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

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

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

14 Debtor-in-Possession.

Case No. 2:21-bk-17267-NB
Chapter 11 Proceeding

**DEBTOR’S MOTION FOR ENTRY OF ORDER
PURSUANT TO 11 U.S.C. §§ 105(a), 363(b), 365,
AND 507(a) AUTHORIZING DEBTOR TO (I)
MAINTAIN CERTAIN CUSTOMER
PROGRAMS; (II) HONOR OR PAY RELATED
PREPETITION OBLIGATIONS IN RESPECT
THEREOF; (III) DIRECT DEBTOR’S
PAYMENT PROCESSORS TO HONOR
MERCHANT AGREEMENTS PENDING
ASSUMPTION OR REJECTION; AND (IV)
GRANTING RELATED RELIEF;
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 JUDGE,**
2 **THE OFFICE OF THE UNITED STATES TRUSTEE, AND PARTIES-IN-INTEREST:**

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

6 **I.**

7 **RELIEF REQUESTED**

8 By this Motion, pursuant to 11 U.S.C. §§ 105(a), 363(b), 365, and 507(a) of title 11 of the
9 United States Code, for the entry of an order authorizing the Debtor to: (i) honor and maintain
10 prepetition Customer Programs (defined below); (ii) pay and honor related prepetition obligations to
11 their customers; (iii) pay any prepetition Processing Obligations (defined below) to the Payment
12 Processors (defined below) in connection with processing Non-Cash Payments (defined below) and
13 directing the Payment Processors to honor the Merchant Agreements (defined below) and related
14 documents pending the Debtor’s assumption or rejection of said agreements; and (iv) granting related
15 relief.

16 In connection with the foregoing, the Debtor also requests that the Court (i) authorize and
17 direct financial institutions to receive, process, honor any and all payments made by the Debtor, so
18 long as sufficient funds are available in the applicable accounts to make payments, and (ii) provide
19 that all such financial institutions are authorized to rely on the Debtor’s designation of any and all
20 payment requests as appropriate to this Motion or any other Order of this Court without any duty of
21 further inquiry and without liability for following the Debtor’s instructions.

22 **II.**

23 **STATEMENT OF FACTS**

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

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

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

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

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

20 After much deliberation and consultation with its professionals and advisors, the Debtor has
21 determined in its business judgment that restructuring through chapter 11 presents the best avenue for
22 the Debtor to address its challenges and promote sustained success. In particular, through this Chapter
23 11 Case, the Debtor has filed a separate motion requesting Court authority to reject its remaining
24 leases for its retail boutiques in order to right-size its business, and to restructure and strengthen its
25 financial picture for its go-forward online business.

26 The Debtor’s customers and their loyal support are essential to the Debtor’s business. To help
27 maintain that support, the Debtor provides certain accommodations and incentives to its customers to
28 attract an expansive customer base and cultivate loyalty (“Customer Programs”). The Customer

1 Programs include, but are not limited to, a Return and Exchange Policy, a Gift Card Program, and a
2 Coupons and Sales Promotions (as all detailed below). Continuing the Customer Programs will allow
3 the Debtor to maintain the goodwill of its current customers, attract potential new customers, and
4 ultimately, enhance the Debtor's revenue and profitability.

5 **B. Return and Exchange Policy**

6 The Debtor provides exchanges and returns to its customers for items purchased. Should a
7 customer choose to return a product within thirty (30) days of purchase, the Debtor permits an
8 exchange of the item or refund the purchase price to the original form of payment, except when the
9 original form of payment is cash. Items purchased with cash in the Debtor's retail boutiques (when
10 they were operational), could only be exchanged or a store credit would be issued. All returns and
11 exchanges must include the original receipt or other valid proof of purchase. Now that the Debtor has
12 shuttered all of its retail locations, customers can return merchandise by mail to the Debtor's
13 Distribution Center. As a temporary measure, the Debtor will be offering free returns for the next
14 thirty (30) days to all customers in order to alleviate any inconvenience caused due to store closures.
15 Further, all items purchased on sale or at a discounted price are final and cannot be returned for a
16 refund or exchanged. The ability to continue the Debtor's Return and Exchange Policy is important to
17 continue to promote and foster the Debtor's loyal customer base and maintain and grow future sales
18 for the benefit of the estate. The goodwill generated from leaving the Return and Exchange Policy in
19 place far outweighs any costs that are associated with the policy.

