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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 AN ORDER PURSUANT TO 11 U.S.C.
§§ 105(a), 363(b), AND 507(a)(8) (I) AUTHORIZING THE DEBTOR TO PAY CERTAIN
PREPETITION TAXES AND (II) DIRECTING FINANCIAL INSTITUTIONS TO
HONOR AND PROCESS RELATED CHECKS AND TRANSFERS**

TPP Acquisition, Inc. d/b/a The Picture People (“TPP” or the “Debtor”), hereby files this *Debtor’s Emergency Motion for an Order Pursuant to 11 U.S.C. §§ 105(a), 363(b), and 507(a)(8) (I) Authorizing the Debtor to Pay Certain Prepetition Taxes and (II) Directing Financial Institutions to Honor and Process Related Checks and Transfers* (the “Motion”), and in support thereof respectfully represent as follows:

Jurisdiction and Venue

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. The Motion constitutes a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). 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 Acquisitoin, 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.

Relief Requested

5. The Debtor seeks entry of an order, pursuant to Bankruptcy Code §§105(a), 363, and 507(a)(8) authorizing, but not directing, the Debtor to pay various prepetition taxes, including prepetition sales and use taxes, prepetition property taxes and prepetition franchise and/or income taxes (collectively, the "Prepetition Taxes") to the appropriate taxing authorities (each a "Taxing Authority," and collectively, the "Taxing Authorities") in the ordinary course of business, on an unaccelerated basis, as such payments become due and payable and to the extent adequate funds are available to make such payments. The requested relief will be without

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

prejudice to the Debtor's right to contest the amount of Prepetition Taxes on any grounds deemed appropriate in the Debtor's discretion.²

6. The Debtor also requests that this Court authorize and direct banks and financial institutions at which the Debtor maintains disbursement and other accounts, at the Debtor's instruction, to receive, honor, process, and pay, to the extent of funds on deposit, any and all checks or electronic funds transfers relating to such Prepetition Taxes.

A. The Debtor's Prepetition Taxes

7. In the ordinary course of business, the Debtor incurs, or collects, various taxes and remits such taxes to the Taxing Authorities. Before the Petition Date, the Debtor has generally paid its undisputed Prepetition Taxes in a timely fashion in accordance with and subject to applicable grace periods, if any. The Debtor remains current on its sales and use taxes (which are remitted monthly) and other trust fund taxes. The Debtor is also not delinquent on its franchise taxes. Nevertheless, as more fully described below, the Debtor is delinquent on a portion of its business personal property taxes.

B. Property Taxes

8. The Debtor owns or leases real property and personal property that are subject to state and local real ("Real Property Taxes") and business personal property taxes (the "BPP Taxes") and together with Real Property Taxes, the "Property Taxes"). Property Taxes are assessed and due annually, and become delinquent at various times, either in the year they are

² Nothing in this Motion should be considered an admission by the Debtor with respect to (i) its liability to any Taxing Authority, (ii) whether any particular obligation owed by the Debtor constitutes a Tax, or (iii) whether any Tax liability constitutes a prepetition or post petition obligation of the Debtor. In addition, while the Debtor is obligated under its various leases to pay certain monthly amounts to its various landlords constituting the estimated amount of real property tax liability associated with a particular studio location, the Debtor does not believe that those amounts constitute tax liabilities, but rather lease obligations. The Debtor therefore reserves all rights with respect to any of its tax obligations under its leases or other similar arrangements, including the right to argue that any taxes payable under its leases constitute merely lease obligations rather than tax obligations owed to Taxing Authorities.

assessed or in the following year. Property Taxes are assessed and become payable in the ordinary course of business and are typically calculated based on a statutorily mandated percentage of property value.

9. As of the Petition Date, the Debtor was delinquent on \$19,961 in BPP Taxes for 2015, and \$48,397 in BPP Taxes for 2016. As such, the Debtor requests authority, but not direction, to pay, in the normal course of the Debtor's operations, any Property Taxes that accrued prepetition – including 2015 Property Taxes – but that remain unpaid as of the Petition Date.

