

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

In re:	)	Chapter 11
	)	
MONTESQUIEU, INC., <u>et al.</u> , <sup>1</sup>	)	Case No. 19-10599 (BLS)
	)	
Debtors.	)	Joint Administration Requested
	)	

**MOTION OF THE DEBTORS PURSUANT TO 11 U.S.C. §§ 105(a), 363, AND 507(a)  
FOR AN ORDER (A) AUTHORIZING THE DEBTORS TO (I) PAY WAGES,  
SALARIES, AND OTHER COMPENSATION, (II) MAINTAIN BENEFITS, AND (III)  
PAY REIMBURSABLE EMPLOYEE EXPENSES AND (B) AUTHORIZING AND  
DIRECTING BANKS AND OTHER FINANCIAL INSTITUTIONS TO PAY ALL CHECKS  
AND ELECTRONIC PAYMENT REQUESTS MADE BY THE DEBTORS RELATING TO  
THE FOREGOING**

Montesquieu, Inc. and certain of its affiliates, as debtors and debtors in possession (collectively, the “Debtors”), by and through their undersigned proposed counsel, file this motion (this “Motion”) for the entry of an order substantially in the form attached hereto as Exhibit A (the “Order”) pursuant to sections 105(a), 363, and 507(a) of title 11 of the United States Code (i) authorizing, but not requiring the Debtors to (a) pay and/or honor prepetition wages, salaries, and other compensation, (b) maintain certain benefits, and (c) pay reimbursable employee expenses; and (ii) authorizing banks and other financial institutions to receive, process, honor, and pay all checks presented for payment and electronic payment requests relating to the foregoing. In support of this Motion, the Debtors respectfully state as follows:<sup>2</sup>

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<sup>1</sup> The Debtors and the last four digits of their respective taxpayer identification numbers include: Montesquieu, Inc. (8069), WG Best Weinkellerei, Inc. dba Montesquieu Winery (California) (0458) and Montesquieu Corp. (California) (4025). The headquarters and service address for the above-captioned Debtors is 8929 Aero Dr, San Diego, California 92123.

<sup>2</sup> The facts and circumstances supporting this Motion are set forth in the Declaration of Fonda Hopkins in Support of Debtors' Chapter 11 Petitions and First Day Motions (the “First Day Declaration”), filed contemporaneously herewith. The Debtors further rely on the First Day Declaration in support of this Motion.

## **JURISDICTION**

1. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). The Debtors consent, pursuant to Rule 7008 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and 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”), to the entry of a final order by the Court in connection with this Motion if 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.

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are 105(a), 363, and 507(a) of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”). Relief also is warranted under Bankruptcy Rules 6003 and 6004.

## **INTRODUCTION**

4. On the date hereof (the “Petition Date”), each of the Debtors filed a petition with this Court under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

5. No party has requested the appointment of a trustee or examiner in these chapter 11 cases, and no committees have been appointed.

6. A description of the Debtors' businesses, the reasons for commencing these chapter 11 cases, and the relief sought from this Court to allow for a smooth transition into chapter 11 are set forth in the First Day Declaration.

### **RELIEF REQUESTED**

7. As of the Petition Date, the Debtors employ approximately 40 persons (the "Employees") as of the Petition Date. The Employees are employed through the PEO (as defined below). To minimize the personal hardships that the Employees will suffer if the prepetition employee-related obligations are not paid, to maintain the morale of the Employees during this critical time, and to minimize disruptions to the Debtors' ongoing business operations, the Debtors, by this Motion, seek authority, in its sole discretion, to: (i) pay unpaid prepetition claims for wages salaries, and commissions to the Employees (the "Unpaid Wages"); (ii) remit applicable withholding obligations to the proper third parties; (iii) honor and maintain certain benefits offered by the Debtors (the "Benefits"); (iv) reimburse certain unpaid business expenses incurred prepetition by the Workforce; and (v) pay all costs incident to the foregoing as set forth in detail below.

8. Under Bankruptcy Code sections 105(a), and 363(b)(1) and (c)(1) and the "necessity of payment" doctrine, the Debtors seek authority to pay or otherwise honor, in its sole discretion:

- a. the Unpaid Wages, including any associated payroll processing obligations;
- b. any Employer Tax Obligations (as defined below) attributable to the period prior to the Petition Date and to remit the same to applicable taxing authorities or other appropriate third-parties;
- c. the General Reimbursement Obligations (as defined below);

- d. all prepetition obligations under the Medical Plans (as defined below);
- e. all prepetition obligations under the PEO, including those obligations incurred prepetition and liquidated post-petition;
- f. all prepetition obligations regarding the Debtor's employee life and disability insurance plan;
- g. vacation time earned prepetition by Employees; and
- h. any other prepetition claims or obligations described in this Motion for which such authority is specifically requested herein (with each of the foregoing referred to collectively as the "Prepetition Workforce Obligations").

