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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: CASE NO. 09-19921-RAM
PSYSTAR CORPORATION,
Debtor.

_____ /

FURTHER HEARING ON THE MOTION TO ASSUME EXECUTORY
CONTRACT FILED BY DEBTOR (4), FURTHER HEARING ON
THE MOTION FOR MAINTENANCE OF EXISTING BANK
ACCOUNTS FILED BY DEBTOR (3), EMERGENCY
APPLICATION TO EMPLOY LAZARO LOPEZ AS ATTORNEY
FILED BY DEBTOR (23)

June 8, 2009

The above-entitled cause came on for
hearing before the HONORABLE ROBERT A. MARK, one
of the judges of the UNITED STATES BANKRUPTCY
COURT, in and for the SOUTHERN DISTRICT OF FLORIDA,
at 51 Southwest 1st Avenue, Miami, Miami-Dade County,
Florida on June 8, 2009, commencing at or about
10:00 a.m., and the following proceedings were had:

Reported By: Karen B. Patlak

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APPEARANCES:

LAZARO J. LOPEZ, Esquire,
On behalf of the Debtor

BERGER SINGERMAN, P.A., by
PAUL SINGERMAN, Esquire,
On behalf of Apple Incorporated

UNITED STATES TRUSTEE'S OFFICE, by
STEVEN SCHNEIDERMAN, Staff Attorney,
On behalf of the United States Trustee

ALSO PRESENT:

RODOLFO PEDRAZA

- - - - -

1 THE COURT: Let's get appearances.

2 Mr. Lopez?

3 MR. LOPEZ: Good morning, Your Honor.

4 Lazaro Lopez on behalf of the debtor, Psystar.

5 MR. SCHNEIDERMAN: Steven Schneiderman for
6 the U.S. Trustee.

7 MR. SINGERMAN: Good morning, Your Honor.
8 I'm Paul Singerman from Berger Singerman and our firm
9 is counsel to Apple Incorporated.

10 THE COURT: All right. We've got your
11 emergency application for employment, which, I guess,
12 we are still not 20 days out. So that would be an
13 interim order. Further hearings on the motion to
14 maintain bank accounts and motion to assume executory
15 contract. And then I don't know if you've seen it,
16 but there is a stay relief motion that was filed, I
17 guess, Friday.

18 MR. LOPEZ: Yeah. Counsel just gave me a
19 copy. I am on the ECF system, but the storm Friday
20 afternoon got to different computers in my office and
21 I'm still waiting for the computer guy to show up and
22 get them going. So I just -- you know, they gave me
23 a copy and ---

24 THE COURT: And I want to talk about
25 scheduling that. All right.

1 So bring me up to date. What's happened
2 since we were last here?

3 MR. LOPEZ: Well, since we were last here,
4 I was supposed to -- you know, we were to file with
5 the Court the rest of the schedules on the 5th, last
6 Friday, and because of the problem that I have, I was
7 unable to. So they are not filed. As soon as I get
8 the computer guy to fix my computers today, I hope, I
9 will get it in, because they are done, but they are
10 inside the computer -- inside the program that, you
11 know -- the program inside the computer.

12 As far as the rest of the stuff, I guess,
13 we still have got those -- the motion for the bank
14 accounts and the credit card company contract.

15 Mr. Pedraza, the officer of the
16 corporation, is here, but he had to go back
17 downstairs to put the cell phone in his car. If he
18 needs to give any testimony, he should be in here
19 shortly.

20 THE COURT: Well, have you talked with the
21 U.S. Trustee in terms of the bank account motion?

22 MR. LOPEZ: Yes, we have a little bit. The
23 problem is that -- I guess, the thing is that, you
24 know, he doesn't -- we just keep talking about why is
25 it that my -- you know, that we are in Chapter 11,

1 and, basically, we can -- why -- you know, why don't
2 we dismiss the bankruptcy or whatever, because, I
3 guess, it doesn't seem like the case should be in
4 here.

5 THE COURT: Well, I guess we could talk
6 about that before we get into the individual motions.

7 What are you hoping to do here and do you
8 have, at least, a preliminary view on how you are
9 going to defend the stay relief motion?