C. Franchise Taxes

10. The Debtor has franchise tax obligations (the "Franchise Taxes") it must pay to the Taxing Authorities to remain in good standing and maintain the right to operate its business. The Franchise Taxes are assessed and due annually, and generally become delinquent during the following year.

11. As of the Petition Date, the Debtor believes that no Franchise Tax amounts are delinquent to the Taxing Authorities as all Franchise Taxes for years prior to 2014 have been assessed and paid prior to the Petition Date. The Debtor paid estimated 2015 Texas Franchise Taxes in May 2016 in the amount of \$42,400 when it requested an extension of the deadline for paying such taxes through November 15, 2016. The Debtor estimates that it will not owe any additional amounts for 2015 Texas Franchise Taxes. The Debtor does not believe that it owes any other Franchise Taxes for 2015 and that no other Franchise Tax is due and payable at this time. The Debtor requests authority, but not direction, in an abundance of caution, to continue to pay the Franchise Taxes if and when they become due and payable during the pendency of the Chapter 11 Case.

D. Certain State and Local Income Taxes

12. Under certain applicable laws, state or local authorities, or both, levy taxes based on the Debtor's income (the "State and Local Income Taxes"). In certain states, state and local authorities are entitled to statutory liens on the Debtor's property located in, or subject to tax, in the respective state if these income taxes are not paid. Moreover, in certain states, the Debtor's directors and officers have personal liability for failure to timely pay these taxes.

13. Due to the Debtor's pre-tax losses in 2015, the Debtor estimates that it does not owe any prepetition amounts with respect to State and Local Income Taxes. Nevertheless, out of an abundance of caution the Debtor requests the authority, but not direction, to pay all prepetition and post-petition State and Local Income Taxes in the ordinary course of business, as they become due.

E. Sales and Use / Trust Fund Taxes

14. Certain Taxing Authorities require the Debtor to collect from its customers, and/or for the Debtor to pay as a customer, sales and use taxes that are based on a percentage of sales prices and other trust-fund taxes (the "Trust Fund Taxes"). In most cases, the Trust Fund Taxes are paid in arrears once collected. While it is difficult for the Debtor to estimate the precise amount of Trust Fund Taxes owed as of the Petition Date, as such taxes are taken into account in the invoices either generated by or paid by the Debtor, the Debtor currently estimates that sales tax due in September for August sales will total approximately \$283,000. The Debtor requests authority to continue its ordinary business practices of invoicing and paying invoices that account for the applicable sales and use taxes, whether such invoices are prepetition or postpetition invoices.

Basis for Relief

15. There are several bases for granting the relief requested in the Motion: (a) the Prepetition Taxes may be entitled to priority status pursuant to Bankruptcy Code § 507(a)(8); (b) failure to pay certain Prepetition Taxes may restrict the Debtor's ability to operate within the state of Texas as well as other states; and (c) the Bankruptcy Code and applicable case law give the Debtor authority to remit payment on account of such Prepetition Taxes in the ordinary course of business under the "doctrine of necessity."

A. The Prepetition Taxes May Be Entitled to Priority Status Pursuant to Bankruptcy Code § 507(a)(8)

16. Claims for the Prepetition Taxes may be priority claims entitled to payment prior to general unsecured creditors. *See* 11 U.S.C. § 507(a)(8). Taxes entitled to priority under Bankruptcy Code § 507(a)(8) include unsecured claims of governmental units for a tax on or measured by income or gross receipts for a taxable year ending on or before the Petition Date (11 U.S.C. § 507(a)(8)(A)); a property tax incurred before the Petition Date and last payable without penalty after one year before the Petition Date (11 U.S.C. § 507(a)(8)(B)); and a tax required to be collected or withheld and for which the debtor is liable in whatever capacity (11 U.S.C. § 507(a)(8)(C)). A fee or charge is a tax if it is an involuntary pecuniary burden: (i) laid upon the individual or property; (ii) imposed by, or under authority of the legislature; (iii) assumed for the public purposes, including the purposes of defraying expenses of government undertakings authorized by it; and (iv) assessed under the police or taxing power of the state. *See LTV Steel Co., Inc. v. Shalala (In re Chateaugay Corp.)*, 54 F.3d 478, 498 (2d Cir. 1995). Here, all or substantially all of the Prepetition Taxes are involuntary pecuniary burdens imposed by the authority of a state or local legislature under its policing power.