9. The Debtors also seek authority to continue, in their sole discretion, on a post-petition basis:

- a. the Medical Plans;
- b. the PEO;
- c. payment of the Employer Tax Obligations; and
- d. any other benefit program described in this Motion for which authority is specifically requested herein (with each of the foregoing referred to collectively as the "Employee Programs").

10. The Debtors represent that (i) the Debtors will not distribute any amounts over the § 507(a)(4) priority cap of \$12,850 directly to any individual Employee on account of aggregate pre-Petition Date Unpaid Wages or the section 507(a)(5) priority cap on account of the types of employee benefit programs listed therein, and (ii) the Debtors will not pay any amounts in excess of the estimated outstanding amounts for each category of prepetition claim identified herein without further order from this Court.

11. The Debtors further request that the Court authorize and direct the Debtors' banks and other financial institutions to receive, process, honor, and pay all checks presented for payment and electronic payment requests relating to the foregoing.

12. Notwithstanding the authority requested in this Motion, the Debtors, in the ordinary course of business may sometimes modify, change and discontinue employee programs and implement new employee programs, and will continue to do so during this chapter 11 case. The Debtors will provide notice thereof as required by applicable rules and law, if any.

13. The Debtors retain ADP TotalSource, Inc. ("ADP") as co-employer of its Employees through a Professional Employer Organization (the ("PEO"), to administer its payroll for Employees. ADP, through the PEO, handles the human resources management and benefits administration function and issues payroll checks and direct deposits to its Employees on a bi-weekly basis. The Debtors are responsible for certain contributions respecting benefits for the Employees.

14. The Debtors' recent aggregate monthly payroll, excluding overtime, commissions and benefits, was approximately \$160,000 per month.

15. While the Debtors do not believe that as of the Petition Date any amounts on account of the Debtors' contributions to tax and insurance withholdings were incurred and unpaid in connection with the Unpaid Wages (the "Employer Tax Obligations"), the Debtors nonetheless request authority to pay any Employer Tax Obligations that accrued prior to the Petition Date, including but not limited to those that are subsequently deemed to be due and owing pursuant to any audit of the Employer Tax Obligations which occurs after the Petition Date.

16. The Debtors seeks authority to pay the Unpaid Wages and any outstanding Employer Tax Obligations in its ordinary course operations.

17. Under the laws of the states in which the Debtors operate, the Debtors are required to maintain workers' compensation insurance to provide their Employees with coverage for claims arising from or related to their employment with the Debtors. The Debtors currently maintain an annual workers' compensation policy (the "Workers' Compensation Policy") with the PEO through which the Debtors receive workers' compensation insurance coverage.

18. The Debtors submit that the continuance of its Workers' Compensation Policy is appropriate in the ordinary course of business, but out of an abundance of caution, seeks authority to maintain its workers' compensation insurance in accordance with applicable law postpetition and to pay all premium installments to the insurance carrier as they come due in the ordinary course of business for going forward coverage.

19. It is the Debtors' policy to reimburse Employees who incur business expenses in the ordinary course of performing their duties on behalf of the Debtors (the "General Reimbursement Obligations"). Such General Reimbursement Obligations also may include amounts billed by an Employee to corporate charge cards for the purchase of supplies, inventory, and equipment on behalf of the Debtors and in support of the Debtors' businesses.

20. It is difficult for the Debtors to determine the exact amounts of General Reimbursement Obligations that are due and owing for any particular time period because the expenses incurred by the Employees on behalf of the Debtors throughout the year vary on a monthly basis and because there may be some delay between when an Employee incurs an expense and submits the corresponding expense report for processing.

21. By this Motion, the Debtors seek authority to pay any prepetition General Reimbursement Obligations (including any such amounts due to former employees) up to \$25,000

and to continue to honor General Reimbursement Obligations incurred post-petition in the ordinary course of the Debtors' business.