20 **C. Gift Card Program**

21 In the ordinary course of business and aligned with standard practices in the retail industry, the
22 Debtor sells E-Gift Cards and previously sold Boutique Gift Cards available in the Debtor's retail
23 boutiques (collectively, the "Gift Cards"). The Debtor continues to sell Gift Cards to its valued
24 customers through its website which may be used and redeemed to purchase a variety of the Debtor's
25 products ("Gift Card Program"). Customers with Gift Cards may redeem them online. The open
26 balance in connection with the Gift Card Program as of the Petition Date is approximately \$526,614.
27 The Debtor believes that potential customer claims that may arise under the Gift Card Program may be
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1 entitled to priority over other general unsecured claims pursuant to section 507(a)(7) of the
2 Bankruptcy Code up to the statutory amount.¹

3 The Gift Card program is valuable to the Debtor. It generates an increase in online customer
4 visits and where customers may often pay in excess of the amount of the Gift Card. The Debtor
5 submits that the benefits of leaving the Gift Card Program in place and continuing to sell Gift Cards
6 and honor outstanding gift cards (as required by applicable law) is important to foster goodwill among
7 its customer base. The Debtor seeks the authority, but not the direction to, (i) honor all Gift Cards
8 purchased by or issued to customers prior to the Petition Date, and (ii) maintain the Gift Card Program
9 after the Petition Date in a manner consistent with the Debtor's past practices, and good business
10 practices.

11 **D. Coupons and Sales Promotions**

12 The Debtor produces flyers it periodically mails to its customers and other parties on its
13 mailing list which allows customers to receive a free product with a minimum purchase. Visitors to the
14 Debtor's website are able to sign up to receive marketing emails and promotions. After providing an
15 email address with the Debtor, currently, a first-time subscriber is able to enjoy \$20 off of a stipulated
16 purchase (i.e., a sports bra) and free shipping on their first order. This promotional method is
17 important for the Debtor to continue to expand its target customer base and secure return customers
18 after the customers begin to receive regular emails from the Debtor about its products and promotions.
19 The Debtor also offers free shipping for purchases above a certain dollar amount, discount codes, and
20 other seasonal promotions. These Coupons and Sales Promotions are offered throughout the year to
21 create incentives for customers to buy the Debtor's products and are standard in the retail industry.
22 The Debtor seeks authorization to continue the Coupons and Sales Promotions in the ordinary course
23 of business and to honor the Debtor's obligations related thereto on a post-petition basis.

24
25 ¹ Section 507(a)(7) of the Bankruptcy Code states that individuals with a claim not exceeding \$3,025 "arising from the
26 deposit, before the commencement of the case, of money in connection with the purchase ... of property... for the
27 personal, family, or household use of such individuals," have a priority claim over other general unsecured claims. See, 11
28 U.S.C. § 507(a)(7). This provision was added to the Bankruptcy Code in 1984 to "protect consumers who had deposited
money for goods and services with a business that subsequently filed for bankruptcy." See, In re River Vill. Assocs., 161
B.R. 127, 133 (Bankr. E.D. Pa. 1993), *aff'd*, 181 B.R. 795 (E.D. Pa. 1995). The Debtor's obligations to customers in
connection with its Gift Card Program may therefore be considered claims entitled to priority status under section
507(a)(7) of the Bankruptcy Code.

