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**PROPOSED ATTORNEYS FOR DEBTORS**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

In re:	§	Chapter 11
	§	
Tuesday Morning Corporation, <i>et al.</i> , <sup>1</sup>	§	Case No. 20-31476-HDH-11
	§	
Debtors.	§	Joint Administration Requested

**DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE  
DEBTORS TO HONOR CERTAIN PREPETITION OBLIGATIONS TO  
CUSTOMERS AND TO OTHERWISE CONTINUE CUSTOMER  
PROGRAMS IN THE ORDINARY COURSE OF BUSINESS**

Tuesday Morning Corporation and its debtor affiliates, as debtors and debtors-in-possession in the above-referenced chapter 11 cases (collectively, the “Debtors”) hereby file this *Debtors’ Emergency Motion for Entry of an Order Authorizing the Debtors to Honor Certain Prepetition Obligations to Customers and to Otherwise Continue Customer Programs in the Ordinary Course of Business* (the “Motion”). In support of the Motion, the Debtors respectfully state as follows:

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<sup>1</sup> The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: Tuesday Morning Corporation (8532) (“TM Corp.”); TMI Holdings, Inc. (6658) (“TMI Holdings”); Tuesday Morning, Inc. (2994) (“TMI”); Friday Morning, LLC (3440) (“FM LLC”); Days of the Week, Inc. (4231) (“DOTW”); Nights of the Week, Inc. (7141) (“NOTW”); and Tuesday Morning Partners, Ltd. (4232) (“TMP”). The location of the Debtors’ service address is 6250 LBJ Freeway, Dallas, TX 75240.

### **Jurisdiction and Venue**

1. The United States District Court for the Northern District of Texas (the “District Court”) has jurisdiction over the subject matter of this Motion pursuant to 28 U.S.C. § 1334. The District Court’s jurisdiction has been referred to this Court pursuant to 28 U.S.C. § 157 and the District Court’s Miscellaneous Order No. 33, *Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc* dated August 3, 1984. This is a core matter pursuant to 28 U.S.C. § 157(b), which may be heard and finally determined by this Court. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

### **Background**

2. On May 27, 2020 (the “Petition Date”), the Debtors each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) commencing the above captioned cases (the “Chapter 11 Cases”). The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108.

3. An official committee of unsecured creditors has yet to be appointed in these Chapter 11 Cases. Further, no trustee or examiner has been requested or appointed in these Chapter 11 Cases.

4. A detailed description of the Debtors and their businesses, and the facts and circumstances supporting the Motion and the Debtors’ Chapter 11 Cases are set forth in greater detail in the *Declaration of Barry Folse in Support of the Debtors’ Chapter 11 Petitions and First Day Motions* (the “Folse Declaration”), which was filed on the Petition Date and is incorporated by reference in this Motion.

5. Prior to the commencement of the Chapter 11 Cases, in the ordinary course of business, the Debtors instituted and engaged in certain activities to develop and sustain a positive reputation and relationship with its customers. To that end, the Debtors implemented various customer programs and policies (collectively, the “Customer Programs”) designed to ensure customer satisfaction, develop and sustain customer relationships and loyalty, improve profitability, and generate goodwill for the Debtors. As of the Petition Date, the Customer Programs include the Gift Card Program, the Tuesday Morning Perks Program, Sales Promotions, and Refunds (each as defined below).

**A. Gift Card Program**

6. In the ordinary course of business, the Debtors maintain a gift card program (the “Gift Card Program”) wherein they distribute gift cards (the “Gift Cards”) for use in all locations. Customers may purchase the Gift Cards at any of the Debtors’ locations. Additionally, the Debtors issue gift cards (i) in connection with promotional activities, (ii) in exchange for store credit on returned items, and (iii) in limited circumstances, to resolve customer disputes. The Gift Cards may be used like cash for purchases at the Debtors’ stores. The Gift Cards do not have an expiration date; however, customers may only receive up to ten dollars (\$10) in cash for any remaining balance on a Gift Card following an in-store purchase for less than the full value on the Gift Card.

7. The Debtors maintain transaction data regarding the sale of Gift Cards. However, the Debtors do not track and have no information about the identity of the holders of the Gift Cards. The Debtors estimate that the total liability, as of the Petition Date, for all outstanding Gift Cards is approximately \$1.9 million.<sup>2</sup>

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<sup>2</sup> The Gift Cards are issued and honored by Friday Morning, LLC.

