

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

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**DEBTORS EMERGENCY MOTION FOR AN ORDER  
AUTHORIZING DEBTOR TO HONOR CUSTOMER DEPOSITS BY FULFILLING  
CUSTOMER ORDERS AND DELIVERING PRODUCTS FOR ANY REMAINING  
BALANCE DUE ON PENDING SALES**

***(EMERGENCY HEARING REQUESTED)***  
**Statement of Exigent Circumstances**

As of the petition date the Debtor is party to numerous contracts for the purchase of computer hardware, software or components. In order to preserve the going concern value of the Debtor's business within the market place, the Debtor requires authorization to deliver product in exchange for the remaining balance due, if any, on those orders secured by a customer deposit. The Debtor respectfully request that the Court waive the provisions of local rule 9075-1(B) which requires and affirmative statement that a bonafide effort was made in order to resolve the issues raised in this Motion as the relief requested herein is urgent in nature and does not lend itself to advance resolution.

**Basis for Emergency Relief**

Psystar Corporation (the "Debtors" or the "Company"), by and through the undersigned counsel, and pursuant to 11 U.S.C. §§ 105(a), 363(c)(1), 507(a)(6), 1107(a), and 1108, and local rule 9075-1, file this Emergency Motion For An Order Authorizing Debtor To Honor Customer Deposits By Fulfilling Customer Orders And Delivering Products For Any Remaining Balance Due On Pending Sales (the "Motion"). The Motion seeks authority to honor existing customer deposits in exchange for delivering product and collecting the remaining balance due, 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 longterm 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.

#### **RELIEF REQUESTED AND BASES THEREFORE**

9. Prior to the Petition Date the Debtor was engaged in the retail and wholesale supply of computer hardware, software and components to the public.

10. One of the most common methods of sale to the Debtor's customers is to take a payment via credit card for either special order computer or a computer already in stock with the product delivered, via shipping carrier, to customers upon procurement, assembly and testing of said computer.

11. As of the Petition Date, the Debtor has between \$5,000 and \$10,000 in customer

deposits. Taking customer deposits comprises a percentage of the Debtor's business. It is an essential part of maintaining the Debtor's customer loyalty to not only maintain the integrity of the customer deposit system, but to continue to have the ability to take customer deposits for the delivery of stock and special order merchandise.

12. The effect of dishonoring the customer deposits on the Petition Date would be devastating to the Debtor's business.

13. If the Debtor was unable to honor customer deposits by fulfilling orders, the going concern value of the Debtor's business would be destroyed and make it impossible to re-organize internally, let alone to preserve the going concern value of the Debtor's business or any process under 11 U.S.C. §363.

14. Additionally, honoring customer deposits will not drain the Debtor's estate of cash that would otherwise be available to general unsecured creditors. To the contrary, honoring customer deposits will increase the Debtor's net cash flows by bringing additional revenue into the estate as customers take delivery of their merchandise and complete their transactions with the Debtor.

15. The basis for the relief sought is 11 U.S.C. §105(a) and the Doctrine of Necessity. See, e.g., Russell A. Eisenberg and Frances F. Gecker, *The Doctrine of Necessity and Its Parameters*, 73 MARQ. L. REV. 1 (1989); See also, *Pension Benefit Guaranty Corp. v. Sharon Steel Corp.* (In re Sharon Steel Corp.), 159 B.R. 730 (Bankr. W.D. Pa. 1993); and *In re Miami Gen. Hosp. Inc.*, 81 B.R. 682 (D. S.D. Fla. 1988) Additionally, because these customer deposit transactions are entered into by the Debtors within their ordinary course of business, the Debtor continues to operate as a Debtor in possession under 1107(a) and 1108, and the Debtors are authorized to operate and conduct transactions in the ordinary course of its business pursuant to §363(c)(1), the Court should

authorize the honoring of the customer deposits. See, In Re Federated Department Stores, Inc., 1990 Bankr.LEXUS 102 (Bankr.S.D. Ohio 1990).

**RESERVATION OF RIGHTS**

16. Nothing herein is intended to constitute a request to assume any contract or agreement under §365 in the Bankruptcy Code, nor is anything here intended to constitute a request to create any rights in favor of, or to enhance the status of any claim held by, any personal entity. Moreover, nothing herein is intended to constitute a request to honor every pre-petitioned contract to which either of the debtors is a party.

**WHEREFORE** The Debtor respectfully request the entry of an order authorizing it to honor pre-petition customer deposits by delivering product in exchange for the remaining balance due and granting such other and further relief as is just and proper.

**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,

/s/ Lazaro Lopez  
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