

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

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

**MOTION OF DEBTORS FOR ENTRY OF AN ORDER (A) AUTHORIZING DEBTORS
TO PAY PREPETITION CLAIMS OF CRITICAL VENDORS AND (B) GRANTING
RELATED RELIEF**

Montesquieu, Inc., (“Holdings”), WG Best Weinkellerei, Inc. dba Montesquieu Winery (“WG Best”) and Montesquieu Corp. (“Montesquieu Corp.” and together with the Holdings and WG Best, the “Debtors”), the debtors-in-possession in the above captioned chapter 11 cases, by and through their attorneys, Fox Rothschild, LLP, submit this motion pursuant to 11 U.S.C. §§ 105(a) and 363(b) and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) for authority to pay the liquidated, non-contingent, and undisputed prepetition claims of vendors and service providers (the “Prepetition Vendor Claims”) in the ordinary course of business under the terms and conditions set forth herein (the “Motion”).

JURISDICTION

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (M). 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

¹ 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 8221 Arjons Drive, San Diego, California 92126.

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 of this proceeding and this Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory basis for the relief requested in herein is sections 105(a) and 363 of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”), Bankruptcy Rules 6003 and 6004, and Local Rules 9013-1(m).

BACKGROUND

4. On March 20, 2019 (the “Petition Date”), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and property as debtors-in-possession in accordance with sections 1107 and 1108 of the Bankruptcy Code.

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

6. The factual background relating to the commencement of this Chapter 11 case is set forth in detail in the Declaration of Fonda Hopkins in Support of First Day Motions (the “Hopkins Declaration”) and is incorporated herein by reference.

RELIEF REQUESTED

7. In the ordinary course of their business, the Debtors rely on certain third-party vendors and service providers to supply goods, materials and services that the Debtors cannot operate without or cannot replace without incurring exorbitant costs (collectively, the “Critical Vendors”). The Debtors’ business relies on their access to and relationship with a network of

vendors and suppliers. Any disruption in the Debtors' supply of merchandise would have a far-reaching economic and operational impact on their business. The vast majority of the Debtors' merchandise is provided by a broad network of vendors that, for the most part, conduct business with the Debtors on an invoice by invoice or purchase order by purchase order basis, and not pursuant to long-term contracts. The Debtors also rely on key service providers. These vendors typically supply their customers with services and products on trade terms based on their experience with and perceived risk of conducting business with such customers.

8. The Debtors undertook a process to identify the Critical Vendors using the following criteria: (i) whether a vendor is a sole-source or primary provider of services or products; (ii) whether certain customizations, specifications, or volume requirements prevent the Debtors from obtaining a vendor's goods or services from alternative sources within a reasonable timeframe; and (iii) if a vendor is not a sole-source or primary provider of services or products, whether the Debtors can continue to operate in the ordinary course while a replacement vendor is secured. As a result of their critical review and evaluation, the Debtors have identified a narrow subset of vendors as Critical Vendors.

9. The Critical Vendors do not operate under formal contracts with the Debtors. Instead, the Critical Vendors rely on prompt and full payment. Absent assurance of immediate payment either in part or in whole, the Critical Vendors could refuse to deliver goods or services to the Debtors. The Debtors believe that it would be extremely difficult, if not impossible, to replace the Critical Vendors within a reasonable time without severe disruption to the Debtors' business. Such harm would likely far outweigh the cost of payment of the Critical Vendor Claims.

10. As of the Petition Date, the Debtors will owe amounts to certain Critical Vendors (a) that have been billed and invoiced and/or (b) that have accrued immediately prior to the Petition Date for which they have not yet been invoiced or payment is not yet due. The Debtors anticipate the total amount of Critical Vendor Claims will be approximately \$15,000.

11. Given the importance of the goods or services provided by the Critical Vendors, it is imperative that the Debtors be granted, on an emergency basis, the flexibility and authority to satisfy the prepetition claims of the Critical Vendors as any disruption in the Debtors' ability to adequately stock their retail stores and provide merchandise directly to their customers would cause immediate and irreparable damage to the Debtors' business.

12. Subject to the Court's approval, the Debtors intend to pay the Critical Vendor Claims only to the extent necessary to preserve its business as a going concern. To that end, in return for paying the Critical Vendors Claims, the Debtors propose that they be authorized to require that the Critical Vendors provide favorable trade terms for the postpetition delivery of goods and services. Specifically, the Debtors propose to condition the payment of the Critical Vendor Claims upon the Critical Vendors' agreement to continue—or recommence—supplying goods and services to the Debtors in accordance with trade terms at least as favorable as those practices and programs (including credit limits, pricing, timing of payments, availability, and other terms) in place 12 months prior to the Petition Date, or such other trade terms that are acceptable to the Debtors in their discretion (the "Customary Trade Terms").

