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7 [Proposed] General Insolvency
Counsel for Lorna Jane USA, Inc.
8

9 **UNITED STATES BANKRUPTCY COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **LOS ANGELES DIVISION**

12 In re:
13 LORNA JANE USA, INC., a California
14 corporation,

15
16 Debtor-in-Possession.
17

Case No. 2:21-bk-17267-NB

Chapter 11 Proceeding

**DEBTOR’S MOTION FOR ENTRY OF
ORDER AUTHORIZING THE DEBTOR
TO PAY CERTAIN TAXES AND FEES IN
THE ORDINARY COURSE OF BUSINESS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

[Declaration of Richard Munro Filed Separately
in Support Hereof]

Date: TBD

Time: TBD

Place: 255 East Temple Street,
Courtroom 1545
Los Angeles, CA 90012

1 **TO THE HONORABLE NEIL W. BASON, UNITED STATES BANKRUPTCY**
2 **JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE, AND PARTIES-IN-**
3 **INTEREST:**

4 Lorna Jane USA, Inc., a California corporation, the debtor and debtor-in-possession herein
5 (“Debtor”), hereby files its motion (“Tax Motion” or the “Motion”) and states as follows:

6 **I.**

7 **RELIEF REQUESTED**

8 By this Motion, pursuant to pursuant 11 U.S.C. §§ 105(a), 363(b), 507(a) and 541(d), and
9 Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rule(s)”), the
10 Debtor requests entry of an order, authorizing, but not directing, the Debtor to remit the payment of
11 Sales and Use Taxes (as defined below) to a third-party service provider, Avalara Inc., through direct
12 integration into its sales channels to calculate, collect and remit Sales and Use Taxes to the
13 appropriate Authorities (as defined below) in the ordinary course of business, as payments become
14 due and payable.

15 **II.**

16 **STATEMENT OF FACTS**

17 **A. General and Brief Description of Background Facts**

18 On September 16, 2021 (“Petition Date”), the Debtor filed a voluntary petition for relief
19 (“Chapter 11 Case”) under Chapter 11 of the Bankruptcy Code. The Debtor continues to operate its
20 business and property as a debtor-in-possession in accordance with Sections 1107 and 1108 of the
21 Bankruptcy Code.

22 Additional factual background relating to the Debtor’s business, capital structure, and the
23 circumstances giving rise to the filing of this Chapter 11 Case are set forth in detail in the *Declaration*
24 *of Richard Munro in Support of First Day Motions* (“Munro Declaration”), filed contemporaneously
25 herewith and incorporated herein by reference. Capitalized terms used but not defined herein shall
26 have the meanings given to them in the Munro Declaration.

1 As detailed in the Munro Declaration, the Debtor is a women’s athletic apparel and
2 accessories retail chain that was established to sell and promote the internationally renowned Lorna
3 Jane products brand in the United States through retail boutiques in several states, and its website.
4 Like most retailers in the United States, the Debtor has been impacted by the COVID-19 and related
5 Delta variant pandemic, which has significantly limited retail operations throughout the country and
6 suppressed consumer willingness to shop in person.

7 The profound and sustained impact of the pandemic has forced the Debtor to more
8 aggressively address the rapidly widening gulf between its brick-and-mortar retail revenue and its
9 substantial lease obligations, which no longer reflect the market. To this end, the Debtor diligently
10 attempted to negotiate new lease terms with its landlords in the hope of achieving an out-of-court
11 restructuring. Landlords, however, have been reluctant to negotiate the type of long-term adjustments
12 to leases that are necessary to ensure the Debtor’s continued viability.

13 After much deliberation and consultation with its professionals and advisors, the Debtor has
14 determined in its business judgment that restructuring through chapter 11 presents the best avenue for
15 the Debtor to address its challenges and promote sustained success. In particular, through this Chapter
16 11 Case, the Debtor has filed a separate motion requesting Court authority to reject its remaining
17 leases for its retail boutiques in order to right-size its business, and to restructure and strengthen its
18 financial position for its go-forward online business.

19 **B. Debtor’s Payment of Sales and Use Taxes**

20 In the ordinary course of business, the Debtor incurs and collects from customers state and
21 local sales taxes charged in connection with the sale of various products to its customers (“Sales
22 Taxes”). Sales Taxes are essentially general consumption taxes charged at the point of purchase for
23 certain goods and services, set by the applicable state taxing authority (“Authority” or “Authorities”)
24 as a percentage of the total purchase price. The Debtor also incurs various use taxes in connection
25 with purchasing various materials and supplies necessary for its day-to-day business (“Use Taxes”
26 and, together with Sales Taxes, the “Sales and Use Taxes”).

27 For the months of January through August 2021, the Debtor paid a monthly average of
28 \$64,155 in Sales and Use Taxes. The Debtor uses a third-party service provider, Avalara Inc.