17. The Prepetition Taxes may qualify for priority under Bankruptcy Code § 507(a)(8). As priority claims, confirmation of a chapter 11 plan must include payment of the Prepetition Taxes. *See* 11 U.S.C. § 1129(a)(9)(C). Thus, payment of the Prepetition Taxes will give the Taxing Authorities no more than that to which they otherwise would be entitled under a chapter 11 plan and will save the Debtor the potential interest expense, legal expense, and penalties that otherwise might accrue on the Prepetition Taxes during the Chapter 11 Case. Moreover, to the extent that the Prepetition Taxes are entitled to priority treatment under Bankruptcy Code § 507(a)(8)(B), the governmental units also may attempt to assess interest and penalties. *See* 11 U.S.C. § 507(a)(8)(G) (granting eighth priority status to “a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss”). The proposed relief will only affect the timing of the payment of the Prepetition Taxes and not whether such amounts will be paid. As such, payment of the Prepetition Taxes will not prejudice the rights of other creditors.

B. Payment of the Prepetition Taxes Will Allow the Debtor to Continue Business Operations

18. The Debtor’s failure to pay Franchise Taxes could cause states to challenge the Debtor’s rights to operate within the state’s jurisdiction. *See, e.g.*, Tex. Tax Code § 171.251. Addressing any subsequent action by the Taxing Authorities would be costly and administratively burdensome for the Debtor’s management during the Chapter 11 Case and would be an unnecessary distraction for the Debtor, and this Court, which could be asked to entertain various motions seeking injunctions with respect to the potential state court actions. Therefore, it is in the best interest of the Debtor’s estate to eliminate the possibility of the foregoing distractions.

C. Ample Authority Exists to Support Payment of the Prepetition Taxes under the “Doctrine of Necessity”

19. Courts generally acknowledge that it is appropriate to authorize the payment (or other special treatment) of prepetition obligations in appropriate circumstances. *See, e.g., In re Ionosphere Clubs, Inc.*, 98 B.R. 174 (Bankr. S.D.N.Y. 1989); *see also Armstrong World Indus., Inc. v. James A. Phillips, Inc., (In re James A. Phillips, Inc.)*, 29 B.R. 391, 398 (S.D.N.Y. 1983) (granting authority to pay prepetition claims of suppliers who were potential lien claimants). As set forth herein, in authorizing payments of certain prepetition obligations, courts have relied on several legal theories, based on Bankruptcy Code §§ 1107(a), 1108, 363(b), and 105(a).

20. Pursuant to Bankruptcy Code §§ 1107(a) and 1108, debtors in possession are fiduciaries “holding the bankruptcy estate[s] and operating the business[es] for the benefit of [their] creditors and (if the value justifies) equity owners.” *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the fiduciary duties of any debtor in possession is the obligation to “protect and preserve the estate, including an operating business’s going-concern value.” *Id.* Some courts have noted that there are instances in which a debtor can fulfill this fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” *Id.* The *CoServ* court specifically noted that the preplan satisfaction of prepetition claims would be a valid exercise of the debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate” *Id.*

21. Consistent with a debtor’s fiduciary duties, courts have also authorized payment of prepetition obligations under Bankruptcy Code § 363(b) where a sound business purpose exists for doing so. *See, e.g., Ionosphere Clubs*, 98 B.R. at 175 (discussing prior order authorizing payment of prepetition wage claims pursuant to Bankruptcy Code § 363(b); relief appropriate where payment was needed to “preserve and protect its business and ultimately

reorganize, retain its currently working employees and maintain positive employee morale.”); *see also Armstrong*, 29 B.R. at 397 (relying on Bankruptcy Code § 363 to allow contractor to pay prepetition claims of suppliers who were potential lien claimants because the payments were necessary for general contractors to release funds owed to debtors).

