

**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 AN INTERIM AND FINAL ORDER PURSUANT TO 11 U.S.C. §§ 105(A) AND 363 AUTHORIZING DEBTORS TO PAY PREPETITION CLAIMS OF SHIPPERS AND CUSTOMS REPRESENTATIVES AND 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 proposed undersigned counsel, 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 continue to pay, in the ordinary course of business certain prepetition claims of the Debtors’ shippers (including Freight Forwarders and Common Carriers as defined herein), shipping and delivery logistics agents, customs representatives and warehousemen (the “Shippers and Customs Representatives”) who have (or may have) non-bankruptcy law remedies available to secure payment of their claims under the terms and conditions set forth herein (the “Motion”).

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.

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 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 bases for the relief requested in herein are 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 incorporated herein by reference.

RELIEF REQUESTED

7. The Debtors seek the authority to continue to pay, in the ordinary course of business, certain prepetition claims of the Debtors’ shippers (including Freight Forwarders and Common Carriers as defined herein), shipping and delivery logistics agents, Shippers and Customs Representatives who have (or may have) non-bankruptcy law remedies available to secure payment of their claims. The Debtors propose to pay such claims, when the Debtors, in their sole discretion, determine that such creditors’ exercise of their remedies would unduly disrupt the Debtors’ business. The Debtors request the authority, but not the obligation, to pay up to \$50,000 on account of such claims (the “Shipping and Custom Charges”). The Debtors also seek authority for all banks and financial institutions to honor any checks or requests for payment related to Shipping and Customs Charges whether presented prepetition or postpetition. Finally, the Debtors also seek authority to retain or obtain any Customs Bond needed, in their discretion.

8. The Debtors source, produce, bottle, and sell high quality boutique wine (the “Merchandise”) directly to consumers in the United States through telephonic and electronic commerce sales directly to consumers (“E-commerce Consumers”).

9. The Merchandise is manufactured within the United States and elsewhere. The Debtors’ business depends on the daily process of importing and shipping the Merchandise to stock the Debtors’ warehouse, and to make direct sales to E-commerce Consumers. The Merchandise is received into the Debtors’ San Diego distribution center (the “Distribution”).

Center”) and then shipped from there directly to E-commerce Consumers. The flow of Merchandise to and from the Debtors is dependent on the services provided by custom brokers, freight forwarders, and common carriers.

10. *Freight Forwarders.* The Debtors engage the services of freight forwarders that contract for, coordinate, and ensure the transportation of the Merchandise to and from the Distribution Center. The Merchandise is manufactured within and outside the United States and must be shipped from the domestic or international manufacturing site to the Distribution Center. Merchandise shipped internationally is subject to custom import duties upon arrival in the United States.

11. *Customs Brokers.* The Debtors rely on Customs Brokers to obtain possession of this Merchandise as it arrives in the United States from abroad and to expeditiously process the release of the Merchandise so it can be delivered to the Distribution Center.

12. *Common Carriers.* Merchandise at the Distribution Center is intended for sales through the Retail Stores, Wholesale Customers and E-commerce Consumers. After the Merchandise is brought to the Distribution Center by the Freight Forwarders, the Debtors then engage the services of certain Common Carriers to expedite shipment of Merchandise from the Distribution Center to the Retail Stores, Wholesale Customers and E-Commerce Consumers.

13. The estimated retail value of the Merchandise being transported and/or processed as of the Petition Date by the Shippers and Customs Representatives substantially outweighs the outstanding Shipping and Custom Charges. The Debtors’ ability to pay the Shippers and Customs Representatives that are involved in the daily transportation of the Merchandise to the Distribution Center and then from the Distribution Center to the E-commerce Consumers is critically important to the Debtors’ business operations.

14. The Debtors owe the Shippers and Customs Representatives approximately \$50,000 for prepetition shipping, custom duties, and similar charges. In the event that such charges remain unpaid, the Shippers and Customs Representatives likely will argue that they have possessory liens for transportation or storage costs, and may refuse to deliver or release goods in their possession until their claims are paid and their liens satisfied.

