

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF GEORGIA  
AUGUSTA DIVISION

In re: ) Chapter 11  
)  
FIBRANT, LLC, *et al.*,<sup>1</sup> ) Case No. 18-10274  
)  
)  
Debtors. ) (Joint Administration Requested)  
\_\_\_\_\_)

**DEBTORS’ EMERGENCY MOTION FOR AN ORDER AUTHORIZING THE  
DEBTORS TO PAY CERTAIN PRE-PETITION TAXES  
AND RELATED OBLIGATIONS**

Fibrant, LLC and its affiliated debtors-in-possession (the “Debtors”) file this *Emergency Motion for an Order Authorizing the Debtors to Pay Certain Pre-Petition Taxes and Related Obligations* (this “Motion”). In support of this Motion, the Debtors respectfully represent as follows:

**JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of this proceeding is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are Sections 105(a), 363(b)(1), and 507(a)(8) of title 11 of the United States Code (the “Bankruptcy Code”).

**BACKGROUND**

3. On February 23, 2018 (the “Petition Date”), the Debtors filed voluntary petitions with the Court under chapter 11 of the Bankruptcy Code.

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number (if any), are: Fibrant, LLC (6694); Evergreen Nylon Recycling, LLC (7625); Fibrant Center South, LLC (8270); and Georgia Monomers Company, LLC (0042).



4. The factual background relating to the Debtors' commencement of these cases is set forth in detail in the *Declaration of David Leach in Support of First-Day Motions and Applications* (the "First-Day Declaration")<sup>2</sup> filed on the Petition Date and incorporated herein by reference.

5. The Debtors have continued in possession of their properties and continue to operate and manage their business as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

6. As of the date of this filing, no official committee of unsecured creditors has been appointed in these cases, and no request has been made for the appointment of a trustee or examiner.

#### **RELIEF REQUESTED**

7. The Debtors seek authority to pay, in their sole discretion, undisputed pre-petition sales, use, personal property, and other similar taxes and obligations ("Taxes") owed to the state and local taxing authorities listed on the attached Exhibit A (collectively, the "Taxing Authorities") in the ordinary course of business.

#### **BASIS FOR RELIEF**

8. The Debtors are direct pay vendors for Georgia use taxes. These taxes are owed for purchases of goods and services that do not fall under the manufacturing tax exemption, such as for janitorial or office supplies. The Debtors do not pay these use taxes at the time of purchase, but instead accrue use taxes and remit them to the Georgia Department of Revenue each month. The Debtors estimate that, as of the Petition Date, they owe approximately \$17,000 in accrued state use taxes. The Debtors also owe personal property taxes. The Debtors estimate

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<sup>2</sup> Capitalized terms that are used but not defined in this Motion have the meanings ascribed to such terms in the First-Day Declaration.

that, as of the Petition Date, they owe approximately \$700,000 in accrued personal property taxes.

9. The relief requested should be granted because, among other things, (i) certain of the taxes may constitute “trust fund” taxes and the funds representing such Taxes are not property of the Debtors’ estates, (ii) such taxes may constitute priority taxes, (iii) the failure to pay the Taxes could disrupt the Debtors’ businesses, and (iv) the Taxes are not excessively large obligations in the context of the Debtors’ estates.

10. The Debtors have sufficient cash reserves and will have sufficient cash to pay the amounts described herein in the ordinary course of business. Nothing in this Motion or the order granting this Motion should be construed as impairing the Debtors’ ability to contest the amounts of any Taxes allegedly owed to the various Taxing Authorities.

11. In addition, many state statutes, including those of Georgia (where the Debtors conduct most of their operations), hold officers and directors of collecting entities personally liable for sales and use taxes owed by those entities. *See, e.g.*, GA. CODE ANN. § 48-2-52(a) (West 2010). To the extent that any Taxes are not paid by the Debtors, the Debtors’ officers and the members of the Debtors’ Board of Managers may be subject to lawsuits or criminal prosecution during the pendency of these chapter 11 cases. Any such lawsuit or criminal prosecution (and the attendant potential liability) would undoubtedly distract the Debtors and their officers and managers from these chapter 11 cases, to the detriment of all parties-in-interest.