1 **E. Electronic Processing Obligations**

2 The Debtor accepts the following methods of payment from customers online: (i) Visa,
3 MasterCard, American Express, Discover, PayPal, Amazon Pay, JCB, and Diners Club International;
4 and (ii) the debtor contracts with American Express, Inc. ("AmEx"), PayPal Inc. ("PayPal"), Afterpay
5 USA, Inc. ("Afterpay"), and Amazon Pay ("Amazon") at online points of sale only (collectively, the
6 "Non-Cash Payments"). To process Non-Cash Payments, the Debtor is a party to or a beneficiary of
7 affiliate agreements ("Merchant Agreement(s)") with Adyen B.V. ("Adyen"), AmEx, PayPal, and
8 Afterpay (collectively, "Merchant Service Providers"). Under the Merchant Agreements, the
9 Merchant Service Providers charge processing fees ("Processing Fees") for the various transactions
10 subject to the terms of the Merchant Agreements. The Processing Fees range depending on the price
11 tier of the transaction. The Merchant Service Providers also charge an acquiring fee ("Acquiring Fee")
12 which is calculated on a tiered structure based on monthly volume. The Debtor and the Merchant
13 Service Providers have also executed "Acquiring Addendums" with US Bank National Association
14 ("US Bank"), relating to the processing services under the Merchant Agreements (collectively, the
15 Merchant Service Providers and US Bank are the "Payment Processors").

16 The Merchant Agreements contemplate situations where the Payment Processors are obligated
17 to process a refund or return. These transactions are subject to certain adjustments ("Chargeback
18 Fees," and together with the Processing Fees and Acquiring Fees, the "Processing Obligations"). It is
19 imperative that the Debtor continue to accept Non-Cash Payments in order to successfully operate its
20 business.

21 Historically, much of the Debtor's sales were made using Non-Cash Payments. As the Debtor
22 has shuttered its retail locations, all purchases will be made online which means that all the Debtor's
23 sales for the foreseeable future will be made using Non-Cash Payments. In order to avoid disrupting
24 these vital payment processing services, the Debtor seeks the authority to pay any prepetition
25 Processing Obligations incurred in connection with processing any Non-Cash Payments and to
26 continue paying Processing Obligations in the ordinary course of business. In addition, if Payment
27 Processors receive Chargeback Fees above a certain threshold, they may immediately, and without
28 notice, withhold funds to the Debtor in reserve funds to protect themselves against future Chargeback

1 Fees, or worse still, refuse to honor future customer transactions, either of which potential scenarios,
2 would potentially significantly harm and disrupt the Debtors business.

3 **III.**

4 **GOOD CAUSE EXISTS TO AUTHORIZE THE DEBTOR**

5 **TO HONOR AND ADMINISTER THE CUSTOMER PROGRAMS**

6 **A. Honoring Customer Programs Falls Within the Ordinary Course of Business**

7 The Bankruptcy Code contemplates that a debtor in possession will continue business as usual
8 in the ordinary course of its business. Unless the Bankruptcy Court orders otherwise, Section 1108 of
9 the Bankruptcy Code authorizes a debtor in possession to “operate the debtor’s business,” and Section
10 363 states that “[i]f the business of the debtor is authorized to be operated under section . . . 1108 . . .
11 and unless the court orders otherwise, the [debtor in possession] may enter into transactions . . . in the
12 ordinary course of business, without notice or a hearing, and may use property of the estate in the
13 ordinary course of business without notice and a hearing.” 11 U.S.C. § 363(c)(1).

14 As the Ninth Circuit Court of Appeals recognized:

15 The touchstone of “ordinariness is . . . the interested parties’ reasonable
16 expectations of what transactions the debtor in possession is likely to enter in the
17 course of it business. So long as the transactions conducted are consistent with
these expectations, creditors have no right to notice and hearing . . .

18 In re Dant & Russell, Inc., 853 F.2d 700, 705 (9th Cir. 1988).

19 The Debtor submit that the Customer Programs are not only within the ordinary course of
20 business, but indeed expected and relied upon by the Debtor’s customers and are customary for the
21 Debtor’s industry. The value of the Debtor’s brand is dependent upon the loyalty and confidence of
22 the customers that buy its products. Continued support of the Debtor’s customers is absolutely
23 essential to the Debtor’s ability to preserve and maximize the going concern value of its estate.

24 The Debtor further submits that the relief requested in this Motion is typical and similar to that
25 approved in other recent chapter 11 cases in the Central District of California and elsewhere.

