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PROPOSED ATTORNEYS FOR DEBTOR

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re: § Chapter 11
§
TPP ACQUISITION, INC. d/b/a The § Case No. 16-33437-hdh-11
Picture People, §
§
Debtor. §

**DEBTOR’S EMERGENCY MOTION FOR ENTRY OF ORDER AUTHORIZING THE
DEBTOR TO HONOR CERTAIN PREPETITION OBLIGATIONS TO CUSTOMERS
AND TO OTHERWISE CONTINUE CUSTOMER PROGRAMS IN THE ORDINARY
COURSE OF BUSINESS**

TPP Acquisition, Inc. d/b/a The Picture People (“TPP” or the “Debtor”), hereby files this *Debtor’s Emergency Motion for Entry of an Order Authorizing Debtor to Honor Certain Prepetition Obligations to Customers and to Otherwise Continue Customer Programs in the Ordinary Course of Business* (the “Motion”), and in support thereof respectfully represents as follows:



Jurisdiction and Venue

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

Background

2. To preserve the value of its assets and restructure its financial affairs, on September 2, 2016 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") commencing the above captioned case (the "Chapter 11 Case"). The Debtor continues to manage and operate its business as a debtor-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108.

3. An official committee of unsecured creditors has yet to be appointed in this Chapter 11 Case. Further, no trustee or examiner has been requested or appointed in this Chapter 11 Case.

4. On September 2, 2016, in connection with the first day hearings in the Chapter 11 Case, the *Statement of Background Information and Declaration of Stuart Noyes, Chief Restructuring Officer of TPP Acquisition, Inc. d/b/a The Picture People, in Support of Debtor's Chapter 11 Petition and First-Day Motions* (the "First Day Declaration")¹ was filed with the Court.

The Customer Programs

5. Prior to the commencement of this Chapter 11 Case, in the ordinary course of business, the Debtor instituted and engaged in certain activities to develop and sustain a positive reputation and relationship with its customers. To that end, the Debtor implemented various

¹ Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the First Day Declaration.

customer programs and policies (collectively, the “Customer Programs”) designed to ensure customer satisfaction, develop and sustain customer relationships and loyalty, improve profitability, and generate goodwill for the Debtor and its services. As of the Petition Date, the Customer Programs include the Gift Card Program, Groupon Coupons and the Portrait Rewards Program².

6. Following is a general description of each of the Debtor’s Customer Programs.

A. Gift Card Program

7. In the ordinary course of business, the Debtor maintains a gift card program (the “Gift Card Program”) wherein it distributes gift cards (the “Gift Cards”) for use in all of its non-Sears and non-Wal-Mart locations. The Gift Card Program is managed by the Debtor’s credit card processor, First Data. The gift cards offered under the Gift Card Program are general for-sale gift cards with no expiration date. Customers may purchase the Gift Cards at any of the Debtor’s mall-based locations, online on the Debtor’s website, and at certain of the Debtor’s BBB locations. Once purchased, such Gift Cards may be used like cash for purchases at the Debtor’s stores, but may not be redeemed for cash or monetary credit.

8. The Debtor maintains transaction data regarding the sale of its Gift Cards. However, the Debtor does not track and has no information about the identity of the holders of the Gift Cards. As of the Petition Date, the total liability for all outstanding Gift Cards was approximately \$600,000.

9. The Debtor believes that continuing to honor its Gift Card Program is essential for maintaining customer goodwill and continuing its business. The negative impact of refusing to honor the Gift Card Program would severely jeopardize the Debtor’s relationships with its customers and the Debtor’s ability to reorganize successfully. Current customers may choose to

² Capitalized terms used but not yet defined herein shall have the meaning ascribed to them below.

patronize other portrait studios, and the negative publicity could jeopardize the Debtor's ability to attract new customers. The Debtor anticipates that any purchaser of its business will continue to honor gift cards but

B. Coupon Marketing

10. The Debtor offers coupons through the popular daily deal website "Groupon". Through its various electronic platforms Groupon broadcasts electronic coupons for various stores and businesses at a significant discount. The Groupon offers are typically targeted to a particular geographic area.

11. The Debtor has partnered with Groupon since 2011 to have coupons for various portrait packages and other offers issued through Groupon's electronic distribution systems (the "Groupon Program"). The Debtor shares with Groupon the revenue generated from each TPP related coupon purchase. Once used in studio, the Debtor has the opportunity through up-selling and repeat business to increase the value of the Groupon customer to the business enterprise.

12. Due to changes in Groupon's coupon generation practices, beginning in mid-2014 the Debtor has experienced a decline in Groupon related transactions. Nevertheless, Groupon continues to be a valuable marketing platform for the Debtor. Because Groupon is such a valuable source of business, the Debtor is requesting authorization, but not direction, to honor any pre-petition obligations to customers relating to the Groupon Program. The Debtor is also requesting authorization, but not direction, to honor any pre-petition revenue sharing obligations owed to Groupon relating to the Groupon Program.