12. Moreover, certain of the Taxes may be entitled to priority status pursuant to Section 507(a)(8) of the Bankruptcy Code. *See* 11 U.S.C. § 1129(a)(9)(C)(i) and (ii). Under any plan of reorganization, the Taxes must be paid in full and in regular cash installments over a five-year period from the date of the order for relief. *Id.* Additionally, such Taxes must be paid in

the order of priority no less favorable than the treatment given to the most favored general unsecured claims. *See* 11 U.S.C. § 1129(a)(9)(C)(iii). Finally, any plan of reorganization must provide the same treatment to those Taxes that constitute secured claims that, were they unsecured, would have been priority tax claims under Section 507(a)(8). *See* 11 U.S.C. § 1129(a)(9)(D). Thus, the payment of the Taxes at this time, to the extent it involves property of the estates, only affects the timing of the payment and does not prejudice the rights of other creditors of the Debtors.

13. Payment of the Taxes may also be authorized under Section 363(b)(1) 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); *see, e.g., FV Steel and Wire Co.*, Case No. 04-22421 (Bankr. E.D. Wis. Feb. 27, 2004) [Docket No. 28] (authorizing payment of pre-petition claims under Section 363 of the Bankruptcy Code); *In re UAL Corp.*, Case No. 02-48191 (Bankr. N.D. Ill. Dec. 9, 2002) [Docket No. 9] (authorizing payment of pre-petition claims under Section 363 of the Bankruptcy Code as an out-of-the-ordinary-course transaction); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (affirming lower court order authorizing payment of pre-petition wages pursuant to Section 363(b) of the Bankruptcy Code). Under Section 363(b), such payment is justified if the debtor has a valid business justification. *See Ionosphere Clubs*, 98 B.R. at 175. Here, the Debtors’ failure to pay the sales and use taxes could have a materially adverse impact on their ability to operate.

14. Finally, Section 105(a) of the Bankruptcy Code provides that “[t]he court may 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 purpose of Section 105(a) of the Bankruptcy Code is “to

assure the bankruptcy court's power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction." 2 *Collier on Bankruptcy* ¶ 105.01 (16th ed. 2015). Thus, Section 105 essentially codifies the Bankruptcy Court's inherent equitable powers. Numerous courts have applied such equitable powers under the "necessity of payment doctrine" to authorize payment of a debtor's pre-petition obligations where, as here, such payment is necessary to the continued operations of the Debtors and to avoid interference with these chapter 11 cases. In light of the foregoing, the relief requested in this Motion is justified under Section 105(a).

15. Relief similar to that requested herein has been granted by courts in other substantial chapter 11 cases in Georgia. *See, e.g., In re Astro Turf, LLC*, No. 16-41504 (Bankr. N.D. Ga. June 29, 2016) (Diehl, J.) [Docket No. 26]; *Miller Auto Parts & Supply Co., Inc.*, No. 14-68113 (Bankr. N.D. Ga. Sept. 18, 2014) [Docket No. 23] (Diehl, J.); *In re Ace Hardware & Building Center, Inc.*, No. 12-24428 (Bankr. N.D. Ga. Jan. 15, 2013) (Brizendine, J.) [Docket No. 40]; *In re Smith-Evans Lumber Co.*, No. 13-41817 (Bankr. N.D. Ga. July 15, 2013) (Diehl, J.) [Docket No. 26]; *In re Cagle's, Inc.*, No. 11-80202 (Bankr. N.D. Ga. Oct. 20, 2011) (Bihary, J.) [Docket No. 29]; *In re Sea Island Co.*, Case No. 10-21034 (Bankr. S.D. Ga. Aug. 12, 2010) (Dalis, J.) [Docket. No. 67]; *In re Currahee Partners, LLC*, No. 09-73838 (Bankr. N.D. Ga. Oct. 22, 2009) (Hagenau, J.) [Docket No. 152]; *In re Friedman's Inc.*, Case No. 05-40129 (Bankr. S.D. Ga. Jan. 20, 2005) (Davis, J.) [Docket no. 49]; *In re Adventure Parks Grp., LLC*, Case No. 06-70659 (Bankr. M.D. Ga. Sept. 13, 2006) (Laney, J.) [Docket no. 48]; *In re Galey & Lord, Inc.*, Case No. 04-43098 (Bankr. N.D. Ga. Aug. 24, 2004) (Diehl, J.) [Docket no. 48]; *In re Dan River, Inc.*, Case No. 04-10990 (Bankr. N.D. Ga. Apr. 1, 2004) (Drake, J.) [Docket no. 56].