10 MR. LOPEZ: I don't. On the stay relief
11 motion, I have no idea what -- what I'm going to do
12 until I read it and take a look at it and see what
13 the situation is.

14 What my client is trying to accomplish
15 is -- they are into financial problems, liquidity
16 problems with paying bills and what have you, and,
17 basically, it's two-fold. The economy has slowed
18 down sales because of all the expenses involved in
19 running their business and the litigation and
20 everything else. So they don't want to close. They
21 don't want to liquidate the company, because they do
22 want to continue the litigation, because they think
23 that that's going to be in their favor, because,
24 basically, what we have at stake here is the -- I
25 guess, the intellectual property and the program that

1 they developed, which they feel is not infringing in
2 any way in Apple's ---

3 (Thereupon, Mr. Rodolfo Pedraza enters the
4 courtroom.)

5 THE COURT: Is this your client?

6 MR. LOPEZ: Yes, yes.

7 THE COURT: Okay. What is his name?

8 MR. LOPEZ: His name is Rodolfo Pedraza.

9 THE COURT: What is the last name?

10 MR. LOPEZ: Rodolfo Pedraza.

11 THE COURT: All right. Well, I think I
12 heard within that sentence or two that you want to
13 continue the litigation.

14 So is there some -- that means either you
15 are going to agree to stay relief or you are going to
16 try to get it to be heard here, which doesn't seem to
17 me to be likely.

18 So did they run out of money to defend the
19 lawsuit out there?

20 MR. LOPEZ: I think they ran out of money
21 to pretty much run the company totally, period.

22 THE COURT: Okay. All right. Well ---

23 MR. LOPEZ: And if it goes into
24 liquidation, then the whole thing is dead.

25 THE COURT: Yeah. The thing is, though,

1 you can't just be parked here in Chapter 11
2 indefinitely to try to get sales back up and prove
3 your liquidity and just keep that litigation on hold
4 indefinitely.

5 MR. LOPEZ: No, not indefinitely, not
6 indefinitely, but just -- just to put everybody -- I
7 mean, the creditors at bay and maybe some of that
8 money be put towards, you know, running the business
9 and be able to operate and keep it open.

10 THE COURT: And what's the defense,
11 basically, to the infringement action? Do you know,
12 or you are not involved in that?

13 MR. LOPEZ: No, I'm not aware. I'm not
14 involved in that litigation. I mean, I know a little
15 bit of what he's told me, but not from a legal point.
16 I mean, I know what his idea is, but I don't know
17 what his lawyers are thinking about or the company's
18 lawyers.

19 THE COURT: All right.

20 Mr. Singerman, I think as we talked about
21 last time, there has been no effort to get a
22 preliminary injunction to stop the pending trial as
23 far as you know, right?

24 MR. SINGERMAN: Your Honor, that's correct.
25 To date, there has not been preliminary injunctive

1 relief sought in the Northern District of California
2 proceeding.

3 Judge, our interest, if I may, Your Honor,
4 is to allow the debtor its wish to have the
5 litigation resolved.

6 As we argue in the stay relief motion, it
7 doesn't seem as though there can be an exit from
8 bankruptcy with the overhang of the legality of the
9 debtor's current business model, and it's critical
10 to Apple, Your Honor, and we would think to whatever
11 the ultimate real creditors of this estate turn out
12 to be, to not lose that trial date in November in the
13 Northern District of California, unless it's Your
14 Honor's will to have that matter tried here. We
15 think, as we've argued, Your Honor, it's more
16 efficient to proceed, but certainly Apple has every
17 confidence in Your Honor and this court if our
18 arguments regarding judicial efficiency and economy
19 fail.

20 So at the end of the day, Judge, it would
21 seem to us that it would be inconsistent with what we
22 perceive to be the debtor's interest in this case to
23 not have the debtor stipulate to stay relief.

24 We assumed by now, candidly, Your Honor,
25 that we would have seen an application to retain

1 special litigation counsel in California. Either the
2 firm that has been handling this matter that's listed
3 as the largest non-insider liquidated creditor of the
4 estate or some indication from debtor's counsel that
5 he or a different firm is picking up that matter.