### **BASIS FOR RELIEF**

22. As a result of this chapter 11 filing, the Debtors generally are prohibited from paying claims that arose prior to the Petition Date unless the Debtors receive authorization from the Court. Statutory support for the requested relief exists pursuant to sections 105(a), 363(b)(1) and (c)(1), and 507(a) of the Bankruptcy Code, and the "necessity of payment" doctrine. Bankruptcy Code section 363(b)(1) authorizes a debtor in possession to use property of the estate other than in the ordinary course of business after notice and a hearing. Bankruptcy Code section 363(c) authorizes a debtor in possession to enter into transactions in the ordinary course of business without notice and a hearing. Bankruptcy Code section 105(a) further provides, in pertinent part, that this Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code. Accordingly, because most, if not all, such priority claims may be paid in full under a plan of reorganization, unless the holders otherwise agree to lesser treatment, accelerated payment of such claims at this time is appropriate and this Court is authorized to grant the relief requested.

23. The relief requested in this Motion is supported by the "necessity of payment" doctrine. Courts have recognized the applicability of the "necessity of payment" doctrine with respect to the payment of prepetition employee expense reimbursements. *See, e.g., In re Chateaugay Corp.*, 80 B.R. 279, 281 (Bankr. S.D.N.Y. 1987) (under the "necessity of payment" doctrine, bankruptcy court should defer to the debtor's business judgment in permitting payment of certain workers' compensation claims). Similarly, the court in *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989) stated that the "necessity of payment" doctrine "recognizes

the existence of the judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor.” In that case, the court permitted Eastern Air Lines, Inc. to pay its current employees’ prepetition wages, salaries, medical benefits, and business expense claims. Judge Lifland relied on his equitable powers under Bankruptcy Code section 105(a) and, in particular, the “necessity of payment” doctrine to authorize such payments, recognizing that the debtor had to make the payments in order to retain its current employees and maintain positive employee morale – two factors that he deemed critical to the rehabilitation of an operating debtor. *Id.* at 176-77 (citing H.R. Rep. No. 595 95th Cong. 1st Sess. 16 (1977)).

24. Therefore, the “necessity of payment” doctrine authorizes the Debtors to pay the amounts they seek authority to pay by this Motion because the Debtors’ Employees are critical assets, necessary both to the Debtors’ operations and the successful prosecution of these chapter 11 cases.

25. Moreover, under Bankruptcy Code section 507(a)(4), claims of Employees of the Debtors for “wages, salaries, or commissions, including vacation, severance, and sick leave pay” earned within 180 days before the Petition Date are afforded priority unsecured status to the extent of \$12,850 per Employee. The Debtors believe that all of the Unpaid Wages relating to the period prior to the Petition Date constitute priority claims under Bankruptcy Code section 507(a)(4). As priority claims, the Unpaid Wages must be paid in full before any general unsecured obligations of the Debtors may be satisfied. Accordingly, the relief requested may affect only the timing of the payment of these priority obligations, and will not prejudice the rights of general unsecured creditors or other parties in interest.



26. Upon information and belief, none of the Employees are currently owed Unpaid Wages. Pursuant to the relief requested herein, the Debtors request authority to pay up to the \$12,850 statutory cap under Bankruptcy Code section 507(a)(4) to each Employee on account of all Unpaid Wages collectively owing to such Employee.

27. Many Employees rely exclusively on receiving their full compensation or reimbursement of their expenses in order to continue to pay their daily living expenses. These Employees may be exposed to significant financial and healthcare related problems if the Debtors is not permitted to pay and/or honor the Prepetition Workforce Obligations, and the expenses associated therewith, in the ordinary course of the Debtors' business. Moreover, the Debtors believe that if they are unable to honor accrued Unpaid Wages and the Benefits described above, including honoring earned vacation time, Employee morale and loyalty will be jeopardized at a time when Employee support is critical.

28. The Employer Tax Obligations and other amounts either voluntarily or involuntarily withheld from Employee paychecks (collectively, the "Withholding Obligations") generally do not constitute property of the Debtors' estates, and principally represent employee earnings that governments (in the case of taxes), Employees (in the case of voluntary Withholding Obligations), and judicial authorities (in the case of involuntary Withholding Obligations), have designated for deduction from Employee paychecks. The failure to transfer these withheld funds could result in hardship to certain Employees. The Debtors may receive inquiries from garnishers regarding any failure to submit, among other things, child support and alimony payments, which are not the Debtors' property but, rather, have been withheld from Employee paychecks. Moreover, if the Debtors cannot remit these amounts, the Debtors' Employees may face legal action due to the Debtors' failure to submit these payments.

29. Finally, the Debtors submit that with respect to the wage-related taxes that constitute “trust fund” taxes, the payment of such taxes will not prejudice other creditors of the Debtors’ estate given that the relevant taxing authorities would have a priority claim under section 507(a)(8) of the Bankruptcy Code in respect of such obligations and the monies payable for trust fund taxes, as well as the other funds that are held in trust for the benefit of third parties are not property of the Debtors’ estates. *See, e.g., Begier v. IRS*, 496 U.S. 53 (1990) (withholding taxes are property held by a debtor in trust for another and, as such, are not property of the debtor’s estate).