1 **B. Continuation of the Customer Programs and the Merchant Agreements are**
2 **Appropriate Under the Doctrine of Necessity**

3 Pursuant to sections 363(b) and 105(a) of the Bankruptcy Code, the Debtor requests authority,
4 in the ordinary course of business and consistent with past practice, to maintain, administer, pay and
5 otherwise honor their prepetition Customer Programs and related obligations. Section 363(b)(1) of the
6 Bankruptcy Code provides that, “[t]he [debtor], after notice and a hearing, may use, sell, or lease,
7 other than in the ordinary course of business, property of the estate ...” See, 11 U.S.C. § 363(b)(1).

8 Section 105(a) of the Bankruptcy Code provides in pertinent part, “[t]he Court may issue any
9 order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” *Id.*
10 § 105(a). Section 105(a) of the Bankruptcy Code codifies the inherent equitable powers of the
11 bankruptcy court. Under this umbrella of equitable powers, courts have adopted what is known as the
12 “doctrine of necessity” or the “necessity of payment” doctrine, which permits a court to authorize a
13 debtor to pay critical prepetition claims, even though such payment is not explicitly authorized under
14 the Bankruptcy Code. See, In re Just for Feet, Inc., 242 B.R. 821, 824- 25 (D. Del. 1999) (holding that
15 section 105(a) of the Bankruptcy Code “provides a statutory basis for the payment of pre-petition
16 claims” under the doctrine of necessity and noting that the Supreme Court, and other courts accept the
17 authority of the bankruptcy court “to authorize the payment of pre-petition claims when such payment
18 is deemed necessary to the survival of a debtor in a chapter 11 reorganization.”); In re Motor Coach
19 Indus. Int’l, Inc., 2009 WL 330993 (D. Del. Feb. 10, 2009) (“The ‘doctrine of necessity’ or the
20 ‘necessity of payment’ doctrine is a general rubric for the proposition that a court can authorize the
21 payment of prepetition claims if such payment is essential to the continued operation of the debtor.”)
22 (citations omitted); In re CoServ, L.L.C., 273 B.R. 487, 492 n.7 (Bankr. N.D. Tex. 2002) (necessity of
23 payment rule “is a rule of payment not of priority” which allows “trustees to pay prepetition debts ...
24 in order to obtain continued supplies or services essential to the continued operation of the debtor’s
25 business”); In re Ionosphere Clubs, Inc., 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989) (“This rule
26 recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay
27 pre-petition claims where such payment is essential to the continued operation of the debtor.”); In re
28 Penn Cent. Transp. Co., 467 F.2d 100, 102 n.1 (3d Cir. 1972) (citations omitted) (“A number of cases

1 declare a so-called ‘necessity of payment’ exception to the normal deferment of the payment of pre[-
2]reorganization claims until their disposition can be made part of a plan of reorganization. These cases
3 permit immediate payment of claims of creditors where those creditors will not supply services or
4 material essential to the conduct of the business until their pre-reorganization claims shall have been
5 paid.”).

6 A bankruptcy court’s exercise of its authority under the doctrine of necessity is appropriate to
7 carry out specific statutory provisions of chapter 11, specifically sections 1107(a), 1108, and
8 363(b)(1) of the Bankruptcy Code, which collectively authorize a debtor in possession to maintain and
9 operate the debtor’s business and use estate property outside of the ordinary course of business.
10 Indeed, a debtor in possession operating a business under section 1108 of the Bankruptcy Code has a
11 duty to protect and preserve the value of its business, and prepetition claims may be paid if necessary
12 to perform the debtor’s duty. See, In re CoServ, L.L.C., 273 B.R. at 497 (“There are occasions when
13 this duty can only be fulfilled by the preplan satisfaction of a prepetition claim.”); see also, In re
14 Lehigh & New England Railway Co., 657 F.2d 570, 581 (3d Cir. 1981) (holding that when failing to
15 pay a prepetition claim would result in an “immediate economic sanction ... it is evident that the
16 payment made under the ‘necessity of payment rule’ is in the interest of all parties ... because such
17 payment will facilitate the continued operation of the [company]”).