8. The Debtors believe that continuing to honor the Gift Card Program is essential for maintaining customer goodwill and continuing business. The negative impact of refusing to honor the Gift Card Program would severely jeopardize the Debtors' relationships with their customers and the Debtors' ability to reorganize successfully. Current customers may choose to patronize other stores, and the negative publicity could jeopardize the Debtors' ability to attract new customers.

#### **B. Tuesday Morning Perks Program**

9. In the ordinary course of business, the Debtors operate the Tuesday Morning Perks Program, which is a value-added program that provides rewards to incentivize customers to purchase additional merchandise from the Debtors (the "Perks Program"). Perks Program members receive exclusive discount and sale offers. Customers join the Perks Program by creating an account on the Debtors' website. Under the Perks Program, members receive a one-time, ten-dollar (\$10) discount off a fifty-dollar (\$50) purchase. This Perks Program discount is only valid for two weeks from the time the member signs up for the Perks Program. Members also receive extended return policies and various members-only offers. To preserve the goodwill of its customer base, the Debtors seek authorization to honor the Perks Program rewards and discounts.

#### **C. Sales Promotions**

10. From time to time, the Debtors conduct sales promotions at selected stores (the "Sales Promotions"). The Sales Promotions include, among other things, coupons and discounts on purchases. To preserve the goodwill of their customer base, the Debtors seek authorization to honor the Sales Promotions.

#### **D. Returns, Refunds, and Exchanges**

11. The Debtors have traditionally maintained flexible return, refund, and exchange

policies. As such, certain customers hold contingent claims against the Debtors for potential refunds, returns, and exchanges (collectively, the “Refunds”) relating to goods sold to customers prior to the Petition Date. Under the Debtors’ traditional return policy, customers may return all purchases to the Debtors’ store locations within 30 days of the original purchase date and within 60 days if the customer is a Perks Program member. Due to the COVID-19 pandemic, the Debtors have further modified their Refunds policy. Once a state or local restriction is lifted and a store location reopens, the Debtors allow customer Refunds up to 45 days from the date of the reopening. If the customer has a receipt along with a valid ID, the customer is entitled to a full refund. The Debtors seek authority to maintain the Refunds policy.

### **Relief Requested**

12. The Debtors request the entry of an order, substantially in the form attached to the motion as **Exhibit A**, authorizing the Debtors, in their business judgment to (a) continue, maintain, and/or terminate any Customer Programs, at the Debtors’ discretion, in the ordinary course of business, (b) pay, honor and otherwise satisfy, at the Debtors’ discretion, the prepetition obligations thereunder in a manner consistent with past practice, and (c) pay, honor or otherwise satisfy prepetition processing costs and fees associated with the Customer Programs (collectively, the “Customer Obligations”). The Debtors also request the Court to authorize and direct the Debtors’ banks to receive, process, honor and pay all checks, credit card payments, and electronic payment requests relating to the foregoing.

13. As stated above, continuing and honoring the Customer Programs is essential for maintaining the Debtors’ customers’ goodwill and continuing the Debtors’ business. The negative

impact of refusing to honor the Customer Programs would harm the Debtors' relationships with its customers and jeopardize the Debtors' ability to reorganize successfully.

### **Basis for Relief Requested**

14. Under Bankruptcy Code § 363(b), a debtor may, in the exercise of its sound business judgment and after notice and hearing, use property of the estate outside of the ordinary course of business. 11 U.S.C. § 363(b). A debtor may also use property of the estate in the ordinary course of business without notice or a hearing. § 363(c). Furthermore, Bankruptcy Code § 105(a) allows a court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” § 105(a); *see In re Tropical Sportswear Int’l Corp.*, 320 B.R. 15, 20 (Bankr. M.D. Fla. 2005) (recognizing and applying §§ 105(a) and 363 of the Bankruptcy Code to justify the payment of prepetition obligations in appropriate circumstances); *In re Gulf Air, Inc.*, 112 B.R. 152, 153 (Bankr. W.D. La. 1989) (“[w]hile pre-petition claims are normally disposed of in a plan of reorganization and in accordance with statutory priorities, there are well-established ‘necessity of payment’ and similar exceptions.”).

