debtors are authorized to make payments in an amount not to exceed \$10,000 in the aggregate to reimburse certain Employees for out-of-pocket expenses associated with prepetition payroll payments that were unintentionally omitted and/or prepetition checks for payroll that did not clear. For the avoidance of doubt, the payment of these amounts shall not result in any single Employee being paid more than the Statutory Cap.

6. The Banks shall be and hereby are authorized to receive, process, honor and pay all prepetition and postpetition checks and fund transfers on account of the Employee

<sup>3</sup> Each category includes amounts for related Employee Administrator Obligations.

Obligations that had not been honored and paid as of the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments. The Banks are prohibited from placing any holds on, or attempting to reverse, any automatic transfers to any account of an Employee or other party for Employee Obligations. The Debtors shall be and hereby are authorized to issue new postpetition checks or effect new postpetition fund transfers on account of the Employee Obligations to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

7. Notwithstanding any other provision of this Order, any Bank may rely on the representations of the Debtors with respect to whether any check, draft, wire, or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to any order of this Court, and any Bank that honors a prepetition check or other item drawn on any account that is the subject of this Order (i) at the direction of the Debtors, (ii) in a good-faith belief that this Court has authorized such prepetition check or item to be honored, or (iii) as a result of an innocent mistake made despite the above-described protective measures, shall not be liable to the Debtors or their estates on their account of such prepetition check or other item being honored postpetition.

8. The Debtors may pay and remit any and all withholding, including social security, FICA, federal and state income taxes, garnishments, health care payments, retirement fund withholding, and other types of withholding, whether these relate to the period prior to or after the Petition Date.

9. Any party receiving payment from the Debtors is authorized to rely upon the representations of the Debtors as to which payments are authorized by this Order.

10. Nothing in the Motion or this Order or the relief granted (including any actions taken or payments made by the Debtors pursuant to the relief) shall (i) be construed as a request for authority to assume any executory contract under section 365 of the Bankruptcy Code; (ii) waive, affect or impair any of the Debtors' rights, claims or defenses, including, but not limited to, those arising from section 365 of the Bankruptcy Code, other applicable law and any agreement; (iii) grant third-party beneficiary status or bestow any additional rights on any third party; or (iv) be otherwise enforceable by any third party.

11. Nothing in this Order shall be construed as binding on this Court or any other party-in-interest, or to establish the law of the case, with respect to whether an individual is or is not an insider within the meaning of section 101(31) of the Bankruptcy Code.

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

13. Nothing in this Order shall be deemed to (i) authorize the payment of any amounts subject to section 503(c) of the Bankruptcy Code, (ii) authorize or approve any bonus plan or severance plan that is subject to section 503(c) of the Bankruptcy Code or (iii) authorize the Debtors to cash out unpaid vacation or leave time upon termination of an employee unless applicable state law requires such payment.

14. 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.

15. 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.

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

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

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UNITED STATES BANKRUPTCY JUDGE