18 The Debtor seeks to continue its Customer Programs, Payment Processing Obligations, and
19 honor related prepetition obligations, as such Customer Programs have proven to be critical to
20 generating valuable goodwill, repeat and new business, and net revenue increases. The Debtor
21 believes that continuing the Customer Programs throughout its Chapter 11 Case is essential to
22 preserve customer relationships and goodwill for the benefit of its estates, and to maximize the
23 revenue and the value of the Debtor’s estate for the benefit of all stakeholders of the Debtor. If the
24 Debtor is prohibited from honoring and maintaining the Customer Programs and related prepetition
25 obligations in the manner consistent with their past business practices, customers may lose confidence
26 in the Debtor and begin to patronize the Debtor’s competitors that do provide such programs, thereby
27 damaging the Debtor’s business to an extent that, in the Debtor’s business judgment, far exceeds the
28 cost associated with honoring and continuing such practices. Moreover, failure to maintain the

1 Customer Programs and to honor related prepetition obligations will cause irreparable damage to the
2 Debtor's reputation.

3 Similarly, there are numerous unpublished court orders which have authorized debtors to
4 administer their customer programs and honor their prepetition customer obligations on a postpetition
5 basis. See e.g., In re RTW Retailwinds, Inc., No. 20-18445 (JKS) (Bankr. D.N.J. July 15, 2020); In re
6 True Religion Apparel, Inc., No. 20-10941-CSS (Bankr. D. Del. Apr. 14, 2020); In re Pace Industries,
7 LLC, No. 20-10927 (MFW) (Bankr. D. Del. Apr. 14, 2020); In re Valeritas Holdings, Inc., No. 20-
8 20290 (LSS) (Bankr. D. Del. Mar. 12, 2020); In re RentPath Holdings, Inc., No. 20-10312 (BLS)
9 (Bankr. D. Del. Mar. 10, 2020); In re Aceto Corporation, No. 19-13448 (VFP) (Bankr. D.N.J. Feb. 21,
10 2019); In re Achaogen, No. 19-10844 (BLS) (Bankr. D. Del. May 3, 2019); In re B. Lane, Inc., d/b/a,
11 Fashion to Figure, Case No. 17- 32958 (Bankr. D.N.J. June 5, 2017); In re Revel AC, Inc., Case No.
12 14-22654 (GMB) (Bankr. D.N.J. July 14, 2014).

13 Based on the foregoing, it is respectfully submitted that continuing the Debtor's Customer
14 Programs, Payment Processing Obligations, and honoring related prepetition obligations, as well as
15 paying any prepetition Payment Processing Obligations, is necessary to maximize the Debtor's
16 revenue and facilitate a successful restructuring in chapter 11.

17 **C. Compelling the Continuation of the Merchant Agreements is in the Best Interest**
18 **of the Debtor's Business and Estate**

19 Section 365 of the Bankruptcy Code regulates the treatment of executory contracts during
20 bankruptcy proceedings. Specifically, Section 365(a) states:

21
22 Except as provided in sections 765 and 766 of this title and in
23 subsections (b), (c), and (d) of this section, [a debtor in possession],
subject to the court's approval may assume or reject any executory
contract or unexpired lease of the debtor.

24 11 U.S.C. § 365(a).

25 Section 365 of the Bankruptcy Code "generally permits" a debtor-in-possession to assume or
26 reject any executory contract of the debtor. See, In re Fleming Cos., Inc., 499 F.3d 300, 304 (3d. Cir.
27 2007) (citing 11 U.S.C. § 365(a)). This provision gives the debtor in possession the latitude to make
28

1 a decision on the various executory contracts that the debtor is a party to. The debtor therefore may
2 assume those contracts that provide a benefit to the estate, and reject those that do not provide value
3 to the estate. See, Cinicola v. Scharffenberger, 248 F.3d 110, 119 (3d Cir. 2001) (quoting L.R.S.C.
4 Co. v. Rickel Home Centers (In re Rickel Home Centers, Inc.), 209 F.3d 291, 298 (3d Cir. 2000)).
5 This decision to assume or reject an executory contract is within the “business judgment” of the
6 debtor. See, NLRB V. Bildisco & Bildisco (In re Bildisco), 682 F.2d 72, 79 (3d Cir. 1982).