15. *Customs Bond.* The Debtors have a Customs Bond in place to provide assurance of payment of United States Customs (“U.S. Customs”) duties upon importation of goods into the United States. The Debtors do not anticipate any change in the existing Customs Bond and intend to keep the Customs Bond in place and renew or obtain any customs bond which may be needed going forward in the ordinary course of their businesses. Should the Customs Bond expire or otherwise be unavailable, clearance of certain Merchandise through U.S. Customs would be delayed or blocked which would be detrimental to the Debtors’ business. Maintenance of any appropriate or required Customs Bond will ensure proper clearance of the Debtors’ merchandise and avoid disruption in the Debtors’ business.

BASIS FOR RELIEF

16. Section 105(a) of the Bankruptcy Code provides that the Court “may issue any order ... that is necessary or appropriate to carry out the provisions of this title.” *See* 11 U.S.C. §105(a). A bankruptcy court’s use of its equitable powers to “authorize the payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept.” *See In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989).

17. Further, section 363(b) 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). Under this section, a court may

authorize a debtor to pay certain pre-petition claims. *See Ionosphere Clubs*, 98 B.R. at 175 (authorizing payment of pre-petition claims where the debtors articulate “some business justification, other than the mere appeasement of major creditors”); *see also In re James A. Phillips, Inc.*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (pursuant to section 363 of the Bankruptcy Code the Court authorized a contractor to pay pre-petition claims of some suppliers who were potential lien claimants because the payments were necessary for the general contractors to release funds owed to the debtors).

18. Section 363(c)(1) of the Bankruptcy Code provides that “[w]ho trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business without notice or a hearing.” *See* 11 U.S.C. § 363(c)(1).

19. The necessity of payment doctrine further supports the relief requested herein. The necessity of payment doctrine “recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay pre-petition claims where such payment is essential to the continued operation of the debtor.” *See Ionosphere Clubs*, 98 B.R. at 176; *In re C.A.F. Bindery*, 199 B.R. 828, 835 (Bankr. S.D.N.Y. 1996); *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991); *In re Structurlite Plastics Corp.*, 86 B.R. 922, 931 (Bankr. S.D. Ohio 1988) (payment of pre-petition claims are authorized when necessary to “permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately”); *In re Chateaugay Corp.*, 80 B.R. 279 (S.D.N.Y. 1987).

20. To determine whether a payment is necessary under this doctrine, bankruptcy courts may exercise their equitable powers and authorize a debtor to pay prepetition claims of creditors whose services are vital to the debtor’s reorganization efforts. *See In re Columbia Gas Sys. Inc.*, 136 B.R. 930, 939 (Bankr. D. Del. 1992) (recognizing that “[i]f payment of a pre-

petition claim 'is essential to the continued operation of [the debtor], payment maybe authorized''').

21. As noted above, the value of the Merchandise that is in transit with the Shippers and Customs Representatives substantially outweighs the Shipping and Custom Charges. The Debtors anticipate that the Shippers and Customs Representatives will demand immediate payment from the Debtors. Even absent a valid lien, the Shippers and Customs Representatives' mere possession (and retention) of the Debtors' Merchandise could severely disrupt the Debtors' operations and restructuring efforts.

22. Debtors assert the total proposed amount to be paid to the Shippers and Customs Representatives is justified and reasonable compared to the importance and necessity of the Shippers and Customs Representatives' releasing the merchandise and delivery of same and the losses the Debtors may suffer if their operations and the administration of their estates are disrupted. Moreover, in most cases, the Debtors do not believe that there are viable timely alternatives to the Shippers and Customs Representatives that are to be paid pursuant to this Motion.