13. In addition, the Debtors request that, if the Critical Vendors accept payment pursuant to the relief requested by this Motion and thereafter do not continue to provide goods or services on Customary Trade Terms, then: (a) the Debtors may then take any and all appropriate steps to cause such Critical Vendors to repay payments made to it on account of its

prepetition claim to the extent that such payments exceed the postpetition amounts then owing to such Critical Vendors; (b) upon recovery by the Debtors, any prepetition claim of such party shall be reinstated as if the payment had not been made; and (c) if there exists an outstanding postpetition balance due from the Debtors to such party, the Debtors may elect to re-characterize and apply any payment made pursuant to the relief requested by the Motion to such outstanding postpetition balance and such supplier or vendor will be required to repay to the Debtors such paid amounts that exceed the postpetition obligations then outstanding without the right of any setoffs, claims, provisions for payment of any claims, or otherwise.

14. The Debtors submit that the relief requested herein is essential, appropriate and in the best interests of the Debtors, their creditors and all parties in interest.

BASIS FOR RELIEF

15. The Debtors submit that the payment of the Prepetition Vendor Claims in the ordinary course of business is appropriate pursuant to sections 105(a) and 363(b) of the Bankruptcy Code, as well as the “necessity of payment” doctrine. Section 363 of the Bankruptcy Code 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.” *See* 11 U.S.C. § 363(b)(1). Under this section, a court may authorize a debtor to pay certain prepetition claims. *See, e.g., In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). To do so, “the debtor must articulate some business justification, other than the mere appeasement of major creditors[.]” *Id.* As set forth below, the Debtors can easily articulate a sound business justification for payment of the Prepetition Vendor Claims in the ordinary course of business.

A. Payment of the Prepetition Vendor Claims is Warranted and Necessary to Allow the Debtors to Successfully Operate their Businesses and Preserve the Value of their Estates

16. Debtors believe that the relief requested in the Motion is warranted, necessary and reasonable under the circumstances. Specifically, the satisfaction of the Prepetition Vendor Claims in the ordinary course of business represents an amount not greater than \$15,000. By making these payments in the ordinary course, the Debtors will prevent any disruption in their ability to obtain the goods and services necessary to the operation of their respective businesses and, ultimately, the preservation of their business.

17. The payment of Vendors in accordance with the Customary Trade Terms is appropriate pursuant to sections 105(a) and 363(b) of the Bankruptcy Code, as well as the “necessity of payment” doctrine. Pursuant to section 105(a) of the Bankruptcy Code, “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” *See* 11 U.S.C. § 105(a). Under the doctrine of necessity, a bankruptcy court may exercise its equity powers under section 105(a) to authorize a debtor to pay certain prepetition claims, even though such payment is not explicitly authorized under the Bankruptcy Code. *See, e.g., In re Just for Feet, Inc.*, 242 B.R. 821, 824 (D. Del. 1999) (bankruptcy courts may exercise equity powers to authorize payment of prepetition debt where such payment is necessary to preserve the going concern value of a debtor's business); *Ionosphere Clubs*, 98 B.R. at 175 (section 105 empowers bankruptcy courts to authorize payment of prepetition debt “when such payment is needed to facilitate the rehabilitation of the debtor”).

18. Additionally, several courts have authorized payment of prepetition claims pursuant to section 363(b) of the Bankruptcy Code. As noted above, section 363(b)(1) authorizes courts to permit a debtor to “use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1); *see also Ionosphere Clubs*, 98 B.R. at 175

(“Section 363(b) gives the court broad flexibility in tailoring its orders to meet a wide variety of circumstances.”); *In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15, 19-20 (Bankr. M.D. Fla. 2005) (acknowledging that in certain circumstances section 363(b)(1) might authorize payment of prepetition claims if it was shown that such payment would “enable a successful reorganization and make even the disfavored creditors better off”).

19. The Debtors do not seek authority to pay all Prepetition Vendor Claims immediately, but only to pay in the ordinary course of business undisputed amounts that come due on terms consistent with prepetition practice. Thus, the Debtors submit that the relief is narrowly tailored to facilitate their proposed fast-tracked chapter 11 reorganization process.

20. The relief sought herein is vital to the Debtors' successful reorganization. The Debtors submit that good relations with their Vendors is essential to the continued operation of their businesses during the pendency of their chapter 11 cases.

21. Furthermore, if the Vendors agree to continue supplying the Debtors postpetition under Customary Trade Terms, the Debtors will avoid unnecessary expenses during these cases. Customary Trade Terms will help the Debtors maintain their liquidity, and will facilitate their ability to sustain operations while reorganizing, while avoiding potential additional costs relating to the shortening of trade terms and/or Vendor requests for the payment of cash on demand or in advance.