15. Courts have developed the “Doctrine of Necessity” (also known as the “Necessity of Payment Rule”) for use in determining whether payment of certain prepetition obligations is permissible. *See In re CoServ, L.L.C.*, 273 B.R. 487, 492–93 (Bankr. N.D. Tex. 2002) (discussing the doctrine). The Debtors, operating their businesses as debtors-in-possession under Bankruptcy Code §§ 1107(a) and 1108, are fiduciaries with the implicit duty to “to protect and preserve the estate, including an operating business’s going-concern value.” *Id.* at 497. As observed in *CoServ*, the debtor-in-possession’s role as the equivalent of a trustee (pursuant to Bankruptcy Code § 1107(a)) provides a bridge from § 105(a) to the Doctrine of Necessity. *Id.* at 496–97. Thus, in certain instances, “it is only logical that the bankruptcy court be able to use Section 105(a) of the

Code to authorize satisfaction of a prepetition claim in aid of preservation or enhancement of the estate.” *Id.*

16. In *CoServ*, this Court held that a debtor must demonstrate the following three elements in order to meet the “necessity” requirement: (1) it must be critical that the debtor deal with the claimant; (2) unless the debtor deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor’s going concern value, which is disproportionate to the amount of the claimant’s prepetition claim; and (3) there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim. *Id.* at 498.

17. It is critical that the Debtors maintain their customer base. If the Debtors do not honor the Customer Programs, they will likely face negative publicity and substantial ill-will from the customer base. Current customers are more likely to be lost to other stores, and new customers may be frightened off. The Debtors submit that the continuing support of customers is imperative to ongoing operations and the viability of the business enterprise. The uninterrupted continuance of the Customer Programs is critical to maintaining and preserving such support.

18. Many Texas bankruptcy courts in this jurisdiction and others have granted similar relief in large Chapter 11 cases. *See, e.g., In re Buffets, LLC*, Case No. 16-50557 (RBK) (Bankr. W.D. Tex. Mar. 8, 2016) (Docket No. 60); *In re TPP Acquisition, Inc.*, Case No. 16-33437 (HDH) (Bankr. N.D. Tex. Sept. 8, 2016) (Docket No. 80); *In re Alco Stores, Inc.*, Case No. 14-34941 (SGJ) (Bankr. N.D. Tex. Oct. 16, 2014) (Docket No. 65); *In re Cafeteria Operators, L.P.*, Case No. 03-30179 (HDH) (Bankr. N.D. Tex. Jan. 3, 2003) (Docket No. 33).

19. Further, the Debtors’ banks and other financial institutions should be authorized and directed to receive, process, honor and pay all prepetition and postpetition checks, credit card

payments, and fund transfers on account of the Customer Program obligations, provided that sufficient funds are on deposit in the applicable accounts to cover such payments. In doing so, the Debtors' banks and other financial institutions should rely on the representations of the Debtors as to which checks, credit card payments, and fund transfers are issued or authorized to be paid.

### **Request for Waiver of Stay**

20. To the extent that the relief sought in the Motion constitutes a use of property under Bankruptcy Code § 363(b), the Debtors seek a waiver of the fourteen-day stay under Bankruptcy Rule 6004(h). Further, the Debtors request that the Court find that the provisions of Bankruptcy Rule 6003 are satisfied. As explained herein, the relief requested in this Motion is immediately necessary for the Debtors to be able to continue to operate their business and preserve the value of the estates.

21. Nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtors, a waiver of the Debtors' right to dispute any claim, or an approval of the assumption of any agreement, contract or lease under Bankruptcy Code § 365.

### **Notice**

22. Notice of this Motion will be provided to: (i) the Office of the United States Trustee; (ii) the Debtors' secured creditors; (iii) any party whose interests are directly affected by this specific pleading; (iv) those persons who have formally appeared and requested notice and service in these proceedings pursuant to Bankruptcy Rules 2002 and 3017; (v) counsel for the proposed DIP Agent;<sup>3</sup> (vi) counsel for any official committees appointed by this Court; (vii) the consolidated list of the 40 largest unsecured creditors of the Debtors; and (viii) all governmental agencies having

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<sup>3</sup> "DIP Agent" means JPMorgan Chase Bank, N.A., in its capacity as administrative agent under that certain [Senior Secured Super Priority Debtor-in-Possession Credit Agreement] dated May 27, 2020 between Debtor Tuesday Morning, Inc., as borrower, Guarantors (as defined therein), the DIP Agent, and the lenders party thereto.



a regulatory or statutory interest in these cases (collectively, the “Notice Parties”). Based on the urgency of the circumstances surrounding this Motion and the nature of the relief requested herein, the Debtors respectfully submits that no further notice is required.

**Conclusion**

**WHEREFORE**, based on the foregoing, the Debtors respectfully request that the Court (i) grant the Motion, and (ii) grant such other and further relief as is just and proper.

RESPECTFULLY SUBMITTED this 27th day of May, 2020.