22. Courts have also authorized payment of prepetition claims in appropriate circumstances pursuant to Bankruptcy Code § 105(a). Bankruptcy Code § 105(a), which codifies the inherent equitable powers of the bankruptcy court, empowers the bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Under Bankruptcy Code § 105(a), courts may permit preplan payments of prepetition obligations when such payments are essential to the continued operation of the debtor’s business and, in particular, where nonpayment of a prepetition obligation would trigger a withholding of goods or services essential to the debtor’s business reorganization plan. *See In re UNR Indus.*, 143 B.R. 506, 520 (Bankr. N.D. Ill. 1992) (permitting the debtor to pay prepetition claims of suppliers or employees whose continued cooperation is essential to the debtors’ successful reorganization); *Ionosphere Clubs*, 98 B.R. at 177 (finding that Bankruptcy Code § 105 empowers bankruptcy courts to authorize payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor); *In re Gulf Air, Inc.*, 112 B.R. 152 (Bankr. W.D. La. 1989) (authorizing payment of pre-petition amounts due, *inter alia*, for wages, benefits, health insurance premiums and per diem expenses under the “necessity of payment doctrine,” without regard to statutory priorities of Bankruptcy Code § 507).

23. Payment of the Prepetition Taxes will preserve and protect the Debtor’s ability to reorganize. Failure to pay Property Taxes may subject the Debtor’s estate to additional liens, penalties, and interest expenses. *See e.g.* Tex. Prop. Tax Code § 32.01(a) (“On January 1 of each

year, a tax lien attaches to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on the property, whether or not the taxes are imposed in the year the lien attaches.”); *Id.* at § 32.01(d) (tax lien perfected on attachment without further action by the taxing unit); *Id.* at § 33.01 (penalties and interest for nonpayment of property taxes).

24. Courts in this district have previously exercised their equitable powers under Bankruptcy Code § 105 to authorize debtors to pay prepetition tax obligations. *See, e.g., In re Forest Park Medical Center at Southlake, LLC*, Case No. 16-40273-rfn (Bankr. N.D. Tex.); *In re Cornerstone E&P Company, L.P.*, Case No. 09-35228-bjh (Bankr. N.D. Tex.); *In re Crusader Energy Group Inc., et al.*, Case No. 09-31797-bjh (Bankr. N.D. Tex.); *In re Bombay Co., Inc.*, Case No. 07-44084-dml (Bankr. N.D. Tex.); *In re Mirant Corp.*, Case No. 03-46590-dml (Bankr. N.D. Tex.); *In re Daisytek, Incorporated, et al.*, Case No. 03-34762 (Bankr. N.D. Tex.); *In re Mosaic Group (US) Inc., et al.*, Case No. 02-81440 (Bankr. N.D. Tex.); *In re Kevco, Inc.*, Case No. 01-40783 (Bankr. N.D. Tex.). The Debtor submits that the present circumstances warrant similar relief in this case.

D. Ample Authority Exists to Support Payment of the Trust Fund Taxes

25. Pursuant to Bankruptcy Code § 541(d), property in which a debtor, as of the commencement date of a bankruptcy case, holds only legal title, and not an equitable interest, becomes property of the debtor’s estate “only to the extent of the debtor’s legal title to such property, but not to the extent of any equitable interest in such property.” 11 U.S.C. § 541(d).