13. The Debtor has similar arrangements, although on a smaller scale, with Living Social and Costco, and those arrangements also constitute Customer Programs that the Debtor wishes to continue.

C. Portrait Rewards Program

14. In the ordinary course of business, the Debtor operates a portrait rewards club (the “Portrait Rewards Program”), a value-added program which provides rewards to incentivize members to visit the stores more often. Customers are eligible to receive a one year membership to the Portrait Rewards Program free with a \$150 purchase. Customers may also purchase an annual membership in the Portrait Rewards Program. For members that purchase an annual membership in the Portrait Rewards Program, the annual membership fee is recognized over 12 months. The current unamortized balance for purchased Portrait Rewards Program memberships is approximately \$300,000.

Relief Requested

15. Pursuant to Bankruptcy Code §§ 105(a), 363, 1107 and 1108 of the, the Debtor requests authority in its business judgment to (a) continue, maintain, and/or terminate any Customer Programs, in its discretion, in the ordinary course of business, (b) pay, honor and otherwise satisfy, at the Debtor’s discretion, its prepetition obligations thereunder in a manner consistent with past practice, and (c) pay, honor or otherwise satisfy prepetition processing costs and fees associated with the Customer Programs (collectively, the “Customer Obligations”). The Debtor also requests the Court to authorize and direct the Debtor’s banks to receive, process, honor and pay all checks and electronic payment request relating to the foregoing.

16. As stated above, continuing and honoring the Customer Programs is essential for maintaining the Debtor’s customers’ goodwill and continuing the Debtor’s business. The negative impact of refusing to honor the Customer Programs would harm the Debtor’s relationships with its customers and jeopardize Debtor’s ability to reorganize successfully.

Basis for Relief Requested

17. Under Bankruptcy Code § 363(b), a debtor may, in the exercise of its sound business judgment and after notice and hearing, use property of the estate outside of the ordinary course of business. 11 U.S.C. § 363(b). A debtor may also use property of the estate in the ordinary course of business without notice or a hearing. 11 U.S.C. § 363(c). Furthermore, Bankruptcy Code § 105(a) a court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). *See In re Tropical Sportswear Int’l Corp.*, 320 B.R. 15 (Bankr. M.D. Fla. 2005) (recognizing and applying sections 105(a) and 363 of the Bankruptcy Code to justify the payment of prepetition obligations in appropriate circumstances); *In re Gulf Air, Inc.*, 112 B.R. 152, 153 (Bankr. W.D. La. 1989) (“[w]hile pre-petition claims are normally disposed of in a plan of reorganization and in accordance with statutory priorities, there are well-established ‘necessity of payment’ and similar exceptions.”).

18. Courts have developed the “Doctrine of Necessity” (also known as the “Necessity of Payment Rule”) for use in determining whether payment of certain prepetition obligations is permissible. *See In re CoServ, L.L.C.*, 273 B.R. 487, 492-93 (Bankr. N.D. Tex. 2002) (discussing the doctrine). The Debtor, operating its business as a debtor-in-possession under sections 1107(a) and 1108 of the Bankruptcy Code, is a fiduciary with the implicit duty to “to protect and preserve the estate, including an operating business’s going-concern value.” *Id.* at 497. As observed in *CoServ*, the debtor-in-possession’s role as the equivalent of a trustee (pursuant to section 1107(a) of the Bankruptcy Code) provides a bridge from section 105(a) to the Doctrine of Necessity. *Id.* at 496-97. Thus, in certain instances, “it is only logical that the bankruptcy court be able to use

Section 105(a) of the Code to authorize satisfaction of a prepetition claim in aid of preservation or enhancement of the estate.” *Id.*

19. In *CoServ*, the Bankruptcy Court for the Northern District of Texas held that a debtor must demonstrate the following three elements in order to meet the “necessity” requirement: (1) it must be critical that the debtor deal with the claimant; (2) unless the debtor deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor’s going concern value, which is disproportionate to the amount of the claimant’s prepetition claim; (3) there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim. *Id.* at 498.

20. It is critical that the Debtor maintain its customer base. If it does not honor its Customer Programs, the Debtor is likely to face negative publicity and substantial ill-will from its customer base. Current customers are more likely to be lost to other portrait studios, and new customers may be frightened off. The Debtor submits that the continuing support of its customers is imperative to its ongoing operations and the viability of its business enterprise. The uninterrupted continuance of the Customer Programs is critical to maintaining and preserving such support.

21. The Debtor’s banks and other financial institutions should be authorized and directed to receive, process, honor and pay all prepetition and postpetition checks and fund transfers on account of the Customer Program obligations, provided that sufficient funds are on deposit in the applicable accounts to cover such payments. In doing so, the Debtor’s banks and other financial institutions should rely on the representations of the Debtor as to which checks and fund transfers are issued or authorized to be paid.