6 So you didn't ask yet, but while I'm
7 standing it's our interest, Your Honor, if the debtor
8 isn't going to stipulate to that stay relief in order
9 to let litigation proceed, as we understand to be its
10 business and legal interest, that we have a hearing
11 scheduled on short notice and whatever briefing,
12 additional briefing Your Honor wants at the earliest
13 time.

14 THE COURT: Okay. So do you still have the
15 California counsel or did they -- they haven't
16 withdrawn, right? They just ---

17 MR. LOPEZ: As far -- yes. As far as I
18 know, they haven't withdrawn. They are still in the
19 case. And I was just telling Mr. Schneiderman
20 outside that I didn't realize that I had to file that
21 petition for the case over there. So I will file --
22 I mean, I will talk to my client and I believe that
23 they are going to still stay in the case, and if
24 that's the case, I will file it within a day or two
25 to get it before the Court.

1 THE COURT: Mr. Schneiderman, maybe you can
2 tell me what is going on with the bank account motion
3 and we can ---

4 MR. SCHNEIDERMAN: Your Honor, counsel for
5 the debtor and I spoke last week. I believe they
6 opened up accounts at TD Bank, which I was advised
7 was an approved institution. I haven't spoken to
8 Mr. DelForn about that or Ms. Lebron, I'm sorry.
9 She's on vacation. She is celebrating her daughter's
10 graduation and took the family on a cruise.

11 The motion should be denied because the
12 motion asks for continuation of use of the check
13 stock and other things. And the motion should just
14 be denied. Counsel said they are opening up a DIP
15 account, so they don't need this relief.

16 As far as letterhead and various other
17 things requested in here -- I don't want to say
18 "letterhead," if that's not the right -- brochures,
19 packaging, stationery -- they don't need Court
20 approval to use that. So the motion should be denied
21 as unnecessary.

22 The other motion that's still pending,
23 Your Honor, I believe, is the motion to assume the
24 credit card agreements, and I would repeat what was
25 said at the last hearing. I think it's premature at

1 this point to grant that motion. We don't know what
2 those agreements state. We don't know the viability
3 of this company, and we don't know what
4 administrative claims assume those contracts at this
5 early stage of the case.

6 THE COURT: Well, what's been happening,
7 Mr. Lopez? Are the credit card companies continuing
8 to proceed in the manner they were pre-petition?

9 MR. LOPEZ: Yes, Your Honor. They are
10 still processing the credit card charges.

11 As far as the bank account is concerned, is
12 that -- let me put a little more clarification on
13 that. There is three main accounts opened and they
14 are opened at TD Bank, which is a depository -- an
15 approved depository by the trustee. I checked on the
16 website and it is listed there.

17 These accounts were opened pre-filing. So
18 they were existing accounts. One is the one where
19 the credit card processing company deposits all the
20 credits -- the credit card charges. There is another
21 account that if any foreign client that does not
22 qualify for the transaction being handled by a credit
23 card company, sends in a wire transfer to process
24 their order, and it goes into a separate account.
25 And then the third account is like the general

1 operating account of the business.

2 The reason that we were asking to maintain
3 those accounts opened is because the continuation of
4 the business. Since there are still charges coming
5 in into the credit card account, there were a couple
6 of wire transfers that were being processed in that
7 other account and there were outstanding checks that
8 were not -- have not come in into the business
9 operating account.

10 Subsequent to that, there has been ---

11 THE COURT: Yeah, but you are not supposed
12 to clear checks post-petition.

13 MR. LOPEZ: No, no, checks that were --

14 THE COURT: Oh, coming in?

15 MR. LOPEZ: -- coming in from ---

16 THE COURT: Yeah, but why can't you --
17 well, what do you want them to do, Mr. Schneiderman?
18 What do the rules require?

19 MR. SCHNEIDERMAN: Your Honor, this is the
20 first I'm hearing.

21 When I spoke to counsel last week, I was
22 told that the new accounts had been opened at TD
23 Bank. Now what I'm hearing is that these were
24 existing accounts at TD Bank, not
25 debtor-in-possession accounts.

1 I think the motion should be denied. The
2 debtor should be directed, given the state of the
3 economic situation, the recent failure or the recent
4 issues with Bank United -- we are very concerned
5 about debtor-in-possession accounts being properly
6 collateralized. I don't know the amounts of money
7 going through these accounts, but the motion should
8 be denied. The debtor should open up debtor-in-
9 possession bank accounts.