7 Credit card processing agreements are classified as an executory contract under section 365 of
8 the code and are contracts which can be assumed or rejected. See, Citizens and Southern Nat’l Bank
9 v. Thomas B. Hamilton Co. Inc. (In re Thomas B. Hamilton Co.), 969 F.2d 1013, 1022 (11th Cir.
10 1992); In re United Airlines, Inc., 368 F.3d 720 (7th Cir. 2004). Therefore, any such credit card
11 processing agreement which has not been terminated prior to the petition date remains an executory
12 contract pursuant to section 365 of the bankruptcy code. See, Velo Holdings Inc. v. Paymentech, LLC
13 (In re Velo Holdings Inc.), 475 B.R. 367, 384 (S.D.N.Y. 2012). The Bankruptcy Court is the
14 gatekeeper of assumption or rejection of executory contracts pursuant to section 365(a), which states
15 that the debtor in possession may only do so, “subject to the bankruptcy court’s approval.” See 11
16 U.S.C. § 365(a). Thus, absent any unusual circumstances which would place the credit card processor
17 at risk, such as fraud, an unreasonably high amount of chargebacks, or if there was a failure to cure a
18 default, the Bankruptcy Court should approve the assumption of the contract. See, Hamilton, 969
19 F.2d at 1021.

20 Additionally, section 365(c)(2) of the Bankruptcy Code restricts the debtor-in- possession’s
21 ability to assume or assign an executory contract if “such contract is a contract to make a loan, or
22 extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to
23 issue a security of the debtor...”. See, 11 § U.S.C. 365(c)(2). However, credit card processing
24 agreements are outside of the scope of the “financial accommodation” restriction in Section
25 365(c)(2). See, Hamilton, 969 F.2d at 1021. This is because, in part, when interpreting section
26 365(c)(2), courts have declined to accept that “agreements involving extensions of credit where credit
27 extension was not the primary purpose of the agreement” are extending debt financing or financial
28 accommodations. See, In re UAL, 293 B.R. 183, 188 (Bankr. N.D. Ill. 2003) (internal citations

1 omitted). Therefore, credit card processing agreements are outside of the scope of section 365(c)(2).

2 The Merchant Agreement is an executory contract that is integral to the Debtor's operations
3 and impacts a significant portion of the Debtor's Day to day business given the large volume of Non-
4 Cash Payments by customers. Interruption or termination of processing services under the Merchant
5 Agreement at the outset of this case would case would "significantly impair the prospects for a
6 successful reorganization." See, In re UAL Corp., 293 B.R. at 189. See also, In re Velo Holdings Inc.,
7 475 B.R. 384 (noting that "termination would significantly impede the Debtors' ability to restructure,
8 if not eliminate the possibility of a successful restructuring entirely, and impair creditor recoveries.").
9 Given the importance of the Merchant Agreement (including the related addendums), it should
10 remain in full force and effect and the Payment Processors should be required to perform thereunder
11 until such time as the Debtor determines to assume or reject the Merchant Agreement.

12 Additionally, paying prepetition Payment Processing Obligations and continuing Payment
13 Processing Obligations in the ordinary course is necessary to ensure that the Debtor can continue to
14 accept and process Non-Cash Payments, which comprise a significant amount of payments made by
15 customers. The need to continue to process Non-Cash Payments has become particularly acute in
16 light of the substantial shift to online purchasing during the pandemic.

17 Accordingly, it is respectfully submitted that the Payment Processors be directed to continue
18 to perform under the Merchant Agreement and that the Debtor be authorized to pay any prepetition
19 Payment Processing Obligations and continuing Payment Processing Obligations in the ordinary
20 course.

21 **D. Cause Exists to Authorize the Debtor's Financial Institutions to Honor Electronic**
22 **Fund Transfers**

23 The Debtor also requests that all applicable banks and other financial institutions ("Banks")
24 be authorized, when requested by the Debtor in its sole discretion, to receive, process, honor, and pay
25 any and all checks, drafts, and other forms of payment including fund transfers (collectively, the
26 "Payments") made by the Debtor related to the Customer Programs including prepetition obligations
27 to customers, as approved by this Court, so long as sufficient funds are available in the applicable
28 accounts to make the Payments.