RESERVATION OF RIGHTS

23. 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 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

24. 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

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

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 Shipping and Custom Charges, up to \$50,000 on account of such claims, when Debtors, in their sole discretion, determine that such creditors' exercise of their remedies would unduly disrupt the Debtors' business; (ii) authorizing all banks and financial institutions to honor any checks or requests for payment related to Shipping and Customs Charges whether presented prepetition or post-petition; (iii) authorizing Debtors to retain or obtain any Customs Bond needed at their discretion; (iv) scheduling a Final Hearing on the Motion; and (v) granting other and further relief as the Court deems proper.

Dated: March 20, 2019

FOX ROTHSCHILD LLP

/s/ Thomas M. Horan

Mette H. Kurth (DE Bar No. 6491)
Thomas M. Horan (DE Bar No. 4641)
919 N. Market St., Suite 300
Wilmington, DE 19899-2323
Telephone: (302) 654-7444
E-mail: mkurth@foxrothschild.com
E-mail: thoran@foxrothschild.com

-and-

Amanda Hunt
One Summerlin
1980 Festival Plaza Drive, Suite 700
Las Vegas NV 89135
Telephone: (702) 699-5162
E-mail: ahunt@foxrothschild.com

*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 (I) AUTHORIZING DEBTORS TO PAY PREPETITION CLAIMS
OF SHIPPERS AND CUSTOMS REPRESENTATIVES
AND (II) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”)² of Montesquieu, Inc. and certain its debtor affiliates, as debtors and debtors in possession (collectively, the “Debtors”), for entry of an interim order (this “Interim Order”) for authority (i) to continue to pay, in the ordinary course of business certain prepetition claims of the Debtors’ shippers (including Freight Forwarders and Common Carriers as defined herein), shipping and delivery logistics agents, customs representatives and warehousemen (the “Shippers and Customs Representatives”) who have (or may have) non-bankruptcy law remedies available to secure payment of their claims under the terms and conditions set forth in the 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

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 8929 Aero Dr, San Diego, California 92123.

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

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 it appearing that notice of the Motion has been given as set forth in the Motion and that such notice is adequate 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 is timely received, this Court may enter such Final Order without need for the Final Hearing.

3. On an interim basis, Debtors are authorized to pay any Shipping and Custom Charges, up to \$50,000 on account of such claims, when Debtors, in their sole discretion,

determine that such creditors' exercise of their remedies would unduly disrupt the Debtors' business; (ii) all banks and financial institutions are authorized to honor any checks or requests for payment related to Shipping and Customs Charges whether presented prepetition or post-petition; (iii) Debtors are authorized to retain or obtain any Customs Bond needed at their discretion under the terms and conditions set forth in the Motion.

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

5. 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.

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

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

8. 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 (I) AUTHORIZING DEBTORS TO PAY PREPETITION CLAIMS OF
SHIPPERS AND CUSTOMS REPRESENTATIVES
AND (II) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”)² of Montesquieu, Inc. and certain debtor affiliates, as debtors and debtors in possession (collectively, the “Debtors”), for entry of a final order (this “Final Order”) for authority (i) to continue to pay, in the ordinary course of business certain prepetition claims of the Debtors’ shippers (including Freight Forwarders and Common Carriers as defined herein), shipping and delivery logistics agents, customs representatives and warehousemen (the “Shippers and Customs Representatives”) who have (or may have) non-bankruptcy law remedies available to secure payment of their claims under the terms and conditions set forth in the 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

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 8929 Aero Dr, San Diego, California 92123.

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

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 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 on a final basis.
2. Debtors are authorized to pay any Shipping and Custom Charges, up to \$50,000 on account of such claims, when Debtors, in their sole discretion, determine that such creditors' exercise of their remedies would unduly disrupt the Debtors' business; (ii) all banks and financial institutions are authorized to honor any checks or requests for payment related to Shipping and Customs Charges whether presented prepetition or post-petition; (iii) Debtors are authorized to retain or obtain any Customs Bond needed at their discretion under the terms and conditions set forth in the Motion.
3. The contents of the Motion satisfy the requirements of Bankruptcy Rule 6003(b).
4. 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.
5. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Final Order are immediately effective and enforceable upon its entry.

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

7. 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