10 To go back five minutes, Your Honor, to the
11 history of the case, if you look at Schedule F, and I
12 just -- there is 200 and --

13 THE COURT: I thought they didn't ---

14 MR. SCHNEIDERMAN: -- \$259,000 in scheduled
15 creditors. \$88,000 of that is for counsel who is
16 representing the debtor in the California litigation,
17 and 120 of that is to Mr. Pedraza who is sitting here
18 in court. So that is 208 of the 259,000.

19 Your Honor, if counsel is being retained as
20 special counsel and they were the reason the case was
21 filed, because they had to pay their attorney's fees,
22 I really don't understand what we are doing here.

23 It's going to be an expensive, time
24 consuming effort if counsel is -- if the same -- if
25 the same counsel is going to be representing the

1 debtor in the Apple litigation in California and
2 Mr. Pedraza is the other large creditor. The other
3 ones are for DHL and Fed Ex, and a couple other small
4 ones. There is an IRS claim for \$11,000. I just
5 don't understand why this Chapter 11 case is here.

6 Maybe counsel needed the 11 in order to
7 convince the attorney in California to continue
8 working with the debtor. But if that's what's going
9 to happen, Your Honor, I would urge counsel and its
10 client to rethink why they are here.

11 With respect to the motions today, I think
12 they should both be denied. There is no reason for
13 the credit card agreement at this point to be assumed
14 and the bank account motion doesn't set forth any of
15 the issues that Mr. Lazaro --

16 MR. LOPEZ: Lopez.

17 MR. SCHNEIDERMAN: -- Lopez -- I'm sorry,
18 sir --

19 MR. LOPEZ: That's okay.

20 MR. SCHNEIDERMAN: -- just stated about the
21 pre-petition accounts, the wire transfer account ---

22 THE COURT: No, that's in there. That's
23 Paragraph 13 --

24 MR. SCHNEIDERMAN: Maybe I glanced over
25 it ---

1 THE COURT: -- 13, 14 and -- there is no
2 14, 13 and 15. I just don't recall ---

3 MR. SCHNEIDERMAN: That's dealing with
4 honoring the deposits. Oh, I'm reading the wrong
5 motion, Your Honor. I'm sorry.

6 THE COURT: Eric, would you find out what
7 time that view from the Bench part of the U.M.
8 program is on the ---

9 MR. SILVER: On June 19th?

10 THE COURT: Yeah, because I might set this
11 on Friday afternoon.

12 MR. SINGERMAN: (Indicating).

13 THE COURT: Oh, yeah, that's right. I put
14 the brochures out there.

15 MR. SINGERMAN: May I approach, Judge?

16 THE COURT: Yeah. I forgot I did a little
17 advertising. I forgot I had the brochures out there.

18 MR. SCHNEIDERMAN: Your Honor, I'll be
19 speaking in the afternoon if you are trying to set
20 something for that same day.

21 THE COURT: Well, but were you going to
22 speak on the stay relief, or you are thinking you are
23 going to file a motion to dismiss?

24 MR. SCHNEIDERMAN: No, Your Honor. I
25 didn't know if you were continuing all the other

1 matters.

2 THE COURT: Oh, no, no. I'm just -- I was
3 thinking ahead towards stay relief.

4 MR. SINGERMAN: Your Honor, I will make an
5 effort to participate. I'm traveling on the 19th,
6 as well. I have a flight out on the 18th at 5:00.
7 If, per chance, we could have a hearing before the
8 19th -- if you can't, then I can --

9 THE COURT: Well, maybe ---

10 MR. SINGERMAN: -- attempt to participate
11 telephonically on the 19th.

12 THE COURT: Well, anyway, let's -- we are
13 skipping around a little bit, but ---

14 MR. SCHNEIDERMAN: I apologize. This might
15 have been the document that did upload correctly the
16 first time, and when I refiled it, I didn't print it
17 out. So I was not -- I didn't see those paragraphs.
18 I apologize for that.