26. Any Taxes that are considered Trust Fund Taxes do not constitute property of the Debtor’s estate, as the Trust Fund Taxes are held in trust for payment to the Taxing Authorities. *See, e.g., Begier v. Internal Revenue Serv.*, 496 U.S. 53, 59 (1990); *In re Al Copeland Enters., Inc.*, 991 F.2d 233, 237 (5th Cir. 1993); *In re Megafoods Stores, Inc.*, 163 F.3d 1063, 1067-68 (9th Cir. 1998); *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 97 (3rd Cir. 1994); *In re*

Shank, 792 F.2d 829, 832 (9th Cir. 1986); *DiChiaro v. N.Y. State Tax Comm'n*, 760 F.2d 432, 433–34 (2d Cir. 1985); *In re Equalnet Comm. Corp.*, 258 B.R. 368, 370 (Bankr. S.D. Tex. 2000).

27. Accordingly, the Debtor should be permitted to pay the Trust Fund Taxes, if any, when due as the Debtor possesses bare legal title but no equitable interest in the funds held to pay such Taxing Authorities.

E. Cause Exists to Authorize the Debtor's Financial Institutions to Honor Checks and Electronic Fund Transfers

28. Subject to budget approval by the Debtor's DIP lender, the Debtor anticipates that it will 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 access to DIP financing. Accordingly, the Debtor requests that the Court authorize all applicable financial institutions, when requested by the Debtor, to receive, process, honor and pay any and all checks or wire transfer requests in respect of the relief requested herein.

Request for Immediate Relief

29. Bankruptcy Rule 6003 provides that to the extent relief is necessary to avoid immediate and irreparable harm, a bankruptcy court may approve a motion to pay a pre-petition claim. Fed. R. Bankr. P. 6003. For the reasons stated previously herein, the Debtor submits that the requested relief is necessary to prevent immediate and irreparable harm to the estate.

30. Further, to implement the foregoing successfully, the Debtor requests a waiver of the notice requirement of Bankruptcy Rule 6004(a) and the 14-day stay under Bankruptcy Rule 6004(h). The exigent nature of the relief sought herein justifies immediate relief that is necessary for the Debtor to be able to continue to operate the Debtor's business and preserve the value of the estate.

Reservation of Rights

31. Nothing contained herein is intended or should be construed as an admission, finding, or ruling as to the validity or priority of any claim against the Debtor or a waiver of the Debtor's rights to dispute any claim. The Debtor expressly reserves its rights to contest any claim, including claims filed by Taxing Authorities, and including with respect to whether any such claim filed by a Taxing Authority is a secured claim or is otherwise entitled to priority status. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity, priority, or secured status of any claim or a waiver of the Debtor's rights to subsequently dispute the validity, priority, or secured status of any such claim.

Notice

32. 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 upon the terms set forth herein, 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 PAY PREPETITION
SALES, USE, PROPERTY, AND OTHER TAXES AND RELATED OBLIGATIONS**

On _____, 2016, the Court conducted a hearing to consider the *Debtor's* *Emergency Motion for an Order Pursuant to 11 U.S.C. §§ 105(a), 363(b), and 507(a)(8) (I) Authorizing the Debtor to Pay Certain Prepetition Taxes and (II) Directing Financial Institutions to Honor and Process Related Checks and Transfers* (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 is authorized, but not required, to pay Prepetition Taxes³ to various Taxing Authorities.
3. The Debtor is authorized, but not required, to pay Prepetition Taxes, in its sole discretion, in the ordinary course of business as the Prepetition Taxes become due.
4. Notwithstanding the relief granted herein and any actions taken hereunder, nothing contained in this Order or any payment made pursuant to this Order shall constitute, nor is it intended to constitute, an admission as to the validity or priority of any claim against the Debtor, a waiver of the Debtor's rights to subsequently dispute such claim or the assumption or adoption of any agreement, contract or lease under Bankruptcy Code § 365.
5. The banks and financial institutions on which checks were drawn or electronic payment requests made in payment of the prepetition obligations approved herein are authorized and directed to receive, process, honor, and pay all such checks and electronic payment requests when presented for payment, and all such banks and financial institutions are authorized to rely on the Debtor's designation of any particular check or electronic payment request as being approved by this Order.

³ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

6. 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).

7. The Debtor is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

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

9. 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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