16. 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 in all respects.

17. The Debtors submit that the facts cited herein and in the *Declaration of David Leach in Support of First-Day Motions and Applications*, filed contemporaneously herewith, illustrate that the relief requested is necessary to avoid immediate and irreparable harm to the Debtors and their estates. Based on the foregoing, Bankruptcy Rule 6003, to the extent it is applicable, has been satisfied.

18. To the extent the fourteen-day stay of Bankruptcy Rule 6004(h) may be construed to apply to the subject matter of this Motion, the Debtors request that such stay be waived.

#### **NOTICE**

19. Notice of this Motion has been provided to: (a) the Office of the United States Trustee for the Southern District of Georgia; (b) the holders of the 20 largest unsecured claims against the Debtors on a consolidated basis; (c) the agent to lenders that previously asserted a blanket lien on Fibrant's assets; (d) the Internal Revenue Service; (e) the United States Attorney's Office for the Southern District of Georgia; (f) the Office of the Georgia Attorney General; (g) the Georgia Department of Revenue; (h) the United States Environmental Protection Agency, (i) the Georgia Environmental Protection Division; (j) parties receiving any other first-day motions; (k) Koninklijke DSM, N.V. and DSM Coating Resins, Inc.; (l) ChemicalInvest Holding, B.V.; (m) Taxing Authorities; and (n) any party that has requested notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Debtors submit that no further notice is necessary.

**CONCLUSION**

WHEREFORE, the Debtors respectfully request that the Court:

- (a) enter an Order substantially in the form attached hereto as Exhibit B granting the relief requested herein; and
- (b) grant the Debtors such other and further relief as is just and proper.

Dated: February 23, 2018  
Augusta, Georgia

Respectfully submitted,

KING & SPALDING LLP

/s/ Paul K. Ferdinands

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PROPOSED COUNSEL FOR THE  
DEBTORS-IN-POSSESSION

**EXHIBIT A**  
**Taxing Authorities**

**Fibrant, LLC Tax Schedule**

<b>Taxing Authority</b>	<b>Estimate of Tax Due</b>	<b>Address</b>	<b>City, State, Zip Code</b>
Georgia Department of Revenue	\$17,000/mo	PO Box 740397	Atlanta, GA 30374
Richmond County Tax Commission	\$700,000/yr <sup>1</sup>	535 Telfair Street, Room 120	Augusta, GA 30901

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<sup>1</sup> Amount is currently in dispute.

**EXHIBIT B**  
**Proposed Order**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF GEORGIA  
AUGUSTA DIVISION**

<b>In re:</b>	)	<b>Chapter 11</b>
	)	
<b>FIBRANT, LLC, et al.,<sup>1</sup></b>	)	<b>Case No. 18-<u>10274</u></b>
	)	
<b>Debtors.</b>	)	<b>Jointly Administered</b>

**ORDER AUTHORIZING THE  
DEBTORS TO PAY CERTAIN PRE-PETITION  
TAXES AND RELATED OBLIGATIONS**

This matter is before the Court on the *Emergency Motion for an Order Authorizing the Debtors to Pay Certain Pre-Petition Taxes and Related Obligations* (the “Motion”) of Fibrant, LLC and its affiliated debtors-in-possession (the “Debtors”). All capitalized terms used but not defined herein shall have the meanings given to them in the Motion.