1 (“Avalara”), through direct integration into its sales channels to calculate, collect and remit Sales and
2 Use Taxes to the appropriate Authorities.

3 As of the Petition Date, the Debtor believes it is current with respect to its payment of Sales
4 and Use Taxes, however the Debtor estimates that \$95,058 in Sales and Use Taxes will be owed for
5 the month of August and for the pre-petition portion of September and payable after the Petition Date.
6 The Debtor represents that it has sufficient availability of funds to pay this amount in the ordinary
7 course of business by virtue of the existing approximate \$1,663,032 unencumbered cash on hand plus
8 expected cash flows from ongoing business operations.

9 The pre-petition Sales and Use Taxes are not property of the estate, but rather are held in trust
10 for the Authorities. The Debtor seeks to pay the pre-petition Sales and Use Taxes in order to, among
11 other things, prevent the taxing Authorities from taking actions that might interfere with the
12 administration of the Debtor’s Chapter 11 Case, including bringing personal liability actions against
13 the Debtor’s officers and directors or other key employees or assessing penalties or interest on past
14 due taxes.

15 Additionally, Sales and Use Taxes may also give rise to priority claims under Section
16 507(a)(8) of the Bankruptcy Code. The Debtor must continue to pay the Sales and Use Taxes to
17 continue its business, and failure to pay those taxes could adversely affect the Debtor’s business
18 operations.

19 Accordingly, by this Motion, the Debtor requests that it be authorized, but not required, to pay
20 through Avalara prepetition unremitted Sales and Use Taxes. Absent the relief requested in this
21 Motion, the Debtor will suffer immediate and irreparable harm.

22 **III.**

23 **PAYMENT OF SALES AND USE TAXES**

24 **IS IN THE BEST INTERESTS OF THE DEBTOR’S ESTATE**

25 The Debtor submits that Sales and Use Taxes do not constitute property of the estate.
26 Specifically, certain forms of taxes constitute so-called “trust fund” taxes that are collected from
27 third parties and held in trust for payment to applicable Authorities. See also, In re Megafoods
28 Stores, Inc., 163 F.3d 1063, 1067 (9th Cir. 1998) (“[A] statutory trust was created under the

1 substantive laws of Texas and that the sales taxes owed to Texas were merely collected by Debtors
2 in trust for the benefit of the State.”); In re Shank, 792 F.2d 829, 830 (9th Cir. 1986) (sales tax that
3 the debtor was required to collect from purchaser on retail sales and forward to the Washington
4 Department of Revenue was a “trust fund sales taxes”); DeChiaro v. New York State Tax Comm’n,
5 760 F.2d 432, 433-34 (2nd Cir. 1985) (sales taxes are trust fund taxes); In re Hilaire, 135 B.R. 186,
6 191-92 (D. Mass. 1991) (sales tax is a trust fund tax).

7 To the extent that these “trust fund” taxes are collected, they are not property of the Debtor’s
8 estates under Section 541(d) of the Bankruptcy Code, and should be turned over to the appropriate
9 authority when due. See, Begier v. IRS, 496 U.S. 53, 59-62 (1990) (withholding taxes are property
10 held by a debtor in trust for another, and as such, do not constitute property of the estate); In re Al
11 Copeland Enterprises, Inc., 991 F.2d 233, 235 (5th Cir. 1993) (state sales tax revenues were held
12 subject to trust for the state and were not property of the estate).

13
14 Pursuant to section 541(d) of the Bankruptcy Code, “property of the estate” is
15 defined as: Property in which the debtor holds, as of the commencement of the case, only
16 legal title and not equitable interest ... becomes property of the estate under subsection
(a)(1) or (2) of this section only to the extent of the debtor’s legal title to such property ...
that the debtor does not hold.

17 See, 11 U.S.C. § 541(d). Courts have concluded that property which a debtor holds in trust for
18 another does not become property of the estate when the debtor files for bankruptcy. See, Begier v.
19 IRS, 496 U.S. 53, 57-61 (1990) (holding that withheld federal income and FICA taxes and excise
20 taxes collected from its customers were not property of the debtor’s estate); In re Megafoods Stores,
21 Inc., 163 F.3d 1063, 1067 (9th Cir. 1998) (“A sales tax trust in which the debtor holds only legal
22 title and not an equitable interest, is not property of the bankruptcy estate.”); In re Calabrese, 689
23 F.3d 312, 321 (3d Cir. 2012) (sales tax collected by the debtor from its customers never become
24 property of the estate and are a non-dischargeable “trust fund” tax).

