

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
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In re: Chapter 11
Psystar Corporation, Case No:
Debtor.
_____ /

**MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS
TO ASSUME CERTAIN EXECUTORY CREDIT CARD AGREEMENTS
PURSUANT TO SECTION 365 OF THE BANKRUPTCY CODE**

(EMERGENCY HEARING REQUESTED)

Basis for Emergency Relief

The above-captioned Debtor and debtor in possession (the "Debtor") request an emergency hearing in this matter on or before May 26, 2009. By this motion, the Debtor seek the entry of an order authorizing the debtors to assume certain executory credit card agreements. The Debtor require the continued use of Credit Card Processing Agreements and cash management system in order to preserve the continuity of their business operations. The Debtor request that this Motion be considered on an emergency basis as the relief requested herein is critical to the Debtor's continued operations. The Debtor respectfully request that the Court waive the provisions of Rule 9075-1(B) of the Local Rules, which require an affirmative statement that the Debtor made a bona fide effort to resolve the issues raised in this emergency motion, as the relief requested herein is urgent in nature and does not lend itself to resolution in advance of a hearing.

Psystar Corporation (the "Debtor"), by and through undersigned counsel, files this *Emergency Motion for an Order Authorizing The Debtors to assume certain executory credit card agreements* (the "Motion"), and in support of this Motion, state as follows:

JURISDICTION

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§157 and 1334. Venue is proper under 28 U.S.C. §§ 1408 and 1409.
2. This is a core proceeding as defined in 28 U.S.C. §§157(b)(2)(A), and (M).

3. The statutory predicates in support of the relief requested herein are § 105 of title 11 of the United States Code (the “Bankruptcy Code”) and Local Rule 9075-1.

BACKGROUND

4. On May 21, 2008, the Debtor commenced this case by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the “Petition Date”). The Debtor are operating their business and managing their affairs as a Debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. No trustee, examiner, or statutory committee has been appointed in this case.

6. Debtor manufactures and distributes computers tailored to customer choosing. As a part of its devotion to supporting customer choice, Debtor supports a wide range of operating systems including Microsoft Windows XP and XP 64-bit, Windows Vista and Vista 64-bit, Linux (32 and 64-bit kernels), and the Mac OS. PSYSTAR generally refers to this custom tailored line of computers as Open Computers. Open Computers are personal computers that, in the case of the Mac OS, work like a Macintosh including the latest Macintosh operation system – OS X.5 (a.k.a. Leopard). PSYSTAR Open Computers, again in the case of the Mac OS, run the OS X like that of a Macintosh from APPLE albeit on a computer hardware system offered at a considerably lower price and with considerably higher performance.

7. Due to the weakened economy, Debtor has had no alternative but to commence these Chapter 11 proceedings. Debtor’s sales have been greatly affected by the decrease in consumer spending. The financial crisis has also caused creditors to tighten up their terms and become more demanding for immediate payment. Debtor’s vendors due to their own financial problems are not being able to supply all necessary items to allow Debtor to produce their product, thus, forcing Debtor to pay higher prices for parts in order to fulfill customer orders in a timely

manner and to assure satisfaction with the product. These factors seriously contribute to the Debtor not being able to turn a significant profit in each sale.

8. Debtor has continued doing business in this manner with diminutive profit in hopes of a turn around in our present economy but find that the long term roots of this crisis can only be overcome by directly implementing the restructuring of Debtor's business plan and can only do so with the requested Chapter 11 protection. Debtor plans on emerging from this Chapter 11 with a strong and effective plan to make an increasingly higher profit and still provide the consumer with the product that they have grown to enjoy and trust. Debtor possesses valuable intellectual property which will be implemented in a well thought out and more profitable business plan. By doing so, Debtor plans to make payment of all debts and also, continue to provide support for its customers.

THE DEBTORS' CREDIT CARD AGREEMENTS

9. Credit card sales represent main source of the Debtors' revenues. Debtor's complete business is via the internet whereby merchandise is purchased through credit in on rare occasion via wire transfer.

10. Pursuant to certain agreements more fully described herein (the "Credit Card Agreements"), Psystar accepts for the purchase of computers with MasterCard, and VISA, processed by Heartland Payment systems, and Master Card, Visa and American Express through Google Checkout, as well as those of their affiliates, licensees and franchisees (collectively, the "Credit Card Companies"). Each of the Credit Card Agreements specifies a discount rate - essentially a processing fee - that reduces the amount of credit card receivables that are paid by the respective Credit Card Company to Psystar. These discount rates are highly confidential and vary depending on the Credit Card Company, the type of charge, and the manner of processing. These

discount rates are subject to additional adjustments as specified in the relevant Credit Card Agreement. Each Credit Card Company has different contractual terms pursuant to which it pays Psystar for customer purchases.

RELIEF REQUESTED

11. The Debtors intend, with Bankruptcy Court approval of this and other related motions, to continue providing good and services in the ordinary course of business during the pendency of these Chapter 11 case. Because credit card sales are the major portion of Psystar's sales, it is absolutely vital that Psystar is authorized to continue accepting credit cards from their customers for the purchase of computers.

12. By this Motion, pursuant to Sections 363 and 365 of the Bankruptcy Code, Psystar seeks entry of an order authorizing Psystar to assume the Credit Card Agreements and cure any defaults thereunder in the ordinary course of business, effective as of the entry of the Credit Card Assumption Order (the "Effective Date").