The Court has considered the Motion, the *Declaration of David Leach in Support of First-Day Motions and Applications*, and the matters reflected in the record of the hearing held on the Motion on [\_\_\_\_], 2018. It appears that the Court has jurisdiction over this proceeding; that this is a core proceeding; that notice of the Application has been provided to: (a) the Office of the United States Trustee for the Southern District of Georgia; (b) the holders of the 20 largest unsecured claims against the Debtors on a consolidated basis; (c) the agent to lenders that previously asserted a blanket lien on Fibrant’s assets; (d) the Internal Revenue Service; (e) the United States Attorney’s Office for the Southern District of Georgia; (f) the Office of the Georgia Attorney General; (g) the Georgia Department of Revenue; (h) the United States Environmental Protection Agency, (i) the Georgia Environmental Protection Division; (j) parties

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number (if any), are: Fibrant, LLC (6694); Evergreen Nylon Recycling, LLC (7625); Fibrant Center South, LLC (8270); and Georgia Monomers Company, LLC (0042).

receiving any other first-day motions; (k) Koninklijke DSM, N.V. and DSM Coating Resins, Inc.; (l) ChemicalInvest Holding, B.V.; (m) Taxing Authorities; and (n) any party that has requested notice pursuant to Bankruptcy Rule 2002; that no further notice is necessary; that the relief sought in the Application is in the best interests of the Debtors, their estates, and their creditors; and that good and sufficient cause exists for such relief.

Accordingly, it is hereby ORDERED as follows:

1. The Motion (Doc. No. \_\_\_) is GRANTED.
2. The Debtors are authorized, but not directed, to pay and remit to the Taxing Authorities the Taxes (including sales, use, and other taxes necessary to operate their business) incurred or collected by the Debtors and due and owing.
3. The banks and other financial institutions on which checks were drawn or electronic payment requests made in payment of the pre-petition obligations approved herein (a) are authorized and directed to receive, process, honor, and pay all checks presented for payment and related to such Taxes, provided that sufficient funds are available in the Debtors' bank accounts to cover such payments; and (b) shall rely on the representations of the Debtors as to which checks are permitted to be paid pursuant to this Order. The banks and financial institutions subject to this Order shall have no liability to any party for relying on the directions of the Debtors as provided for herein.
4. Nothing herein shall impair the Debtors' ability to contest the amount or validity of the Taxes owing to the Taxing Authorities.
5. The Debtors are authorized to reissue any check, electronic payment, or otherwise that was drawn in payment of any pre-petition amount that is not cleared by a depository.

6. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

7. The Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

8. To the extent the 14-day stay of Bankruptcy Rule 6004(h) may be construed to apply to the subject matter of this Order, such stay is hereby waived.

9. Counsel for the Debtors are directed to serve a copy of this Order on: (a) the Office of the United States Trustee for the Southern District of Georgia; (b) the holders of the 20 largest unsecured claims against the Debtors on a consolidated basis; (c) the agent to lenders that previously asserted a blanket lien on Fibrant's assets; (d) the Internal Revenue Service; (e) the United States Attorney's Office for the Southern District of Georgia; (f) the Office of the Georgia Attorney General; (g) the Georgia Department of Revenue; (h) the United States Environmental Protection Agency, (i) the Georgia Environmental Protection Division; (j) parties receiving any other first-day motions; (k) Koninklijke DSM, N.V. and DSM Coating Resins, Inc.; (l) ChemicalInvest Holding, B.V.; (m) Taxing Authorities; and (n) any party that has requested notice pursuant to Bankruptcy Rule 2002, within three days of the entry of this Order and to file a certificate of service with the Clerk of the Court.

END OF DOCUMENT

Prepared and presented by:

KING & SPALDING LLP

*/s/ Paul K. Ferdinands*

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