25 Due to the fact that the Sales and Use Taxes do not constitute estate property, the payment
26 by Avalara to the applicable Authorities will not adversely affect the Debtor or its creditors.
27 Moreover, the taxing Authorities may impose personal liability on the officers and directors of
28 corporations to the extent such taxes are collected but not remitted, and the Debtor’s officers may

1 be subject to civil or even criminal liability as a result of such non-payment. The prosecution of
2 such actions during the pendency of these cases would be a significant distraction, and therefore, be
3 detrimental to preserving the Debtor's operations and going concern value. As such, it is in the best
4 interest of the Debtor's estates to eliminate the possibility of these risks by permitting the Debtor to
5 meet its tax obligations without interruption and focus on its restructuring efforts.

6 Further, claims for some or all of the Sales and Use Taxes may be afforded priority status
7 under section 507(a)(8) of the Bankruptcy Code, which may include added interest and/or penalties
8 if not timely paid. See, 11 U.S.C. § 507(a)(8). Pursuant to section 1129 of the Bankruptcy Code,
9 such claims would have to be paid in full under any chapter 11 plan in this Chapter 11 Case.
10 See, 11 U.S.C. § 1129(a)(9)(C). In other words, the proposed relief with respect to such claims
11 should only affect the timing of the payment and should not prejudice the rights of other creditors or
12 parties in interest.

13 Notwithstanding the foregoing, to the extent that any of the Sales and Use Taxes constitute
14 property of the Debtor's estate, the Court has the authority to grant the relief requested in this
15 Motion pursuant to sections 105(a) and 363(b) of the Bankruptcy Code. Section 363(b)(1) of the
16 Bankruptcy Code provides, in relevant part, that, "[t]he [debtor], after notice and a hearing, may
17 use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. §
18 363(b)(1). Consistent with a debtor's fiduciary duties, this provision grants debtors the authority
19 and flexibility to pay prepetition obligations where there is a sound business purpose, and where the
20 debtor is able to "articulate some business justification," courts may permit such disposition. See, In
21 re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (finding that a sound business
22 justification existed to pay prepetition wages). Additionally, courts have also authorized payment
23 of prepetition claims in appropriate circumstances pursuant to section 105(a) of the Bankruptcy
24 Code. Section 105(a) of the Bankruptcy Code, which codifies the inherent equitable powers of the
25 bankruptcy court, allows the bankruptcy court to "issue any order, process, or judgment that is
26 necessary or appropriate to carry out the provisions of this title." See, 11 U.S.C. § 105(a).

1 IV.

2 **IMMEDIATE RELIEF IS NECESSARY**

3 **TO AVOID IMMEDIATE AND IRREPARABLE HARM**

4 Pursuant to Bankruptcy Rule 6003, the Court may grant relief within twenty-one (21) days
5 after the filing of the petition regarding a motion to use property of the estate only if such relief is
6 necessary to avoid immediate and irreparable harm. For the reasons set forth above, the relief
7 requested herein is necessary to avoid immediate and irreparable harm to the Debtor's estate.
8 Accordingly, the relief requested herein may be granted within the twenty-one (21) days following
9 the Petition Date.

10 Here, immediate and irreparable harm would result without the relief requested herein. To the
11 extent that the Debtor owes any accrued but unpaid tax obligations as of the Petition Date, failure to
12 pay such prepetition taxes in the ordinary course may cause the Authorities to assert tax liens over the
13 Debtor's property or impose other penalties which would be detrimental to the value of the Debtor's
14 estate.

15 Moreover, payment of prepetition taxes is essential to ensure the smooth operation of the
16 Debtor's business. Failure to make such payments when due in the ordinary course of business during
17 the first twenty-one (21) days of this Chapter 11 Case would result in needless disruption to the
18 Debtor's business and may jeopardize the Debtor's operations at this critical time. For these reasons,
19 the Debtor submits that the relief requested in the orders submitted herewith is essential to prevent
20 immediate and irreparable harm to the Debtor's operations and preserve the ongoing value of the
21 Debtor's business and thus stakeholder recoveries.

22 V.

23 **WAIVER OF BANKRUPTCY RULES 6004 (a) AND 6004(h) IS WARRANTED AND**

24 **JUSTIFIED UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE**

25 To implement the foregoing successfully, and given the nature of the relief requested herein,
26 the Debtor respectfully requests a finding that (i) the notice requirements under Bankruptcy Rule
27 6004(a) are met and (ii) the 14-day stay under Bankruptcy Rule 6004(h) is waived. Such waiver is
28

1 warranted here because the relief requested herein is critically important to prevent irreparable
2 damage to the Debtor's operations.