22. In addition, the relief requested herein allows the Debtors to avoid the expense required to analyze each Prepetition Vendor Claim to determine exactly which amounts are subject to potential liens, payable as postpetition administrative expenses, or subject to administrative priority under section 503(b)(9) of the Bankruptcy Code. Finally, paying the Prepetition Vendor Claims in the ordinary course of business minimizes disruption to the

Debtors' operations by preventing the initiation of reclamation claims, adversary proceedings and other motions filed by the Vendors seeking payment on their prepetition claims. Paying such Claims in the ordinary course of business renders a savings to the Debtors both monetarily and operationally by preserving liquidity, and enabling the Debtors to operate smoothly during these cases.

B. Failure to Authorize Payment of the Prepetition Vendor Claims Within 21 Days After the Petition Date Would Cause Immediate and Irreparable Harm

23. Pursuant to Bankruptcy Rule 6003, a court may grant a motion authorizing payment of prepetition claims within twenty-one (21) days of the Petition Date if relief is necessary to avoid immediate and irreparable harm. See Fed. R. Bankr. P. 6003. The Debtors would suffer immediate and irreparable harm if the Court denied the relief request herein.

24. The Debtors request a waiver of any stay of the effectiveness of the order approving this Motion. 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).

25. As stated above, any disruption in the Debtors’ ability to adequately stock their retail stores and provide Merchandise to Debtors’ customers would cause immediate and irreparable damage to Debtors’ business. Thus, he Debtors submit that they have satisfied the requirements of Bankruptcy Rules 6003, ample cause exists to justify a waiver of the fourteen-day stay imposed by Bankruptcy Rule 6004(h), and there is sufficient support for payment of the Prepetition Vendor Claims as proposed herein.

RESERVATION OF RIGHTS

26. Nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtors, a waiver of the Debtors' right to dispute any claim

or an approval or assumption of any agreement, contract or lease. Likewise, if this Court grants the relief requested herein, any payment made or credit granted pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

NOTICE

23. 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) counsel to the agent for the Debtors' prepetition secured 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

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

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CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter interim and final orders substantially in the form attached hereto as Exhibit A and Exhibit B respectively (i) authorizing the Debtors to pay any prepetition amounts owing to the Critical Vendors in the ordinary course of business (ii) scheduling a Final Hearing on the Motion; and (iii) granting such other and further relief as the Court deems 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. <u>et al.</u> , ¹	)	Case No. 19-10599 (BLS)
)	
Debtors.	)	Jointly Administered
)	
	)	Re: D.I. _____
)	

**INTERIM ORDER (A) AUTHORIZING DEBTORS TO PAY PREPETITION CLAIMS
OF CRITICAL VENDORS AND (B) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”)² of Montesquieu, Inc. and certain of its affiliates, as debtors and debtors in possession (collectively, the “Debtors”), for entry of an interim order (this “Interim Order”) (i) authorizing but not directing, Debtors to pay the liquidated, non-contingent, and undisputed prepetition claims of vendors and service providers (the “Prepetition Vendor Claims”) in the ordinary course of business under the terms and conditions set forth described in this Motion; (ii) scheduling a Final Hearing on the Motion; and (iii) granting such other and further relief as the Court deems proper, all as more fully set forth in the Motion; and upon the First Day Declaration; and the Court having found that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and the Court having found that the Debtors provided

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² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

appropriate notice of the Motion and the opportunity for a hearing on the Motion under the circumstances; and the Court having reviewed the Motion and having heard the statements in support of the relief requested therein before the Court (the “Hearing”); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is hereby ordered that:

1. The Motion is granted as set forth herein.

2. The final hearing (the “Final Hearing”) on the Motion shall be held on _____, 2019 at __:__ .m., prevailing Eastern Standard Time Any objections or responses to entry of a final order on the Motion shall be filed on or before 4:00 p.m. on _____, 2019; and shall be served on: (a) the Debtors, 8929 Aero Dr., San Diego, CA 92123; (b) proposed counsel to the Debtors, Fox Rothschild LLP, 919 N. Market St., Suite 300, Wilmington, DE 19801, Attn: Thomas M. Horan (thoran@foxrothschild.com); (c) the Office of the United States Trustee for the District of Delaware, 844 King Street, Suite 2207, Wilmington, DE 19801, Attn: Linda Richenderfer, Esq. (linda.richenderfer@usdoj.gov); (d) counsel to any statutory committee appointed in these chapter 11 cases; and (e) any other such party entitled to notice. In the event no objection to entry of the Final order on the Motion are timely received, this Court may enter such Final Order without need for the Final Hearing.