30. The Employees have an intimate knowledge of the operation of the Debtors’ business and are critical components to the success of these chapter 11 cases. Deterioration in the morale and welfare of the Employees at this critical time undoubtedly would adversely impact the Debtors and their ability to reorganize. Satisfaction of the Prepetition Workforce Obligations and Benefits, as described herein, is necessary to maintain the Employees’ morale during the case and to insure continued, efficient operation in order to maximize value for all creditors. Moreover, Courts in this district have approved payment of prepetition claims for compensation and benefits similar to those described herein in other chapter 11 cases.

31. To the extent any Employee Programs, Employee Benefits or related agreement are deemed an executory contract within the meaning of section 365 of the Bankruptcy Code, the Debtors do not, at this time, seek to assume any such contract. Accordingly, if the Court authorizes the payments described above, such payments should not be deemed to constitute a post-petition assumption or adoption of the programs, policies, or agreements as executory contracts pursuant to section 365 of the Bankruptcy Code. Moreover, authorization to pay all amounts on account of

Unpaid Wages and Benefits shall not affect the Debtors' right to contest the amount or validity of these obligations.

32. The Debtors further request that all applicable banks and other financial institutions be authorized to receive, process, honor, and pay all checks presented for payment and to honor all fund transfer requests made by the Debtors to its Employees, whether such checks were presented or fund transfer requests were submitted prior to, on, or after the Petition Date.

33. Finally, the Debtors request authority to pay all of the processing fees associated with payment of the Prepetition Workforce Obligations including, but not limited to, any fees owed to any third party administrators of Benefits as described in the Motion.

#### **SATISFACTION OF BANKRUPTCY RULE 6003(b)**

34. Bankruptcy Rule 6003(b) empowers a court to grant relief within the first 21 days after the Petition Date "to the extent that relief is necessary to avoid immediate and irreparable harm." Fed. R. Bankr. P. 6003(b). For the reasons described more fully above, the Debtors submit that the requirements of Rule 6003 have been met and that the relief requested in this Motion is necessary to avoid immediate and irreparable harm. Accordingly, Bankruptcy Rule 6003 has been satisfied and the relief requested herein should be granted.

#### **REQUEST FOR WAIVER OF STAY**

35. Pursuant to Bankruptcy Rule 6004(h), "[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). To implement the foregoing successfully and ensure the wages and benefits owed to Employees are not interrupted, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule

6004(a) and the fourteen-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h), to the extent these rules are applicable.

### **RESERVATION OF RIGHTS**

36. Nothing contained in this Motion, however, shall constitute a request for authority to assume any agreements, policies, or procedures relating to Prepetition Workforce Obligations. Further, the Debtors seek to retain the discretion to decide which Prepetition Workforce Obligations it will pay and honor, and nothing in this Motion shall be deemed an admission by the Debtors that any Prepetition Workforce Obligations will in fact be paid or honored, or are entitled to any particular form of priority claim.

### **NOTICE**

37. The Debtors have provided notice of the Motion to: (a) the Office of the United States Trustee for the District of Delaware; (b) the entities holding the largest unsecured claims; (c) the Debtors' prepetition lenders; (d) the Internal Revenue Service; (e) the Securities and Exchange Commission; (f) the Delaware Secretary of State; (g) the Delaware Secretary of Treasury; (h) the California Secretary of State; and (i) the California State Treasurer's Office. In light of the nature of the relief requested, the Debtors respectfully submit that no further notice is necessary.

### **NO PRIOR REQUEST**

38. No prior request for the relief sought in this Motion has been made to this or any other court.

Wherefore, for the reasons set forth herein and in the First Day Declaration, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto as

Exhibit A, granting the relief requested herein and granting such other and further relief as is just and proper.