19 Again, Your Honor, I don't think it's
20 appropriate, given the current status, to allow the
21 pre-petition accounts. They can be transferred over
22 to the DIP accounts. If they need to leave an
23 account open that can be swept into a DIP account for
24 certain wire transfers or for the credit card
25 agreements for the next 60 days with the order

1 specifically saying and instructing the bank that no
2 monies go out of that account, other than to be swept
3 into the approved debtor-in-possession account, we
4 could probably live with that while the debtor tries
5 to transfer over its merchant accounts with the
6 credit card machines. But I don't believe that the
7 motion should be granted as filed.

8 MR. LOPEZ: If I may? There are new
9 accounts opened that were opened June 3rd, the
10 debtor-in-possession. So the bank is aware of the
11 situation and the bankruptcy. Basically, these
12 existing accounts should -- what we are asking for is
13 just that these remain open long enough to make the
14 transition, so that the business doesn't get like
15 stopped or, you know, checks start bouncing because
16 the account has been closed, you know, things of that
17 nature, or the ones that were pre-petition. But new
18 accounts have been already opened in the same bank,
19 in the TD Bank.

20 THE COURT: So is there some room for
21 compromise there?

22 MR. SCHNEIDERMAN: Yes, Your Honor. Like I
23 said, the merchant accounts should be swept into the
24 debtor-in-possession account and no money should go
25 out of that credit card account, so that they can

1 leave that for 60 days while they are trying to
2 transfer the merchant account numbers over to these
3 bank accounts.

4 Again, Your Honor, I would urge counsel and
5 his client to really think about what the purpose of
6 the Chapter 11 is and why they want to proceed in
7 this court when everything is going on in the
8 District Court action in California, and the creditor
9 in this case appearing to be the lawyer who's
10 handling the case in California and the insider who
11 is sitting here in court today.

12 THE COURT: Okay. So do you think you
13 could work out language with Mr. Lopez?

14 MR. SCHNEIDERMAN: Yes, sir.

15 THE COURT: All right. And then the credit
16 card motion can be denied without prejudice and then,
17 Mr. Lopez, you can do an order that denies the motion
18 really as premature in terms of assumption.

19 MR. LOPEZ: Okay.

20 THE COURT: But pending assumption or
21 rejection, you can put in that the parties are
22 authorized to continue operating under the
23 pre-petition credit card agreements, so there is
24 some comfort level that the motion isn't being
25 denied in any way that is going to scare off the

1 credit card companies, which is what your concern is.

2 MR. LOPEZ: Right.

3 THE COURT: I'm looking at maybe the 17th
4 in the afternoon.

5 MR. SINGERMAN: Your Honor, I'm available.
6 Thank you.

7 MR. LOPEZ: That's okay. If I have
8 anything, I'll clear it.

9 THE COURT: Okay. Well, I have a stay --
10 what could be a contested stay relief hearing at
11 10:00, which may carry over, and then a summary
12 judgment at 2:00, although I'm not sure, not having
13 seen a response memo, whether that is going to be
14 contested. But why don't we set it for 3:00 to be
15 safe in case that stay relief motion goes.

16 MR. LOPEZ: Do you want me to do the notice
17 of hearing on that?

18 THE COURT: No, I'll just have Elaine do
19 the notice. So it's 3:00. I don't see it as
20 evidentiary, right? It's -- I mean, you've got --
21 except to the extent of the facts surrounding the --
22 but I will set it as a final hearing.

23 MR. SINGERMAN: Yes, sir.

24 Your Honor, may I also suggest, again, for
25 the purpose of efficiency, that after counsel has had

1 an opportunity to review the brief and consult with
2 his client, that perhaps counsel file a consent or
3 advise the parties if we don't need the hearing?
4 Because, again, I'm not -- I'm not finessing the
5 advocacy. I don't understand how it is that the
6 debtor would oppose this relief if it intends to
7 proceed, as counsel indicated was its interest in the
8 resolution of this matter and proceeding with its
9 business. So, perhaps they will contend it, and I'm
10 sure if they do, they will have a good reason at
11 least from their perspective. But my instinct is
12 that after the brief is reviewed, on what counsel
13 said at the outset, that they are going to want to
14 proceed in California just as we are.

15 THE COURT: Okay. Actually, I will do an
16 order setting hearing and I will require some
17 response by the 15th. But I agree with
18 Mr. Singerman, it would be nice to know sooner rather
19 than later if it is not going to go.