1 To stabilize the Debtor’s operations and to smoothly transition into chapter 11, it is
2 imperative that the Debtor normalize its business. Failure to do so would result in extremely adverse
3 business effects. Under the Debtor’s existing cash management system, the Debtor represents that
4 wire and other electronic bank transfer requests can be readily identified as relating to an authorized
5 Payment related to the Customer Programs. Accordingly, the Debtor believes that unauthorized wire
6 and electronic bank transfer requests, will not be honored inadvertently and that all Banks may rely
7 on the representations of the Debtor as to which Payments are made and authorized to be paid in
8 accordance with this Motion without any duty of further inquiry and without liability for following
9 the Debtor’s instructions.

10 IV.

11 **WAIVER OF BANKRUPTCY RULES 6004 (a) AND 6004(h) IS WARRANTED AND**
12 **JUSTIFIED UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE**

13 To implement the foregoing successfully, and given the nature of the relief requested herein,
14 the Debtor respectfully requests a finding that (i) the notice requirements under Bankruptcy Rule
15 6004(a) are met and (ii) the 14-day stay under Bankruptcy Rule 6004(h) is waived. Such waiver is
16 warranted here because the immediate payment of any accrued and unpaid prepetition Payments or
17 obligations under the Customer Programs is essential to prevent potentially irreparable harm to the
18 Debtors’ business, value, and ability to reorganize.

19 V.

20 **RELIEF IS JUSTIFIED ON AN EXPEDITED BASIS**

21 Pursuant to Rule 6003 of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”),
22 the Court may grant relief within twenty-one (21) days after the filing of the petition regarding a
23 motion to use property of the estate only if such relief is necessary to avoid immediate and irreparable
24 harm. For the reasons already set forth herein, the Debtor submits that the relief requested in this
25 Motion is necessary to avoid immediate and irreparable harm to the Debtor, its estate and its
26 creditors. To the extent that the Debtor owes any related prepetition obligations as of the Petition
27 Date, failure to honor such prepetition obligations in the ordinary course may cause the customers to
28 seek a competitor’s products, which would be detrimental to the value of the Debtor’s estate.

1 Moreover, payment of any prepetition obligations under the Customer Programs is essential to
2 ensure the smooth operation of the Debtor’s business. Failure to do so when due in the ordinary course
3 of business during the first 21 days of this Chapter 11 Case would result in needless disruption to the
4 Debtor’s business and may jeopardize the Debtor’s customer relationships at this critical time. For
5 these reasons, the Debtor submits that the relief requested in the orders is essential to prevent
6 immediate and irreparable harm to the Debtor’s operations and preserve the ongoing value of the
7 Debtor’s business and thus stakeholder recoveries.

8 **VI.**

9 **PROPOSED NOTICE PARTIES AND NOTICE OF THE MOTION**

10 **IS APPROPRIATE UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE**

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

21 **VII.**

22 **CONCLUSION**

23 **WHEREFORE**, the Debtor respectfully requests that the Court enter an order granting the
24 Motion in its entirety; and granting the Debtor such other and further relief as the Court deems just

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26 ///

27 ///

1 and proper.

2 DATED: September 16, 2021

WINTHROP GOLUBOW HOLLANDER, LLP

3

By: /s/ Richard H. Golubow

4

Richard H. Golubow

5

Peter W. Lianides

6

[Proposed] General Insolvency Counsel for
Lorna Jane USA, Inc., a California corporation

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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 PURSUANT TO 11 U.S.C. §§ 105(a), 363(b), 365, AND 507(a) AUTHORIZING DEBTOR TO (I) MAINTAIN CERTAIN CUSTOMER PROGRAMS; (II) HONOR OR PAY RELATED PREPETITION OBLIGATIONS IN RESPECT THEREOF; (III) DIRECT DEBTOR’S PAYMENT PROCESSORS TO HONOR MERCHANT AGREEMENTS PENDING ASSUMPTION OR REJECTION; AND (IV) GRANTING RELATED RELIEF; 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:

- **Richard H Golubow** rgolubow@wghlawyers.com, jmartinez@wghlawyers.com; mweinberg@wghlawyers.com
- **Dare Law** dare.law@usdoj.gov
- **United States Trustee (LA)** ustpreion16.la.ecf@usdoj.gov

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.

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	/s/ Jeannie Martinez
<i>Date</i>	<i>Printed Name</i>	<i>Signature</i>

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