3. The Debtors are authorized, but not directed to, to pay the liquidated, non-contingent, and undisputed prepetition claims of vendors and service providers (the “Prepetition Vendor Claims”) in the ordinary course of business under the terms and conditions set forth in the Motion.

4. The Debtors are further authorized to condition the payment of the Critical Vendor Claims upon the Critical Vendors' agreement to continue—or recommence—supplying goods and services to the Debtors in accordance with trade terms at least as favorable as those practices and programs (including credit limits, pricing, timing of payments, availability, and other terms) in place 12 months prior to the Petition Date, or such other trade terms that are acceptable to the Debtors in their discretion (the “Customary Trade Terms”).

5. If the Critical Vendors accept payment pursuant to the relief requested by the Motion and thereafter do not continue to provide goods or services on Customary Trade Terms, then: (a) the Debtors may then take any and all appropriate steps to cause such Critical Vendors to repay payments made to it on account of its prepetition claim to the extent that such payments exceed the postpetition amounts then owing to such Critical Vendors; (b) upon recovery by the Debtors, any prepetition claim of such party shall be reinstated as if the payment had not been made; and (c) if there exists an outstanding postpetition balance due from the Debtors to such party, the Debtors may elect to re-characterize and apply any payment made pursuant to the relief requested by the Motion to such outstanding postpetition balance and such supplier or vendor will be required to repay to the Debtors such paid amounts that exceed the postpetition obligations then outstanding without the right of any setoffs, claims, provisions for payment of any claims, or otherwise.

6. The contents of the Motion satisfy the requirements of Bankruptcy Rule 6003(b).

7. Notice of the Motion shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

8. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Interim Order are immediately effective and enforceable upon its entry.

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

10. The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Interim Order.

Dated: _____, 2019

The Honorable Brendan Linehan Shannon
United States Bankruptcy Judge

EXHIBIT B

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

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

**FINAL ORDER (A) AUTHORIZING DEBTORS TO PAY PREPETITION CLAIMS OF
CRITICAL VENDORS AND (B) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”)² of Montesquieu, Inc. and certain of its affiliates, as debtors and debtors in possession (collectively, the “Debtors”), for entry of an Final order (this “Final Order”) (i) authorizing but not directing, Debtors to pay the liquidated, non-contingent, and undisputed prepetition claims of vendors and service providers (the “Prepetition Vendor Claims”) in the ordinary course of business under the terms and conditions set forth described in this Motion; (ii) scheduling a Final Hearing on the Motion; and (iii) granting such other and further relief as the Court deems proper, all as more fully set forth in the Motion; and upon the First Day Declaration; and the Court having found that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and the Court having found that the Debtors provided

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² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

appropriate notice of the Motion and the opportunity for a hearing on the Motion under the circumstances; and the Court having reviewed the Motion and having heard the statements in support of the relief requested therein before the Court (the “Hearing”); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is hereby ordered that:

1. The Motion is granted as set forth herein.
2. The Debtors are authorized, but not directed to, to pay the liquidated, non-contingent, and undisputed prepetition claims of vendors and service providers (the “Prepetition Vendor Claims”) in the ordinary course of business under the terms and conditions set forth in the Motion.
3. The Debtors are further authorized to condition the payment of the Critical Vendor Claims upon the Critical Vendors’ agreement to continue—or recommence—supplying goods and services to the Debtors in accordance with trade terms at least as favorable as those practices and programs (including credit limits, pricing, timing of payments, availability, and other terms) in place 12 months prior to the Petition Date, or such other trade terms that are acceptable to the Debtors in their discretion (the “Customary Trade Terms”).
4. If the Critical Vendors accept payment pursuant to the relief requested by the Motion and thereafter do not continue to provide goods or services on Customary Trade Terms, then: (a) the Debtors may then take any and all appropriate steps to cause such Critical Vendors to repay payments made to it on account of its prepetition claim to the extent that such payments exceed the postpetition amounts then owing to such Critical Vendors; (b) upon recovery by the Debtors, any prepetition claim of such party shall be reinstated as if the payment had not been

made; and (c) if there exists an outstanding postpetition balance due from the Debtors to such party, the Debtors may elect to re-characterize and apply any payment made pursuant to the relief requested by the Motion to such outstanding postpetition balance and such supplier or vendor will be required to repay to the Debtors such paid amounts that exceed the postpetition obligations then outstanding without the right of any setoffs, claims, provisions for payment of any claims, or otherwise.

5. The contents of the Motion satisfy the requirements of Bankruptcy Rule 6003(b).

6. Notice of the Motion shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

7. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Final Order are immediately effective and enforceable upon its entry.

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

9. The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Final Order.

Dated: _____, 2019

The Honorable Brendan Linehan Shannon
United States Bankruptcy Judge