3 **VI.**

4 **PROPOSED NOTICE PARTIES AND NOTICE OF THE MOTION**
5 **IS APPROPRIATE UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE**

6 The Debtor has separately filed an application for an order shortening time requesting that
7 this Motion be heard on shortened notice. The Debtor submits that the parties affected by the relief
8 requested in this Motion, consist of: (a) the Office of the United States Trustee; (b) the twenty (20)
9 largest unsecured creditors of the Debtor (as identified in the list filed pursuant to Rule 1007(c) of the
10 Bankruptcy Rules; (c) US Bank; (d) Avalara; and (e) the Subchapter V trustee, once appointed. The
11 Debtor further respectfully submits that a copy of this Motion, the Munro Declaration, and notice of
12 a hearing thereof provided by overnight courier, e-mail or hand-delivery, at the discretion of the
13 Debtor, is fair, reasonable, and appropriate notice and comports with the requirements of the
14 Bankruptcy Rules and the Local Bankruptcy Rules ("LBR"). See, Bankruptcy Rule 2002;
15 Bankruptcy Rule 9006(c); LBR Rule 9075-1.

16 **VII.**

17 **CONCLUSION**

18 **WHEREFORE**, the Debtor respectfully requests that the Court enter an order granting the
19 relief requested herein in its entirety; and such other and further relief as the Court deems just and
20 proper.

21 DATED: September 16, 2021

WINTHROP GOLUBOW HOLLANDER, LLP

22 By: /s/ Richard H. Golubow

23 Richard H. Golubow

Peter W. Lianides

24 [Proposed] General Insolvency Counsel for
25 Lorna Jane USA, Inc., a California corporation
26
27
28

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 1301 Dove Street, Suite 500, Newport Beach, CA 92660

A true and correct copy of the foregoing document entitled (*specify*): **DEBTOR'S MOTION FOR ENTRY OF ORDER AUTHORIZING THE DEBTOR TO PAY CERTAIN TAXES AND FEES IN THE ORDINARY COURSE OF BUSINESS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** will be served or was served (**a**) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (**b**) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):

Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On **September 16, 2021**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL: On (*date*) _____, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

3. SERVED BY EMAIL: Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on **September 16, 2021**, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

4. SERVED BY OVERNIGHT MAIL: Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on **September 17, 2021**, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

September 16, 2021 Jeannie Martinez

Date

Printed Name

/s/ Jeannie Martinez

Signature

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United States Trustee
915 Wilshire Blvd., Suite 1850
Los Angeles, CA 90017

Lorna Jane USA, Inc.
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Gardena, CA 90249

LORNA JANE – Landlords - 20 LARGEST- UST –
SECURED – RSN - NEF

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Hayley Rable VP, Leasing
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20 Largest / Landlord – Manhattan Beach
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LANDLORD – STORE 1085

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Virginia Bergman Loo - VP, Business Affairs

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asmith@chartwellproperties.net**

LANDLORD – STORE 751

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**Kenneth M. Gillett - Senior Vice President, Operations
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kengillett@irvinecompany.com**

LANDLORD – STORE 150C1B

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**Angela Boots Director of Leasing
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LANDLORD – STORE 1012

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Los Angeles, California 90025
**Virginia Bergman Loo VP, Business Affairs
Unibail-Rodamco-Westfield
virginia.bergmanloo@urw.com**

LANDLORD – STORE 807

The Irvine Company LLC
Attention: General Counsel, Retail Properties
The Irvine Company LLC
110 Innovation
Irvine, California 92617
**Kenneth M. Gillett Senior Vice President, Operations
kengillett@irvinecompany.com**

LANDLORD – STORE 1106

The Retail Property Trust
c/o M.S. Management Associates Inc.
Attention: Legal Department
225 West Washington Street
Indianapolis, Indiana 46204-3438
**Rocky McMurtray – Leasing Simon
rmcmurtray@simon.com**

LANDLORD – STORE

Union Street Property Trust 1
Attention: Corporate Officer
63 Paul Avenue
San Rafael, California 94903
**Reno D Rossi -
renorossi@marincheese.com**

LANDLORD – STORE E25

UTC Venture LLC
Attention: Legal Department
2049 Century Park East
41st Floor
Los Angeles, California 90067
**Virginia Bergman Loo VP, Business Affairs
Unibail-Rodamco-Westfield
virginia.bergmanloo@urw.com**

LANDLORD – STORE 2730

Valencia Town Center Venture, L.P.
Attention: Legal Department
2049 Century Park East
41st Floor
Los Angeles, California 90067
**Virginia Bergman Loo VP, Business Affairs
Unibail-Rodamco-Westfield
virginia.bergmanloo@urw.com**

LANDLORD – STORE 316

Westcor Santan Village LLC Santan
c/o Macerich
Attention: Legal Department
P.O. Box 2172
401 Wilshire Boulevard, Suite 700
Santa Monica, California 90407
**Hayley Rable VP, Leasing Macerich
Hayley.Rable@macerich.com**