**HAYNES AND BOONE, LLP**

By: /s/ Ian T. Peck

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**PROPOSED ATTORNEYS FOR DEBTORS**

**EXHIBIT A**

**PROPOSED ORDER**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

In re:	§	Chapter 11
	§	
Tuesday Morning Corporation, <i>et al.</i> , <sup>1</sup>	§	Case No. 20-31476-HDH-11
	§	
Debtors.	§	Joint Administration Requested

**ORDER AUTHORIZING THE DEBTORS TO HONOR CERTAIN PREPETITION  
OBLIGATIONS TO CUSTOMERS AND TO OTHERWISE CONTINUE CUSTOMER  
PROGRAMS IN THE ORDINARY COURSE OF BUSINESS**

*Upon the Debtors' Emergency Motion for Entry of an Order Authorizing the Debtors to  
Honor Certain Prepetition Obligations to Customers and to Otherwise Continue Customer*

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<sup>1</sup> The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Tuesday Morning Corporation (8532) ("TM Corp."); TMI Holdings, Inc. (6658) ("TMI Holdings"); Tuesday Morning, Inc. (2994) ("TMI"); Friday Morning, LLC (3440) ("FM LLC"); Days of the Week, Inc. (4231) ("DOTW"); Nights of the Week, Inc. (7141) ("NOTW"); and Tuesday Morning Partners, Ltd. (4232) ("TMP"). The location of the Debtors' service address is 6250 LBJ Freeway, Dallas, TX 75240.

*Programs in the Ordinary Course of Business* (the “Motion”)<sup>2</sup> of Tuesday Morning Corporation, *et al.* (collectively, the “Debtors”); and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334, and the *Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc*, Miscellaneous Rule No. 33 (N.D. Tex. August 3, 1984) (Woodward, H.O.); and consideration of the Motion and the requested relief being a core proceeding pursuant to 28 U.S.C. § 157(b); and it appearing that venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided, and it appearing that no other or further notice need be provided; and the Court having reviewed the Motion; and the Court having held a hearing on the Motion; and all objections, if any, to the Motion have been withdrawn, resolved, or overruled; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor,

**IT IS HEREBY ORDERED THAT:**

1. The Motion is granted as set forth herein.
2. The Debtors, in their business judgment, are authorized, but not directed, pursuant to Bankruptcy Code §§ 105(a) and 363 to continue, renew, replace, implement, modify and/or terminate the Customer Programs as they deem appropriate, in the ordinary course of business and without further order of the Court.

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

3. The Debtors are authorized, but not directed, in their discretion, to pay, honor or otherwise satisfy all prepetition Customer Obligations, in the ordinary course of business, in the same manner and on the same basis as they honored such obligations prior to the commencement of the Chapter 11 Cases, including, but not limited to, any prepetition processing costs and fees associated with the Customer Programs.

4. Notwithstanding anything to the contrary herein, any payments authorized to be made by this Order with respect to such claims shall be subject to that certain *Order (I) Authorizing Continued Use of Existing Business Forms and Records, (II) Authorizing Maintenance of Existing Corporate Bank Accounts and Cash Management System, (III) Authorizing Payment of Prepetition Costs and Fees Associated with Customer Credit and Debit Card Transactions; and (IV) Waiving Certain U.S. Trustee Requirements.*

5. Notwithstanding anything to the contrary herein, nothing in this Order authorizes the use of cash collateral or debtor-in-possession financing. Any payments authorized to be made pursuant to the Motion shall be made only to the extent authorized under the cash collateral and debtor-in-possession financing order approved by the Court in effect as of the time such payment is to be made (together with any approved budgets in connection therewith, the “DIP Order”), and such payments shall be subject to the terms, conditions, limitations, and requirements of the DIP Order in all respects.

6. The Debtors’ banks shall be, and hereby are, authorized and directed, when requested by the Debtors, to receive, process, honor and pay any and all checks, credit card payments, or electronic fund transfers drawn on the Debtors’ bank accounts on account of the Customer Programs, whether those checks were presented prior to or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments.

7. The Debtors' banks are authorized and directed to rely on the representations of the Debtors with respect to whether any check, credit card payment, or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Order, and any such bank shall not have any liability to any party for relying on such representation by the Debtors as provided for in this Order.

8. Nothing herein shall be construed to limit, or in any way affect, the Debtors' ability to dispute any claim with respect to the Customer Programs or any related programs.

9. The requirements of Bankruptcy Rule 6003 are satisfied, and the relief requested is necessary to avoid immediate and irreparable harm.

10. Notwithstanding Bankruptcy Rule 6004(h), this Order shall be effective and enforceable immediately upon entry hereof.

### END OF ORDER ###

**Submitted by:**

**HAYNES AND BOONE, LLP**

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