Request for Waiver of Stay

22. To the extent that the relief sought in the Motion constitutes a use of property under Bankruptcy Code § 363(b), the Debtor seeks a waiver of the fourteen-day stay under Bankruptcy Rule 6004(h). Further, the Debtor requests that the Court find that the provisions of Bankruptcy Rule 6003 are satisfied. As explained herein, the relief requested in this Motion is immediately necessary for the Debtor to be able to continue to operate its business and preserve the value of the estates.

23. Nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtor, a waiver of the Debtor's right to dispute any claim, or an approval of the assumption of any agreement, contract or lease under Bankruptcy Code § 365.

Notice

24. Notice of this Motion has been provided to: (i) the Office of the United States Trustee; (ii) the Debtor and its counsel; (iii) the Debtor's secured creditors; (iv) any party whose interests are directly affected by this specific pleading; (v) those persons who have formally appeared and requested notice and service in these proceedings pursuant to Bankruptcy Rules 2002 and 3017; (vi) counsel for and the members of any official committees appointed by this Court; (vii) the 20 largest unsecured creditors of the Debtor; and (viii) all governmental agencies having a regulatory or statutory interest in this case. No other or further notice need be provided.

WHEREFORE, the Debtor respectfully requests that the Court (i) grant the Motion and (ii) grant such other and further relief as is just and proper.

RESPECTFULLY SUBMITTED this 2nd day of September, 2016.

HAYNES AND BOONE, LLP

By: /s/ Robert D. Albergotti

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	Chapter 11
	§	
TPP ACQUISITION, INC. d/b/a The	§	Case No. 16-33437-hdh-11
Picture People,	§	
	§	
Debtor.	§	

**ORDER AUTHORIZING THE DEBTOR TO HONOR CERTAIN PREPETITION
OBLIGATIONS TO CUSTOMERS AND TO OTHERWISE CONTINUE CUSTOMER
PROGRAMS IN THE ORDINARY COURSE OF BUSINESS**

On _____, 2016, the Court conducted a hearing to consider the *Debtor's Emergency Motion for an Order Authorizing the Debtor to Honor Certain Prepetition Obligations to Customers and to Otherwise Continue Customer Programs in the Ordinary Course of Business* (the "Motion"), filed by the above-captioned debtor (the "Debtor"). The Court finds that: (i) it has jurisdiction over the matters raised in the Motion pursuant to 28 U.S.C. §§ 157 and 1334; (ii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iii)

the relief requested in the Motion is in the best interests of the Debtor, its estate, and its creditors; (iv) proper and adequate notice of the Motion has been given and no other or further notice is necessary; and (v) upon the record herein after due deliberation thereon, good and sufficient cause exists for the granting of the relief as set forth herein.

Therefore,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.
2. The Debtor, in its business judgment, is authorized (but not directed) to perform and fully honor its prepetition obligations under and related to the Customer Programs, and any related programs, as it deems appropriate, in the ordinary course of business, without further application to or order of the Court. For the avoidance of doubt, the Customer Programs include, without limitation, the following: (i) the Gift Card Program; (ii) the Groupon Program and other similar coupon programs as described in the Motion; and (iii) the Portrait Rewards Program.¹
3. The Debtor, in its business judgment, is authorized (but not directed) to continue, renew, replace, implement a new, and/or terminate the Customer Programs, and any related programs, as it deems appropriate, in the ordinary course of business, without further application to the Court.
4. The Debtor is authorized (but not directed), in its discretion, to pay, honor or otherwise satisfy all prepetition Customer Obligations, in the ordinary course of business, in the same manner and on the same basis as it honored such obligations prior to the commencement of this chapter 11 case, including, but not limited to, any prepetition processing costs and fees associated with the Customer Programs.

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

5. Notwithstanding anything to the contrary herein, all authorization for payment provided herein is subject to the terms and conditions of any order entered in this Chapter 11 Case approving debtor-in-possession financing or use of cash collateral and to the Budget (as defined and provided in any such order approving debtor-in-possession financing or use of cash collateral).

6. The Debtor's banks shall be, and hereby are, authorized, when requested by the Debtor in its discretion, to receive, process, honor and pay any and all checks or electronic fund transfers drawn on the Debtor's bank accounts on account of the Customer Programs, whether those checks were presented prior to or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments.

7. The Debtor's banks may rely on the representations of the Debtor with respect to whether any check or other transfer drawn or issued by the Debtor prior to the Petition Date should be honored pursuant to this Order, and any such bank shall not have any liability to any party for relying on such representation by the Debtor as provided for in this Order.

8. Nothing herein shall be construed to limit, or in any way affect, the Debtor's ability to dispute any claim with respect to the Customer Programs or any related programs.

9. Nothing contained in this Order shall be deemed to constitute an assumption of any executory contract pursuant to Bankruptcy Code § 365.

10. The requirements of Bankruptcy Rule 6003 are satisfied and the relief requested is necessary to avoid immediate and irreparable harm.

11. Notwithstanding Bankruptcy Rule 6004(h), this Order shall be effective and enforceable immediately upon entry hereof.

12. This Court shall retain jurisdiction with respect to all matters relating to the interpretation or implementation of this Order.

END OF ORDER

Submitted by:

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