Dated: March 20, 2019

**FOX ROTHSCHILD LLP**

/s/ Thomas M. Horan

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*Proposed Counsel to the Debtors and  
Debtors-in-Possession*

# **EXHIBIT A**

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

In re:	)	Chapter 11
	)	
MONTESQUIEU, INC., <sup>1</sup>	)	Case No. 19-10599 (BLS)
	)	
Debtors.	)	Jointly Administered
	)	
	)	<b>Re: D.I. _____</b>
	)	

**ORDER GRANTING DEBTORS’ MOTION PURSUANT TO 11 U.S.C. §§ 105(a), 363,  
AND 507(a) FOR AN ORDER (A) AUTHORIZING THE DEBTORS TO (I) PAY  
WAGES, SALARIES, AND OTHER COMPENSATION, (II) MAINTAIN BENEFITS,  
AND (III) PAY REIMBURSABLE EMPLOYEE EXPENSES AND (B) AUTHORIZING  
AND DIRECTING BANKS AND OTHER FINANCIAL INSTITUTIONS TO PAY ALL  
CHECKS AND ELECTRONIC PAYMENT REQUESTS MADE BY THE DEBTORS  
RELATING TO THE FOREGOING**

Upon the motion (the “Motion”)<sup>2</sup> of the above-captioned debtors and debtors-in-possession (the “Debtors”) for entry of an order (i) authorizing, but not requiring, the Debtors to all the relief requested in the Motion, including to (a) pay and/or honor prepetition wages, salaries, and other compensation, (b) maintain payments to its payroll service, (c) maintain certain benefits and (d) pay reimbursable employee expenses; and (ii) authorizing and directing banks and other financial institutions to receive, process, honor, and pay all checks presented for payment and electronic payment requests relating to the foregoing; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order; and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and this being a core proceeding for which the Court may enter a final order; and it appearing that notice of the Motion has been given as set forth in the Motion

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<sup>1</sup> The Debtors and the last four digits of their respective taxpayer identification numbers include: Montesquieu, Inc. (8069), WG Best Weinkellerei, Inc. dba Montesquieu Winery (California) (0458) and Montesquieu Corp. (California) (4025). The headquarters and service address for the above-captioned Debtors is 8929 Aero Dr, San Diego, California 92123.

and that such notice is adequate under the circumstances; and a hearing having been held to consider the relief requested in the Motion (the "Hearing"); and the appearances of all interested parties having been noted in the record of the Hearing; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and it appearing that the relief requested in the Motion is in the best interests of the Debtors, the Debtors' estates, creditors, and parties in interest; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor, it is hereby ordered that:

1. The Motion is granted as set forth herein.
2. Pursuant to Bankruptcy Code sections 507(a), 363(b), and 105(a), the Debtors are authorized, but not directed, to pay and/or honor the Prepetition Workforce Obligations, the Employee Programs, all costs and/or expenses related thereto, in accordance with the Debtors' policies in the ordinary course of business, provided that the Debtors will not distribute any amounts over the Bankruptcy Code section 507(a)(4) priority cap of \$12,850 directly to any individual Employee on account of aggregate pre-Petition Date Unpaid Wages or the Bankruptcy Code section 507(a)(5) priority cap on account of the types of employee benefit programs listed therein.
3. The Debtors and any other third party administering withholding obligations on behalf of the Debtors, are authorized, but not directed, to make payments to applicable third parties with respect to the Withholding Obligations, and the Employer Tax Obligations, as set forth in the Motion, and the costs associated therewith, in accordance with the Debtors' ordinary course of business and stated policies, as set forth in the Motion.
4. In accordance with this Order and any other order of this Court, the banks and financial institutions at which the Debtors maintains their accounts are authorized to honor all



fund transfer requests made by the Debtors related hereto, to the extent that sufficient funds are on deposit in such accounts.

5. The Debtors are authorized to pay all processing and administrative fees associated with the Prepetition Workforce Obligations, Employee Programs, and other benefits as set forth in the Motion. The Debtors also are authorized to take such other actions or execute such other documents as may be necessary to implement the relief granted by this Order.

6. Nothing in the Motion or this Order shall be deemed to be (i) an assumption or adoption of any policy, procedure, or executory contract that may be described or referenced herein or in the Motion, (ii) an admission as to the validity of claim against the Debtors; or (iii) a waiver of the Debtors' rights to dispute any claim on any grounds. The Debtors retain the discretion to not make the payments contemplated by this Order and nothing in this Order will, in and of itself, constitute a promise or guarantee of any payment.

7. Bankruptcy Rule 6003(b) has been satisfied.

8. The requirements of Bankruptcy Rule 6004(a) are waived.

9. Notwithstanding any applicability of Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon entry of this Order.

10. Nothing in the Motion shall be deemed a request by the Debtors for authority to assume, and nothing in this Order shall be deemed authorization to assume any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code or create an administrative obligation for any prepetition wages or benefits.

11. This Court shall retain jurisdiction to implement, interpret, and enforce this Order.

Dated: \_\_\_\_\_, 2019

\_\_\_\_\_  
The Honorable Brendan Linehan Shannon  
United States Bankruptcy Judge