13. In addition, other courts previously have granted similar relief to the relief requested herein concerning credit card agreements identical or substantially similar to the Credit Card Agreements described herein. See *In re US Airways Group, Inc.*, Case No. 02-83984 (Bankr. E.D. Va. 2002) (Order Pursuant to Sections 363 and 365(a) of the Bankruptcy Code Authorizing the Assumption of That Certain Charge Card Processing and Security Agreement, As Modified, By and Among National Processing Company, National City Bank of Kentucky and US Airways, Inc.); *In re Trans World Airlines, Inc.*, Case No. 01-0056 (Bankr. D. Del. Jan. 10, 2001) (Interim Order Authorizing the Honoring of Certain Executory Credit Card Agreements and Certain Notice Procedures Relating Thereto); *In re Trans World Airlines, Inc.*, Case No. 95-43748-399 (Bankr. E.D. Mo. July 3, 1995) (Order Pursuant to Section 365(a) of the Bankruptcy Code Authorizing the

Assumption of Certain Credit Card Agreements); see also *In re Continental Airlines, Inc.*, Case Nos. 90-932, 90-974, and 90-975 (Bankr. D. Del. Dec. 5, 1990) (directing performance of credit card merchant agreement and granting other relief).

BASIS FOR RELIEF REQUESTED

14. Under Section 365(a) of the Bankruptcy Code, a debtor, “subject to the court’s approval, may assume or reject an executory contract or unexpired lease.” 11 U.S.C. § 365(a); see *Borman’s Inc. v. Allied Supermarkets, Inc.*, 706 F.2d 187, 189 (6th Cir.), cert. denied, 464 U.S. 908 (1984). An executory contract is a “contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance.” *Sharon Steel Corp. v. Nat’l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39-40 (3rd Cir. 1989) (quotations omitted).

15. In the case of the Credit Card Agreements, there are unperformed continuing obligations for both Psystar and the Credit Card Companies. For example, Psystar is under a continuing obligation to honor ticket purchases made by credit card holders. The Credit Card Companies, on the other hand, must pay Psystar for all credit card charges submitted by Psystar in accordance with the respective Credit Card Agreement. As such, the Credit Card Agreements constitute executory contracts assumable under Section 365 of the Bankruptcy Code. *In re Thomas B. Hamilton Co., Inc.*, 969 F.2d 1013, 1020-22 (11th Cir. 1992).⁶⁵⁸ The assumption or rejection of an executory contract by a debtor in possession is subject to review under the business judgment standard. If such business judgment has been reasonably exercised, the Court should approve the proposed assumption or rejection. See, e.g., *NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 523 (1984); *In re Taylor*, 913 F.2d 102 (3d Cir. 1990) (the decision to assume or reject an executory contract or unexpired lease is a matter within the “business judgment” of the debtor); *Sharon Steel*, 872 F.2d

36; *In re Minges*, 602 F.2d 38, 42 (2nd Cir. 1979).

16. In the Debtor's business judgment, it is in the best interests of the Debtor to assume the Credit Card Agreements. The Debtor intend to continue selling computers in the ordinary course of business during the pendency of these Chapter 11 case in order to preserve consumer confidence. To do so, assumption of the Credit Card Agreements is vital. As the largest source of Debtor's revenues, credit card sales are an absolutely essential component of Debtor's business. The Debtor believe that after the assumption of the Credit Card Agreements, computer sales should remain at or above prepetition levels (in the wake of the Debtors' Chapter 11 filing) should be kept to a minimum. It will be impossible for the Debtors to reorganize if the revenues which it regularly receives from the Credit Card Companies as a result of credit card sales for computers and other services are withheld by the Credit Card Companies upon the commencement of these Chapter 11 cases. In short, the refusal of the Credit Card Companies to continue operating under the terms of the Credit Card Agreements would be fatal to the Debtor's operational and reorganizational efforts.

17. Accordingly, because the Debtor's businesses depend so heavily on the Credit Card Agreements for success, and because the Debtor expects to generate significant postpetition revenues for its estate as a result of the Credit Card Agreements, the Debtor submit that the assumption of the Credit Card Agreements is in the best interests of the Debtor, its estate, and their creditors.

18. The Debtor has satisfied the other requirements of Section 365 of the Bankruptcy Code. Specifically, the Debtors propose to cure all defaults under the Credit Card Agreements, if any, through the continued performance and payment of amounts due under such Agreements in the ordinary course of business. See 11 U.S.C. § 365(b)(1)(A). Furthermore, there is an adequate assurance of future performance under Section 365(b)(1)(C) of the Bankruptcy Code because of the

essential nature of the Credit Card Agreements.

19. No previous request for the relief sought herein has been made to this or any other Court.

WHEREFORE, the Debtor respectfully request that the Court enter an order (a) authorizing the Debtors to assume certain executory credit card agreements, and (b) granting such other and further relief as this Court may deem just and proper.

Dated: Miami, Florida

May 21, 2009.

CERTIFICATE OF ADMISSION

I hereby certify that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this court set forth in Local Rule 2090-1(A).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all ECF registered users herein via CM/ECF, and by regular first class United States mail on all other interested parties on May 22nd, 2009.

Respectfully,

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