20 MR. LOPEZ: Definitely, Your Honor.

21 THE COURT: Okay. So all you need to do is
22 the order on the -- well, on the two matters, the
23 bank account and denying the motion to assume the
24 credit card agreements, but putting in authorization.

25 Now, as far as interim retention, is there

1 any issue?

2 MR. SCHNEIDERMAN: No, Your Honor. But I
3 believe the order -- the motion provided that unless
4 there is an objection, the interim order would become
5 a final order and I just ask that that be set for
6 hearing.

7 THE COURT: Okay. So, do an interim order
8 approving your retention, set it for final hearing at
9 the same time on the 15th --

10 MR. LOPEZ: You said the 17th.

11 THE COURT: -- the 17th at 3:00.

12 MR. SCHNEIDERMAN: Your Honor, I also had
13 Document Number 13 if you have the docket up. It's
14 the debtor's emergency motion for an order
15 authorizing the debtor's continued use of business
16 forms and records, and that's the motion I was
17 referring to earlier when they were asking to use
18 check stock and stationery and business forms. I
19 would ask that that motion be denied. It's not
20 necessary, Your Honor, and I surely don't want an
21 order authorizing the use of the check stock.

22 THE COURT: All right. So, maybe the
23 simplest thing, just so it is clear,
24 Mr. Schneiderman, if you do the order on that
25 reflecting that as to many of those items they don't

1 need authority. So it's really moot. And as to the
2 ones where you think it's inappropriate, just deny
3 it, because the checks you are going to have to have
4 DIP checks.

5 MR. LOPEZ: Yes.

6 MR. SCHNEIDERMAN: Yes, Your Honor. So two
7 orders from Mr. Lopez and I will submit an order on
8 that motion.

9 THE COURT: Yeah. But you are going to
10 work with him on that bank account motion.

11 MR. SCHNEIDERMAN: Yes, sir.

12 THE COURT: Okay. Anything ---

13 MR. SINGERMAN: Judge, I'm not -- Apple was
14 not at all objecting to counsel's retention. But in
15 kind of a collaborative note, the motion and the
16 affidavit didn't refer to retainers and the data
17 required by 329(a), the disclosure within a year, and
18 if counsel is going to stay in the case, you might
19 wish to have him protect himself and comply with the
20 statute and the rule in the affidavit under 2014 and
21 16 and 329.

22 THE COURT: Did you file something
23 indicating what you were paid or what your retainer
24 is?

25 MR. LOPEZ: What the hourly rate will be,

1 yeah, it was in there.

2 THE COURT: What about retainer?

3 MR. LOPEZ: Well, that will be in the --
4 that's in the schedule, the disclosure of attorney's
5 fees. So I didn't think I had to put it back in the
6 affidavit.

7 THE COURT: All right.

8 Well, Mr. Schneiderman, will you just point
9 Mr. Lopez to the rules?

10 You've got to do a separate --

11 MR. LOPEZ: Okay.

12 THE COURT: -- disclosure on the payment
13 issue.

14 MR. LOPEZ: Okay.

15 THE COURT: Okay. And I think we are good.

16 MR. SINGERMAN: Judge, I brought courtesy
17 copies of the stay relief motion and the exhibits.
18 Would you and your law clerk like one, or ---

19 THE COURT: Yeah, we will take one. I read
20 it this morning.

21 MR. SINGERMAN: (Hands documents).

22 THE COURT: Thank you. Okay.

23 MR. SINGERMAN: Thank you, Your Honor.

24 MR. SCHNEIDERMAN: Thank you.

25 (Thereupon, the hearing was concluded.)

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CERTIFICATION

State of Florida:
County of Dade:

I, KAREN B. PATLAK, shorthand reporter and notary public in and for the State of Florida at Large, do hereby certify that the foregoing proceedings were taken before me at the date and place as stated in the caption hereto on Page 1; that the foregoing computer aided transcription is a true record of my stenographic notes taken at said proceedings.

WITNESS my hand this 9th day of June, 2009.

KAREN B. PATLAK
Court Reporter and Notary Public
in and for the State of Florida at Large
Commission Number DD495353
Expires: December 20, 2009

